

**In the United States Bankruptcy Court  
for the  
Southern District of Georgia  
Brunswick Division**

In the matter of:

FIRST AMERICAN HEALTH  
CARE OF GEORGIA, INC.,  
and its wholly owned subsidiaries  
(Chapter 11 Case 96-20188)

*Debtor*

IHS OF BRUNSWICK, INC.  
Successor to First American  
Health Care of Georgia, Inc.,  
its wholly owned subsidiaries, and  
INTEGRATED HEALTH  
SERVICES, INC.

*Plaintiffs*

v.

ROGER TOWNE

*Defendant*

Adversary Proceeding

Number 98-2032

**FILED**

at 10 O'clock & 25 min A M

Date 8/25/99

MICHAEL F. McHUGH, CLERK  
United States Bankruptcy Court  
Savannah, Georgia



**MEMORANDUM AND ORDER**

Debtor, First American Health Care of Georgia, Inc., filed its petition for bankruptcy protection on February 26, 1996, under Chapter 11; its plan was confirmed in October 1996. Its successor, IHS of Brunswick, Inc. ("IHS") filed this adversary on May 13,

1998, seeking enforcement of the discharge injunction. The adversary was tried on May 20, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1334(b) and 28 U.S.C. § 157(b)(2). Pursuant to Rule 7052 of the F.R.B.P., I make the following Findings of Fact and Conclusions of Law.

Stipulations of Parties

The parties, in a joint consolidated pre-trial statement filed pursuant to order of this Court, have stipulated the following facts:

- 1) June 24, 1996, was the claims bar date for non-governmental, pre-petition claims, including general unsecured claims.
  
- 2) Roger Towne, by and through his attorney of record in Civil Action No. CV295-140 in the United States District Court for the Southern District of Georgia, Grayson P. Lane, filed in said action on February 27, 1996, a "Notification of Filing in the United States Bankruptcy Court of Debtor Relief Petition Filed by the Defendant, First American Health Care of Georgia, Inc.," acknowledging the filing of Debtors' Chapter 11 bankruptcy petition.
  
- 3) Debtors' Disclosure Statement with regard to Debtors' Plan of Reorganization, dated and filed April 12, 1996, contained, in Paragraph V.B.4. thereof, a

statement that June 24, 1996, was the claims bar date and that creditors whose claims were not scheduled as undisputed were required to file a proof of claim by such claims bar date.

4) Roger Towne's attorney of record in Civil Action No. CV295-140 in the United States District Court for the Southern District of Georgia, Grayson P. Lane, had actual knowledge of the filing of Debtors' Chapter 11 petitions not later than February 27, 1996.

5) No proof of claim was filed by Roger Towne, or on his behalf, in Debtors' Chapter 11 case by June 24, 1996.

6) During the hearing on confirmation of the Debtors' Second Amended and Restated Plan of Reorganization held in the Bankruptcy Court for the Southern District of Georgia on October 3 and 4, 1996, the Court, after consideration of Roger Towne's objection to confirmation, announced that the Plan would be confirmed over Roger Towne's objection, but without prejudice to Roger Towne's moving to file a late proof of claim after the claims bar date.

7) The Order Confirming Plan entered by the Bankruptcy Court on October 24, 1996, expressly ordered that confirmation would be without prejudice to the rights of Roger Towne to seek the allowance of his claim, subject to any objection which the Debtor might assert.

8) Roger Towne, through his attorney Grayson P. Lane, on April 16, 1998, filed a Motion for Order to be Entered Restoring Civil Action No. CV295-140 to the Trial and Pending Case Status Docket, seeking resumption of trial of his claims against Debtors in the United States District Court litigation. Mr. Lane also filed a motion to have the bankruptcy issues consolidated into the District Court action.

9) Neither Roger Towne nor his legal counsel took any action in the Bankruptcy Court to seek allowance of his claim in Debtors' Chapter 11 case until they filed a Motion to Amend Informal Proof of Claim or to Allow the Filing of a Late Claim on June 12, 1998.

10) Roger Towne's Motion to Amend Informal Proof of Claim or to Allow the Filing of a Late Claim was filed thirty (30) days after the filing of Plaintiffs' Complaint herein.

11) As an answer to a mandatory interrogatory in the District Court action, the Debtor was informed of Mr. Towne's residence address.

12) No person acting on behalf of the Debtors purports to have served a notice of the claim bar date on Mr. Towne other than by service on Grayson P. Lane.

13) Debtor corporation First American Health Care of Georgia, Inc., was voluntarily dissolved in November of 1996 after it was merged with IHS Acquisitions XIV, Inc., a wholly-owned subsidiary of IHS of Brunswick, Inc.

Based upon the stipulation of the parties, the evidence received at trial and review of applicable authorities I enter the following Findings of Fact and Conclusions of Law.

#### FINDINGS OF FACT

At the time Debtors' Chapter 11 case was commenced, Defendant Roger Towne was represented by Grayson Lane in a related civil action pending in the United States District Court for the Southern District of Georgia. A notice was issued by the Clerk's Office immediately after the filing of the case, advising creditors that a meeting held pursuant to Section 341 of the Bankruptcy Code would be held on March 26, 1996. Pursuant to the requirements of the Code, Debtors' counsel provided lists of creditors on whom notices, including notice of the Section 341 meeting, were to be served. Because the Debtor was a national corporation with far flung operations and thousands of creditors, it was impossible for Debtors' counsel to provide to the Court a complete list of creditors in the case in time for the mailing of the notice of the Section 341 meeting. However, notice was provided to the individuals and entities initially listed as creditors in order that they could participate in the creditors' meeting.

Roger Towne was not among the creditors initially scheduled by Debtors' counsel. By subsequent amendment, however, Debtors supplemented their list of creditors on several occasions. At some time after the creditors' meeting and before the claims bar date, an amendment was filed which added Roger Towne as a creditor in the case. As required by the Code and Bankruptcy Rules, Debtor provided the mailing address to which notices to be served on Mr. Towne should be sent. Debtor showed Mr. Towne's address to be "care of" Grayson P. Lane, at Mr. Lane's law office in Brunswick, Georgia.

On or about May 23, 1996, Debtor served Mr. Towne "care of" Mr. Lane, with a copy of the original Section 341 meeting notice. That notice established a bar date for the filing of claims as June 24, 1996. The Section 341 meeting had already been held by this time; nevertheless, the notice was sent to Mr. Towne and numerous other creditors in order to give them notice that the case had been filed and was pending. This notice further advised the parties of the claims bar date at a time when it was still possible to file a timely claim. No proof of claim was filed by Roger Towne or anyone on his behalf prior to the June 24, 1996, bar date.

Mr. Lane is a longtime practitioner in both State and Federal Court in the Brunswick area, but is not and does not hold himself out to be a regular bankruptcy practitioner. He testified unequivocally, "I did not receive this notice," when presented with a copy of the Section 341 notice setting forth the bar date for filing claims. He identified the address to which the notice was sent as being the correct address and testified that his mail is received twice daily,

once at a post office box and once by street delivery. The same procedure for processing mail in his office is followed: His secretary of twenty years picks up the mail at the Post Office every morning and receives, by hand delivery, the mail brought in by carrier in the afternoon. She then sorts the mail, identifying any and all mail addressed to Mr. Lane's attention. She opens all mail which is not clearly personal in nature and stacks it at his desk or in his chair for his immediate attention. He has never previously experienced a situation where mail that arrived at his office did not come to his attention, although he has, within this calendar year, experienced situations where three pieces of mail directed to or from his office have been lost by the United States Postal Service. Mr. Lane testified that he never became aware of the claims bar date until just before confirmation, at which time he engaged a bankruptcy specialist to file an objection to confirmation, asserting the lack of timely notice of the pendency of the case, on Mr. Towne's behalf.

#### CONCLUSIONS OF LAW

Under Section 524, Towne may not proceed with his district court action if his debt was discharged. 11 U.S.C. § 524(a) provides:

A discharge in a case under this title operates as an injunction against the commencement or continuation of an action, the employment of process, or an act to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived.

11 U.S.C. § 524(a)(2). In order to enforce the discharge injunction, Debtor must show that the debt was discharged under Section 1141, which states:

Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan discharges the debtor from any debt that arose before the date of such confirmation . . . whether or not (I) a proof of the claim based on such debt is filed or deemed filed under 501 of this title; (ii) such claim allowed under section 502 of this title; (iii) or the holder of such claim has accepted the plan.

11 U.S.C. § 1141(d)(1). Once confirmed, the plan binds the debtor and all creditors, whether or not a creditor has accepted the plan. 11 U.S.C. § 1141(a). Thus, confirmation presumptively discharged all disputed claims, including Towne's. Because Towne did not timely file a proof of claim, he presumptively could not share in any distribution of the proceeds under this Plan. In order to share in the distribution, he must show one of three things: (1) that legally sufficient notice of the commencement of the case and of the bar date was not provided him; (2) excusable neglect in filing a late claim; or (3) that previous pleadings filed in the case can be deemed to constitute an informal proof of claim.

A debtor does not obtain a discharge of a particular claim unless the creditor whose claim is to be discharged has been given notice sufficient to satisfy due process. IHS v. Broussard, 220 B.R. 720 (Bankr. S.D.Ga. 1998). The Eleventh Circuit has held that in a

corporate Chapter 11 case, even if a creditor knows that a bankruptcy case is pending, its claim is not discharged unless it received legally sufficient notice of the claims bar date. In re Spring Valley, 863 F.2d 832 (11th Cir. 1989). In the Broussard case, I found that legally sufficient notice of the claims bar date was received by a creditor when the notice was sent to the attorney representing her in a state court action against the debtor and where it identified the client, Ms. Broussard, as a creditor. I distinguished the situation in Broussard from a case in which I held notice to be insufficient where it was sent to an attorney without specifying the name of the client, who was the real party in interest. 200 B.R. at 712 n.4 (distinguishing In re Osman, 164 B.R. 709 (Bankr. S.D.Ga. 1993)).

In this case, service was made on Mr. Towne, care of Grayson P. Lane, and identified Roger Towne as the real party in interest. The salient fact which distinguishes this case from Broussard, however, is the fact that Mr. Lane disputes ever receiving the notice that was sent. No such issue existed in Broussard, in which the creditor conceded receipt of the notice by the claimant's state court counsel. The threshold question in this case is, therefore, whether the presumption that a notice properly mailed is received is overcome by evidence which tends to negate any actual receipt on the part of Mr. Lane.

A letter or notice, properly addressed and placed in the mail, is presumed to be delivered to the addressee in a timely manner. Hagner v. United States, 285 U.S. 427, 430, 52 S.Ct. 417, 418, 76 L.Ed. 861 (1932). This presumption can be rebutted, however, by

producing evidence which supports a finding of the "non-existence of the presumed fact." In re Hobbs, 141 B.R. 466 (Bankr. N.D.Ga. 1992) (Cotton, J.). The majority of courts which have considered this presumption of receipt have ruled that a denial of receipt, standing alone, is insufficient to rebut the presumption. See In re Eagle Bus Manufacturing, 62 F.3d 730, 735-36 (5<sup>th</sup> Cir. 1995); In re Longardner, 855 F.2d 455 (7<sup>th</sup> Cir. 1988); In re Williams, 185 B.R. 598 (9<sup>th</sup> Cir. B.A.P. 1995); Hobbs, 141 B.R. at 468. *But see* In re Yoder, 758 F.2d 1114 (6<sup>th</sup> Cir. 1985) (testimony of nonreceipt alone is sufficient to support finding of nonexistence of presumed fact). I agree with the majority view, and therefore hold that mere denial of receipt is insufficient to overcome the presumption that notice properly mailed is properly delivered.

On the other hand a direct denial, coupled with other evidence of standardized procedures in the receipt and processing of mail, can be sufficient to rebut the presumption. Hobbs, 141 B.R. at 468 (citing Legille v. Dann, 544 F.2d 1, 5-11 (D.C.Cir. 1976)). In this case, Mr. Lane testified that the same procedure was observed in his office for many years and that he never received the notice. He also established that some of his mail has been lost during this calendar year by the Postal Service. In light of Mr. Lane's testimony, I hold that Mr. Towne did not timely receive legally sufficient notice of the claims bar date so as to be subject to the discharge injunction of 11 U.S.C. § 524.

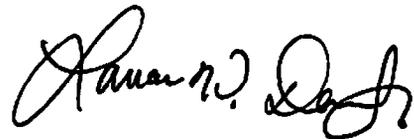
#### CONCLUSION

The confirmation of Debtor's plan did not discharge Mr. Towne's claim in

light of the lack of sufficient notice. As a result, the discharge injunction does not enjoin Mr. Towne from proceeding with his civil action pending in the United States District Court for the Southern District of Georgia, against First American and its successor.

ORDER

In consideration of the foregoing, IT IS THE ORDER OF THIS COURT that Plaintiff's action to enforce the discharge injunction against Roger Towne is DISMISSED with prejudice.



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Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 24<sup>th</sup> day of August, 1999.