

IN THE SUPREME COURT OF MISSISSIPPI

**CHARLES R. PHILLIPS
AND RJK INVESTMENTS, LLC**

APPELLANTS

VS.

NO. 2010-CA-01266

**JOEY P. KELLEY, KEITH D. TEMPLETT,
PIKE COUNTY NATIONAL BANK AND
SAMUEL C. HALL**

APPELLEES

**BRIEF OF APPELLEES
PIKE NATIONAL BANK AND SAMUEL C. HALL**

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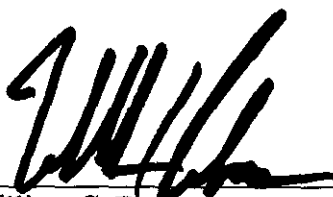
APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Charles R. Phillips, Appellant
2. RJK Investments, LLC, Appellant
3. Eduardo A. Flechas, Esq., Counsel for the Appellants
4. Ronald E. Stutzman, Esq., Counsel for the Appellants
5. Joey P. Kelley, Appellee
6. Keith D. Templett, Appellee
7. Pike National Bank (formerly known as Pike County National Bank), Appellee
8. Samuel C. Hall, Appellee
9. Wayne Smith, Esq., Counsel for the Appellees
10. William C. Brabec, Esq., Counsel for the Appellees
11. Lindsey N. Oswalt, Esq., Counsel for the Appellees
12. Derek A. Henderson, United States Bankruptcy Trustee for the Estate of Charles R. Phillips
13. The Honorable Michael M. Taylor, Circuit Court Judge, Pike County, Mississippi

Certified this the 11th day of April, 2011



William C. Brabec
Attorney of Record for Pike National Bank

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STATEMENT OF THE ISSUES

- I. Are Plaintiffs' arguments, which are asserted for the first time on appeal, procedurally proper?
- II. In his capacity as Bankruptcy Trustee for the estate of Charles Phillips, did Derek Henderson have the authority to settle a lawsuit on behalf of Phillips' limited liability company?
- III. Does the Court have jurisdiction to disturb an order of the bankruptcy court?

STATEMENT OF THE CASE

Plaintiffs' Statement of the Case is incomplete, and should be supplemented as follows. (See Brief of Appellants at 2-4).

RJK Investments, LLC ("RJK") and one of its members, Charles R. Phillips ("Phillips") (collectively "Plaintiffs"), commenced litigation in this case on April 25, 2008. (R. 3). PNB, its employee, Samuel C. Hall (collectively "PNB"), and the two other purported owners of RJK, Keith Templett and Joey Kelley, were named as defendants. (R. 3). It is undisputed that Phillips is a member and owner of RJK, although there is some dispute as to whether Phillips owns RJK in whole or in part.

Several months after filing suit, Phillips, as an individual, filed for Chapter 7 bankruptcy protection in the United States Bankruptcy Court for the Southern District of Mississippi. (R. 33).¹ Because of the automatic stay imposed by the bankruptcy filing, this case was stayed for almost a year. (R. 1). During the stay, Bankruptcy Trustee Derek Henderson sought to settle the claims between the parties. (R. 33-37). A settlement was eventually reached, and was agreed to by Henderson, Templett, and Kelley. (R. 34). The bankruptcy court issued an order accepting the settlement agreement. (R. 33-37). This agreement expressly provided that an Order of Dismissal with prejudice was to be executed and that the Defendants "be released from any further responsibility and liability in this case." (R. 36-37).

Pursuant to the settlement, Henderson moved the Pike County Circuit Court to dismiss the case with prejudice as to both Phillips and RJK. (R. 30). The court granted the motion to dismiss, noting the trustee's authority to settle the debts of the bankruptcy estate. (R. 30-33). After the order of dismissal was entered, counsel for Phillips and RJK filed a motion to voluntarily dismiss the claims of Phillips, individually. (R. 39-40). PNB opposed the motion,

¹ During this time, Charles Phillips also was convicted in Pike County Circuit Court for grand larceny and was incarcerated by the Mississippi Department of Corrections.

emphasizing that the case had been dismissed with prejudice and that the motion was therefore moot. (R. 42-43). RJK and Phillips filed their Reply, and for the first time argued that the judgment should be amended to reflect that only the claims of Phillips, individually, had been dismissed. (R. 53-58). Without waiting for the Circuit Court to decide this issue, Plaintiffs filed their appeal. (R. 65).

SUMMARY OF THE ARGUMENT

This case turns on three key issues: (1) whether the Plaintiffs' arguments are procedurally proper;² (2) whether Derek Henderson, as bankruptcy trustee for the estate of Charles Phillips, had authority to settle claims on behalf of Phillips' limited liability company, RJK Investments; and (3) whether this Court has jurisdiction to overturn an order of the bankruptcy court. On any basis, this Court should affirm the Circuit Court's order dismissing the Plaintiffs' case.

The first fact this Court must consider is that none of the four arguments in the Brief of the Appellants have ever been ruled upon by the trial court. Indeed, the first and only time Plaintiffs argued that the Bankruptcy Trustee lacked authority to settle RJK's claims was in a post-dismissal reply brief. To date, Plaintiffs have not sought relief in the trial court based on Mississippi Rules of Civil Procedure 59 or 60. Instead, Plaintiffs proceeded directly to appeal. As a result, PNB is now arguing issues on appeal that have never been passed upon by a court of competent jurisdiction. Longstanding precedent of this Court establishes that review of questions not presented to the trial court is improper. Consequently, Plaintiffs' claims are waived and procedurally barred.

Should this Court reach the merits of Plaintiffs' appeal, however, the law of this and other jurisdictions confirms that the Bankruptcy Trustee lawfully settled RJK's claims against PNB. The Mississippi Code makes clear that a membership interest in an LLC is personal property. According to the Bankruptcy Code, personal property – including intangible property – becomes a part of the bankruptcy estate the moment a claim is filed. Further, courts in eleven

² Plaintiffs contend that PNB may not raise the issue of waiver because it was previously argued in PNB's Motion to Dismiss for want of jurisdiction, which was denied. (*See* Brief of Appellants at 16). However, Plaintiffs have not cited any case law or rules of court preventing a party from reasserting in its brief issues raised in a Motion to Dismiss the Appeal. In any event, in its order denying the Motion to Dismiss, this Court neither explicitly nor implicitly addressed the argument that Plaintiffs' claims are procedurally barred. Indeed, from the Court's order, it is not clear that the issue of waiver was considered at all. It is entirely possible that the Court merely refused to hear the substantive issue of waiver on a Motion to Dismiss. Accordingly, PNB is entitled to reassert this argument herein.

circuits have specifically considered whether the right to manage an LLC passes to the bankruptcy estate of an LLC's owner. All have determined that it does. Many of these courts have also acknowledged a distinction between governance rights in an LLC and direct ownership of its assets. The courts have concluded that although the assets of the LLC do not pass directly to the estate, the Trustee may nonetheless cause the LLC to dispose of those assets by virtue of the management authority flowing from the debtor. In this case, the Trustee stepped into the shoes of Charles Phillips, and thereby assumed all of Phillips' rights – including the right to govern RJK.

Additionally, Plaintiffs' claims that the order of dismissal is void for misrepresentation and that the court unilaterally pierced the corporate veil are meritless. Plaintiffs have not cited any facts which could satisfy the high standard for demonstrating "fraud on the court." Further, there is no issue of improper "veil piercing" as no party has attempted to disregard the corporate form in order to reach the assets of RJKs officers or members.

Finally, PNB respectfully asserts that this Court lacks jurisdiction to grant the relief Plaintiffs seek. The Pike County Circuit Court entered its order of dismissal at the express direction of the United States Bankruptcy Court. Accordingly, that order could be reversed only by directly contravening the bankruptcy court's authority. Any challenge to the bankruptcy court's decision may only be properly argued to the district court. Because this case rests primarily on a question controlled by federal bankruptcy law, this Court lacks jurisdiction to entertain the merits.

ARGUMENT

I. PLAINTIFFS ARE PROCEDURALLY BARRED FROM CHALLENGING THE ORDER OF DISMISSAL.

Plaintiffs assert that (1) Derek Henderson, as Trustee of the bankruptcy estate of Charles R. Phillips, lacked the authority to sign the order of dismissal on behalf of RJK Investments, LLC; (2) the Order of Dismissal was void due to alleged misrepresentations; (3) the Order disregards the status of RJK as a separate legal entity and (4) no notice of intention to settle was provided to RJK's counsel. These claims, however, are procedurally barred and waived because Plaintiffs failed to present any of these issues to the Circuit Court and allow it to make any rulings.

Mississippi law is clear that issues not raised before the trial court are deemed waived and procedurally barred. *See Gayle v. Thomas*, 759 So. 2d 1150, 1153 (Miss. 1999); *Swindle v. Harvey*, 23 So. 3d 562, 573 (Miss. App. 2009). The rationale for this procedural bar is that an appellant is not entitled to raise a new issue on appeal since to do so would prevent the trial court from having an opportunity to address the alleged error. *See West v. West*, 891 So. 2d 203, 214 (Miss. 2004); *First Investors Corp. v. Rayner*, 738 So. 2d 228, 239 (Miss. 1999). As a result, the Supreme Court will not review matters on appeal that were not considered by the trial court. *Fitch v. Valentine*, 959 So. 2d 1012, 1021 (Miss. 2007); *Boyles v. State Oil & Gas Bd.*, 794 So. 2d 149, 153 (Miss. 2001); *see also In re D. O.*, 798 So. 2d 417, 421 (Miss. 2001) (trial court will not be reversed for failing to grant relief that was not requested).

It should be noted that the instant appeal comes directly from the entry of the Order of Dismissal, dated July 6, 2010. (R. 30). It is undeniable that prior to the entry of the Order of Dismissal, none of the instant issues had been presented to the trial court. Accordingly, since the Circuit Court was not given the opportunity to consider them, Plaintiffs are procedurally barred from bringing these claims on appeal.

Plaintiffs had clear procedural avenues to raise these issues with the trial court. Both Rules 59 and 60 provided Plaintiffs with methods to challenge the order on these points, if such a challenge was appropriate in state court. Nonetheless, it is indisputable that Plaintiffs failed to file or pursue either a Rule 59 or Rule 60(b) motion within the times prescribed by each respective rule. *See* Miss. R. Civ. Pro. 59(b) (motion shall be filed no later than ten days after entry of judgment); *id.* at 60(b) (motion under Rules 60(b)(1), (2) or (3) shall be filed not more than six months after the judgment was entered). Even Plaintiffs admit that:

11. As this Court well knows, Rule 59(e) and 60(b) of the Mississippi Rules of Civil Procedure provide this Court with the procedural mechanism to modify and/or set aside its Order of Dismissal, as to the tort claims of RJK. *See* Miss. R. Civ. P. 59 and 60.

(R. 57).

It is indisputable that Plaintiffs failed to file proper Rule 59 or 60(b) motions. In a reply brief to the Defendants' Joint Response in Opposition to Motion for Voluntary Dismissal, Plaintiffs intimated for the first and only time a right to recourse under Rules 59 and 60(b). (R. 53, 57).³ Regardless, to this day, Plaintiffs have failed to bring their claimed rights under Rules 59 and 60(b) to the trial court for consideration. Therefore, the trial court has not been given the opportunity to rule on their challenge to the Order of Dismissal being affective as to RJK. Clearly, Plaintiffs were under a duty to seek and obtain a ruling on those issues prior to appeal. Having failed to do so and instead, having pursued a direct appeal from the Order of Dismissal, Plaintiffs have waived this argument and are procedurally barred from seeking the relief they request in this appeal.

³ This was an improper means to raise the issue. Parties are prohibited from raising new issues in a reply brief because the opposing party is not given the opportunity to respond to the new issues. *See Bishop v. State*, 882 So. 2d 135, 154-55 (Miss 2004); *Dock v. State*, 802 So. 2d 1051, 1053 (Miss. 2001); *Sanders v. State*, 678 So. 2d 663, 669-70 (Miss 1996).

II. THE BANKRUPTCY TRUSTEE HAD COMPLETE AUTHORITY TO SETTLE RJK'S CLAIMS AGAINST PNB

The heart of Plaintiffs' appeal is the allegation that the Trustee of Charles Phillips' personal bankruptcy estate lacked authority to act on behalf of RJK and settle its lawsuit against PNB. This contention, however, is inconsistent with prevailing law. The Mississippi Limited Liability Act states that an individual's ownership interest in a limited liability company ("LLC") is personal property. Miss. Code Ann. § 79-29-701. As a result, that interest passes to the individual's bankruptcy estate at the moment a bankruptcy case is filed. 11 U.S.C. § 541(a)(1). Federal bankruptcy law makes clear that the bankruptcy estate, with the Trustee as its guardian, succeeds to the full rights of the debtor in his property. *Id.* In this case, Charles Phillips has consistently maintained that he possessed sole governance rights in RJK when his personal bankruptcy commenced. Consequently, Phillips' right to manage, govern, and act on behalf of RJK passed to Bankruptcy Trustee Derek Henderson upon the filing of his Chapter 7 case.⁴

Generally speaking, a Bankruptcy Trustee has authority to settle lawsuits belonging to the bankruptcy estate. *In re Cajun Elec. Power Corp.*, 119 F.3d 349, 354 (5th Cir. 1997); Fed. Bankr. R. 9019(b). The more specific question here, however, is whether the lawsuit filed by RJK could be settled by the Bankruptcy Trustee for the estate of its owner, Charles Phillips. Although LLCs are of fairly recent vintage, courts in eleven circuits have considered this precise

⁴ One of the major disputed issues in the Circuit Court was whether Charles Phillips was the sole member of RJK, or whether Keith Templett and Joey Kelley were also members. The Circuit Court never had the opportunity to rule on this issue. Phillips continues to insist on appeal that he is the sole member of RJK. Although PNB maintains that Templett and Kelley also possessed ownership interests, that matter is irrelevant to this appeal. The outcome of the question before this Court is the same whether Phillips was sole owner or part owner of RJK. If Phillips was the sole owner, and the Bankruptcy Trustee possessed complete authority to manage and govern RJK on Phillips' behalf, then the settlement and dismissal were proper. Even if Phillips was part owner, however, the suit against PNB was still properly dismissed, as both Templett and Kelley, in their capacities as members of RJK, agreed in writing to the settlement. In any event, for the purposes of this brief only, PNB will assume that Phillips was, indeed, the sole owner of RJK.

question, either directly or in passing. All have concluded that when the sole owner of an LLC files for bankruptcy, the debtor's rights to control the LLC pass to the Bankruptcy Trustee.

In the leading case on this point, an individual debtor filed for Chapter 7 bankruptcy. *In re Albright*, 291 B.R. 538, 539 (Bankr. D. Colo. 2003). Listed among her assets was a single-member LLC, which owned certain real property. *Id.* The Bankruptcy Trustee believed he could cause the LLC's property to be sold, and brought suit seeking confirmation that he possessed the authority to assume management of the LLC and to dispose of its assets. *Id.* The debtor argued that the Trustee could not manage the LLC or cause it to sell the property. *Id.* The court found in favor of the Trustee. *Id.* It first noted that Colorado's limited liability statute – like Mississippi's – stated that a membership interest in an LLC is personal property of the member. *Id.* at 539-40. Accordingly, when the debtor filed for bankruptcy, she “effectively transferred her membership interest to the estate . . . and the Trustee has become a substituted member.” *Id.* at 540. The court further noted that the debtor's bankruptcy filing “assigned her entire membership interest in the LLC to the bankruptcy estate, and the Trustee obtained all her rights, including the right to control the management of the LLC. Ultimately, the court concluded that “[b]ecause the Trustee became the sole member of [the LLC] upon the Debtor's bankruptcy filing, the Trustee now controls, directly or indirectly, all governance of that entity, including decisions regarding the liquidation of the entity's assets.” *Id.* at 541.

Another court reached the same conclusion merely by interpreting the language of the Bankruptcy Code. The court there evaluated the meaning of 11 U.S.C. § 541(a)(1), which defines the “property of the [bankruptcy] estate.” *In re Allentown Ambassadors, Inc.*, 361 B.R. 422, 436 (Bankr. E.D. Pa. 2007). Section 541 provides that “all legal and equitable interests of the debtor in property as of the commencement of the case” are included in the bankruptcy estate. *See* 11 U.S.C. § 541(a)(1). The *Allentown* court determined that this definition of

property “encompasses rights and interests arising from ordinary contractual relationships. *This would include a debtor’s interest in a limited liability company.*” 361 B.R. at 436 (emphasis added).

Similarly, another bankruptcy court considered whether a Trustee possesses only economic rights in an LLC owned by its debtor or whether the Trustee also holds management rights as well. *In re Modanlo*, 412 B.R. 715, 716 (Bankr. D. Md. 2006), *aff’d*, 2006 U.S. Dist. LEXIS 96045 (D. Md. Oct. 11, 2006). The court concluded that the Bankruptcy Trustee “possesses both the economic and governance rights to participate in the management of [the LLC] that the Debtor himself enjoyed prior to his Bankruptcy filing.” *Id.* at 731. Additionally, the *Modanlo* court specifically addressed the Trustee’s authority to take legal action on behalf of the debtor’s LLC:

[A] bankruptcy trustee is the successor to property of the debtor’s estate and is the legal representative of the estate . . . As the representative of the estate, the Trustee is the proper party in interest and the only party with standing to prosecute causes of action belonging to the estate.

Id. at 724 (citation omitted). By this standard, Derek Henderson was the only party capable of disposing of RJK’s claims during the pendency of the bankruptcy case.

Importantly, a bankruptcy court in the Sixth Circuit specifically addressed one of Plaintiffs’ key arguments in this case. *In re Howerda*, 428 B.R. 730 (Bankr. W.D. Mich. 2010); *see also In re Penn*, 2010 Bankr. LEXIS 1546 (Bankr. N.D. Ga. 2010). That court considered a litigant’s contention that the Trustee for a debtor’s personal bankruptcy estate could not act on behalf of the debtor’s LLC because state law dictated that the debtor – and thus the bankruptcy estate – had no ownership interest in the *assets* of the LLC. *Id.* at 732. The court directly rejected the debtor’s argument, drawing a distinction between the ownership of assets held by an LLC and ownership of an interest in the LLC itself. *Id.* While the Bankruptcy Trustee did not

directly own the LLC's assets, he nevertheless succeeded to the debtor's management interest in the LLC, and all the rights flowing there from. *See id.*

Accordingly, PNB does not disagree with Plaintiffs' assertion that the bankruptcy estate has no direct claim to the *assets* of RJK. However, this fact does not cut off the Trustee's right to manage RJK in Phillips' place. As an artificial entity, an LLC can act only through its members or managers. *See* Miss. Code Ann. § 79-29-305. Charles Phillips has asserted throughout this litigation that he is the sole member and manager of RJK. Yet, under his theory of the case, no one had authority to act on RJK's behalf during the pendency of the bankruptcy action. This simply cannot be. Although the Bankruptcy Trustee could not have directly sold RJK's assets for the benefit of the bankruptcy estate, he possessed authority to cause the LLC to dispose of its suit against PNB. *See Howerda*, 428 B.R. at 732. Just as Charles Phillips, as RJK's alleged sole manager, could have settled its claims with PNB, his Bankruptcy Trustee was permitted to do the same in his stead.⁵

Additionally, as a matter of policy, the Plaintiffs' position is untenable. A debtor should not be able to place assets beyond the reach of his Bankruptcy Trustee – and his creditors – merely by holding them in his wholly-owned LLC. Nothing in the Bankruptcy Code creates this

⁵ A number of other courts have likewise concluded that the bankruptcy estate owns the legal rights of a debtor in his or her LLC. *See In re Penn*, 2010 Bankr. LEXIS 1546, *11 (Bankr. N.D. Ga. 2010) (holding that “once the sole owner of an LLC files a bankruptcy petition, the membership interests themselves become property of the owner’s estate”); *In re First Protection, Inc.*, 440 B.R. 821, 830 (Bankr. App. 9th Cir. 2010) (explaining that the bankruptcy trustee “stepped into Debtors’ shoes, succeeding to all of their rights, including the right to control [the LLC]”); *In re Frumusa*, 2010 Bankr. LEXIS 962, *22 (Bankr. W.D. NY 2010) (finding that “[the debtor’s] bankruptcy estate is the owner of the [LLC] interest, and his Trustee . . . has full right and authority to take any actions on behalf of [the LLC]”); *In re Schwab*, 378 B.R. 854, 856 (Bankr. D. Minn. 2007) (noting “[LLC] membership interests are property interests that pass to the bankruptcy estate upon the filing of a bankruptcy case”); *In re A-Z Electronics, LLC*, 350 B.R. 886, 890 (Bankr. D. Ida. 2006) (determining that a bankruptcy estate’s right in the LLC of its debtor includes both the “economic” and “non-economic” rights previously owned by the debtor); *In re Desmond*, 316 B.R. 593, 595 (Bankr. D. N.H. 2004) (“There is no question that on the date of the bankruptcy filing, the Debtor’s [LLC] membership interests were personal properties under Delaware law and property of the Chapter 11 estate.”); *In re Calhoun*, 312 B.R. 380, 384 (Bankr. N.D. Iowa 2004) (“under Iowa law, a debtor’s membership interest in an LLC is personal property. Such interest becomes property of the estate upon filing of the petition”).

type of shelter for a debtor's assets. Indeed, such a provision would directly contravene statutory rules specifically prohibiting a debtor from using otherwise legal means to withhold assets owed to his creditors. *See* 11 U.S.C. §§ 547, 548 (prohibiting fraudulent and preferential transfers).

Further, each of the cases used by the Plaintiffs to impugn the Trustee's authority to act on RJK's behalf are easily distinguishable. All these cases deal with the rights of a shareholder to the assets of a corporation. *See, e.g., Penn Nat'l Gaming, Inc. v. Ratliff*, 954 So. 2d 427, 431 (Miss. 2007) (observing that shareholders do not own a corporation's assets). However, shareholders of a corporation possess distinct legal interests from those held by the managing member of an LLC. Specifically, the managing member of an LLC – which Charles Phillips purports to be – has singular authority to act on the LLC's behalf. *See* Miss. Code Ann. § 79-29-305. An LLC's manager is the agent of the company and has the power to bind the LLC. *Id.* § 79-29-307. A mere shareholder in a corporation simply does not possess the same authority. As a result, a shareholder in bankruptcy does not vest the same rights in his Trustee as does an LLC member.

Nevertheless, Plaintiffs argue that this Court should apply rules governing shareholders to members of an LLC based on the Mississippi Court of Appeals' observation that "an LLC is treated like a corporation *in that [an LLC] acts as a separate individual and owns property as a separate individual*" *See Champluvier v. State*, 942 So. 2d 172, 178 (Miss. App. 2005) (emphasis added), *reversed by Champluvier v. State*, 942 So. 2d 145 (Miss. 2006). Based on this statement alone, Plaintiffs contend that "corporations and limited liability companies are treated the same under Mississippi law." (Brief of Appellants at 10). What Plaintiffs fail to mention, however, is that the case they cite for this proposition was reversed when this Court expressly rejected the argument that LLCs and corporations are so closely related that a prohibition applying to one may be applied equally to the other. *Champluvier v. State*, 942 So. 2d 145, 150-

154 (Miss. 2006). Indeed, this Court cited with approval to Judge Barnes' dissenting opinion in the Court of Appeals, which noted that "[a]n LLC, by definition, is not an incorporated company, and regardless of the similarities between the two types of entities, the terms are not interchangeable." *Id.* at 152.

Moreover, the "shareholder" cases cited by the Plaintiffs actually support the conclusion that the Trustee had authority to dismiss RJK's claims. For instance, *Fowler v. Shadel*, 400 F.3d 1016 (7th Cir. 2005), on which Plaintiffs rely to support their position, notes that "[t]he trustee has control over property in the bankruptcy estate for which no exemption is taken, *and may exercise the powers that accompany that control.*" *Id.* at 1018 n.1 (emphasis added). Further, "[a]s the owner of the shares in bankruptcy, the trustee could liquidate the corporation and obtain legal ownership of the corporate [assets], which is another way of saying that the trustee then possessed the (entire) equitable interest in the property. Thus, [the debtor] could claim an equitable interest only as the owner of the shares – *a status that ended at bankruptcy.*" *Id.* at 1018-19 (emphasis added). Even this case acknowledges the distinction between direct ownership of an entity's assets and the right to control the entity's use of those assets. This distinction supports PNB's assertion that a Trustee may control the governance rights of an entity absent direct control of its assets.

In sum, Derek Henderson, as Bankruptcy Trustee for the estate of Charles Phillips, succeeded to Phillips' claimed management rights in RJK. The Bankruptcy Code makes clear that personal property, as defined by state law, passes to the estate on the filing of a bankruptcy case. Further, of the eleven jurisdictions that have directly addressed this issue, all have specifically concluded that the managerial rights of an LLC constitute personal property of the debtor that becomes a part of the bankruptcy estate. Here, Henderson stepped into Phillips' shoes as a substituted member of RJK. In that role, Henderson lawfully exercised his authority

creditor on the basis that the bankruptcy court lacked jurisdiction to enter a final order on the creditor's claim. *Id.*

The U.S. Supreme Court, however, reversed, admonishing the state court that its decision flouted res judicata. *Stoll*, 305 U.S. at 170. The Court emphasized that the bankruptcy court's decision was "final until reversed in an appellate court, or modified or set aside in the court of its rendition." *Id.* Consequently, "[t]he problem before the Supreme Court of Illinois was not one of full faith and credit but of res judicata." *Id.* at 171. Although the Court assumed for the purposes of its opinion that the bankruptcy court did *not* have subject matter jurisdiction over the creditor's claim, it nonetheless determined that the state court could not entertain his attack. *Id.*

More recently, in *Travelers Indemnity Co. v. Bailey*, the Court considered whether a settlement order entered by a bankruptcy court could be attacked in a subsequent suit. 129 S.Ct. 2195 (2009). The order issued in *Travelers* purported to cut off future claims against the debtor's insurer by yet-to-be-identified third parties. Some years later, the affected third parties contended that the bankruptcy court lacked jurisdiction to dispose of their claims. The Second Circuit agreed, but the Supreme Court reversed. *Id.* at 2205. The Court held that the claimants' challenge was improper because the subject matter jurisdiction of a federal court "may not be attacked collaterally." *Id.* (citation omitted). In reaching its decision, the Court refused to consider the merits of the argument that the bankruptcy court had exceeded its jurisdiction. *See id.* at 2205-7. The decisions in *Travelers* and *Stoll* demonstrate that even if the bankruptcy court oversteps its authority in the first instance, the bar against collateral attacks nevertheless protects the court's actions. *Id.*

Moreover, the Supreme Court's holding in these cases is identical to this Court's approach to collateral attacks on the federal courts. In *Department of Human Services v. Shelnut*, the Court noted that "a federal court, by merely assuming jurisdiction and adjudicating a case,

necessarily determines it has jurisdiction thereof, and the correctness of such a determination cannot be collaterally attacked in a subsequent suit in state court.” 772 So. 2d 1041, 1047 (Miss. 2000) (quoting *Alliance Trust Co. v. Armstrong*, 186 So. 633, 634 (Miss. 1939)).

Obviously, PNB does not suggest that the orders of a bankruptcy court may not be appealed at all. Those appeals, however, are required by statute to be taken in the District Court. 28 U.S.C. § 158(a). Only a federal court has jurisdiction to consider arguments that the bankruptcy court’s order is invalid or otherwise improper. *Id.* As the Supreme Court has noted, “If dissatisfied with the Bankruptcy Court’s ultimate decision, [Appellants] can appeal to the district court for the judicial district in which the bankruptcy judge is serving.” *Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995). If they choose not do so, they nevertheless may not collaterally attack the bankruptcy court’s decision “without seriously undercutting the orderly process of law.” *Id.*

CONCLUSION


For the foregoing reasons, PNB respectfully requests that this Court affirm the order of dismissal entered by the trial court.

Respectfully submitted this the 11th day of April 2011,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a true and exact copy of the foregoing document to be served via e-mail and first class U.S. mail, postage prepaid to the following:

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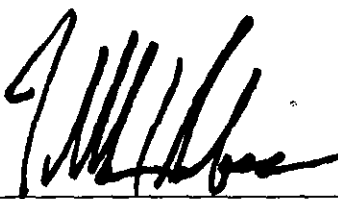
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This the 11th day of April, 2011.



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