IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

Alysson Mills, as Receiver for
Arthur Lamar Adams and
Madison Timber Properties, LLC — Plaintiff

v. — No. 3:19-cv-00941-CWR-FKB

Trustmark National Bank,
Bennie Butts, Jud Watkins,
Southern Bancorp Bank,
and Riverhills Bank — Defendants

Trustmark's Reply in Support of Motion to Certify Order (#67) For Interlocutory Appeal

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Introduction

The Receiver now acknowledges that Mississippi law governs all of her claims. But she turns her back on Mississippi law when it does not support her position, citing her power as a "federal equity receiver." She states that this Court's Order applied Mississippi law, and "also faithfully followed the Fifth Circuit," as if a separate body of federal receivership common law exists, and controls. She still has not acknowledged that under *O'Melveny*, her status as a "federal equity receiver" does not bolster her claims or weaken Trustmark's defenses. Under Mississippi law, the Receiver stands squarely in the shoes of Lamar Adams. Appointment of a receiver does not strip away state-law defenses, or create state-law rights, that did not exist pre-receivership.

The numerous cases filed by the Receiver will likely cost millions of dollars to prosecute, and to defend. The Court is in uncharted waters regarding the substantive law – Mississippi has never accepted an "increased liabilities" theory of injury; Mississippi has never accepted an "aiding and abetting" tort; Mississippi has never allowed a receiver to escape the Wrongful Conduct Rule or the *in pari delicto* doctrine. This is the right case, and the right time, for an interlocutory appeal.

The Effect of *O'Melveny*

It is troubling that a Court-appointed receiver would be so dismissive of controlling Supreme Court authority. The issue in *O'Melveny* was whether the knowledge and conduct of dishonest bank officers was attributable to the bank's federal receiver. The Supreme Court held that issue was controlled exclusively by California law. Here, a dispositive issue is whether Lamar Adams's knowledge and conduct are attributable to the plaintiff federal receiver. By claiming that *Zacarias* and *Mendez* control her claims, the Receiver urges this Court to do exactly what the Supreme Court disallowed in *O'Melveny* – follow a "federal common law" approach. The Receiver's attempt to distinguish *O'Melveny* because different federal agencies

served as plaintiff receivers (FDIC and SEC),[1] or because *O'Melveny* was "not a Ponzi scheme case,"[2] is nonsense.

O'Melveny is controlling authority. Therefore, Mississippi law – not "Fifth Circuit law," or "federal equity receiver" law – determines whether the Receiver has viable claims.

Controlling Question Meriting Interlocutory Appeal

The Receiver openly misstates the controlling question of law presented by Trustmark's Motion and memorandum brief:

Trustmark's Statement of the Question	Receiver's Misstatement of the Question
"*O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79 (1994) held that a federal receiver's state-law claims are governed exclusively by state law. Thus, a plaintiff's status as a federal receiver does not improve her ability to recover damages, or to avoid defenses. **In light of O'Melveny, does the plaintiff's status as a 'federal equity receiver' A) give the plaintiff Article III standing to pursue claims against third parties for 'increased liabilities' of the receivership estate, or B) enable the plaintiff to avoid state-law defenses?"** (Doc. #70, p.1)	"The controlling question of law, as articulated by Trustmark, is whether state law governs a federal receiver's state-law claims." (Doc. #77, p.3)

The Receiver's misstatement of the controlling issue of law should not distract the Court. Trustmark has stated the controlling issue of law that merits interlocutory appeal.

[1] *O'Melveny* applies equally to SEC receivers, of course. *Jones v. Wells Fargo Bank, N.A.*, 666 F.3d 955, 966, n.11 (5th Cir. 2012) (citing *O'Melveny*, in SEC receivership, "[t]he rights of a receiver are determined by state law."). The Receiver cites no case that holds, or suggests, otherwise.

[2] When confronted with case law she cannot answer substantively, the Receiver frequently resorts to the "not a Ponzi scheme case" dodge. *See* Receiver's Response to Defendants' Motions to Dismiss, Doc. #48 (p. 8, "*LSI was not a Ponzi scheme*;" p. 8, n.21, "*Reneker* was not a Ponzi scheme case;" p.51, "*Price* is not a Ponzi scheme case and does not involve a receiver."). That is no distinction. The law of torts is not different in Ponzi scheme cases, as opposed to other cases involving fraud.

Injury in Fact/Article III Standing

This Court ruled the Receiver has Article III standing based on the Fifth Circuit's opinion in *Zacarias*, which acknowledged the theory that the Stanford Ponzi scheme was "injured" when it stole investors' money, because it then owed the money to the investor/victims. (See this Court's Order denying motions to dismiss, Doc. #67, p.9.)

Whether Article III standing exists is a question of federal constitutional law.[3] Article III of the United States Constitution requires a plaintiff to have an "injury in fact" in order to have standing. Since the Receiver's claims are governed by state law, Mississippi substantive law controls[4] whether Madison Timber, and thus the Receiver, could recover damages based on the "increased liabilities" theory. If no such recovery is allowed under Mississippi law, then Madison Timber did not sustain an "injury in fact."

In accepting the Receiver's arguments, this Court's Order relied solely on *Zacarias*. No Mississippi case has ever held – or even hinted – that a criminal enterprise is "injured" when it steals money. The "increased liabilities" theory of "injury" has been rejected by many courts, including the Fifth Circuit,[5] the Eleventh Circuit, and the Second Circuit.

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[3] The Receiver makes a red-herring argument about standing requirements in Mississippi's state courts, arguing that Mississippi's state courts are "always open," even if there is no "case or controversy." (Doc. #77, p.5.) While Mississippi substantive law governs the merits of the Receiver's claims, Mississippi standing requirements are irrelevant here. *Intl. Primate Protec. League v. Administrators of the Tulane Educ. Fund*, 895 F.2d 1056, 1061 (5th Cir. 1990) ("The plaintiffs contend that even if they lack standing under Article III, they meet the requirements for standing under state law; as they allege only state law causes of action, the plaintiffs maintain, the more stringent Article III requirements need not be met. Although standing requirements in state courts are often less stringent than those of Article III, the issue lacks relevance here, as standing in federal court is determined entirely by Article III and depends in no degree on whether standing exists under state law."), *rev'd on other grounds*, 500 U.S. 72 (1991), following *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804, 105 S.Ct. 2965, 2970, 86 L.Ed.2d 628 (1985).

[4] *AT&T Mobility, LLC v. Natl. Ass'n for Stock Car Auto Racing, Inc.*, 494 F.3d 1356, 1360 (11th Cir. 2007) (analyzing Article III injury-in-fact requirement by evaluating state-law rights; "[t]he question of whether, for standing purposes, a non-party to a contract has a legally enforceable right is a matter of state law."); *League of United Latin American Citizens, Dist. 19 v. City of Boerne*, 675 F.3d 433, 436, n. 1 (5th Cir. 2012) (Article III standing evaluated based on state-law voting rights injury).

[5] The Receiver admits that "the Fifth Circuit did not look to state law for its holdings in *Zacarias* or *Rotstain*, or even *DeJoria*." (Doc. #77, p.5.) If that is true, the Fifth Circuit overlooked *O'Melveny*,

Whether Mississippi would adopt this novel theory of "injury" is clearly a proper and important question for appeal – despite the Receiver's incredible claim that there is no "substantial ground for difference of opinion." *See In re Depuy Orthopedics, Inc.,* 888 F.3d 753, 781 (5th Cir. 2018) ("a federal court exceeds the bounds of its legitimacy in fashioning novel causes of action not yet recognized by the state courts"); *Midwestern Cattle Mktg., L.L.C. v. Legend Bank, N. A*., 800 Fed. Appx. 239, 250 (5th Cir. 2020)(unpublished) ("[T]herefore, we cannot recognize a claim that the Texas Supreme Court has yet to expressly adopt."). The Fifth Circuit should be given the opportunity to either fully evaluate whether Mississippi would recognize such an expansion of tort recovery, or to certify the question to the Mississippi Supreme Court.

Application of State-Law Defenses to the Receiver

Under Mississippi law, "[t]he receiver acquires no other or better or greater interest than had the person out of whose hands it was taken." J. Shelson, *Mississippi Chancery Practice* § 20:12, "The Effect of a Judgment of Receivership" (Westlaw 2019 ed.). Mississippi law holds that "any defense good against the original party is good against the receiver." *Citizens' Bank of Greenville v. Kretschmar,* 44 So. 930, 932, 91 Miss. 608 (1907).

This Court rejected Trustmark's motion to dismiss based on the Wrongful Conduct Rule, because "[t]he appointment of the receiver removed the wrongdoer from the scene." (Doc. #67, p.19, citing *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995).) There is no Mississippi authority that allows a receiver to sidestep the Wrongful Conduct Rule (or any pre-receivership defense). In fact, Mississippi has applied the Wrongful Conduct Rule to defeat claims asserted

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because the litigants did not adequately raise or argue the requirement of "injury" under state law, as required by *O'Melveny*. *See Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 737 (2007) ("we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.").

by a wrongdoer's innocent successor.[6] When *O'Melveny* is properly considered, and the Court's analysis is based purely on Mississippi law, there is certainly "substantial ground for difference of opinion" on this dispositive issue.

The Intra-Circuit and Inter-Circuit Split

Trustmark has shown that the Fifth Circuit has issued inconsistent opinions regarding a failed entity's standing to pursue claims belonging to creditors, and that *Zacarias* conflicts with decisions of other circuits.[7] Regarding the inter-circuit split, the Receiver's only response is that New York law governed in the *Madoff* Ponzi scheme cases, and Florida law governed in *Isaiah*. (Doc. #77, p.8.)

That is exactly Trustmark's point. Neither *Zacarias*, nor any opinion from Stanford receivership lawsuits, has more weight than other non-Mississippi case law. Yet, the Receiver continues to push this Court to allow her to pursue claims that have not been adopted by Mississippi, and to set aside defenses, because she is a "federal equity receiver."

The Receiver's Reference to Assignments

Finally, the Receiver tosses out a footnote, stating that "[e]ven if Trustmark were correct that the Receiver's claims fail for the reasons it argues in its motion, the Receiver's claims would remain to the extent she asserts them in her capacity as holder of assignments made by investors." (Doc. #77, p. 8, fn. 6.) The Receiver has not filed any assigned claims. She has not identified an assignor, or an assignment, or a single assigned claim. *See MAO–MSO Recovery II, LLC v. Boehringer Ingelheim Pharm., Inc,* 281 F.Supp.3d 1278, 1283 (S.D. Fla. 2017)

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[6] *See Downing v. City of Jackson,* 24 So.2d 661 (Miss. 1946) (widow's claims were barred due to her husband's wrongful conduct – even though the widow was blameless). Trustmark discussed *Downing* in arguing its motion to dismiss (Doc. #40, p. 12), and the Receiver's Response ignored it. The Receiver is thus incorrect when she states that Trustmark "does not point to any contrary state-law authority" regarding application of the Wrongful Conduct Rule.

[7] Doc. #70, pp.2-3, citing Fifth Circuit decisions in *DeJoria, Janvey, Zacarias*, and *Rotstain,* as well as Second Circuit decision in *Madoff,* and Eleventh Circuit decision in *Isaiah*.

(dismissing claims for lack of Article III standing, because complaint did not sufficiently plead details of alleged assignments; "Plaintiffs allege that they have valid assignment agreements from the MAOs, but they plead no facts supporting that legal conclusion"). The exclusion of assigned claims from her complaints is obviously a strategic decision – probably made because (to no avail) she wants to avoid defenses that would apply to those claims.

Conclusion

Trustmark has shown that 28 U.S.C. § 1292(b)'s requirements are clearly present. Trustmark respectfully requests that this Court modify its Order (Doc. #67), certifying the decision for interlocutory appeal, and setting forth grounds as follows:

1) The Order involves a controlling question of law, i.e., whether under Mississippi law, which must be followed under *O'Melveny*, the plaintiff's status as a "federal equity receiver" A) gives the plaintiff Article III standing to pursue claims against third parties for "increased liabilities" of the receivership estate, or B) enables the plaintiff to avoid state-law defenses.

2) There is a substantial ground for difference of opinion regarding the question of law, as evidenced by the Fifth Circuit's opinions in *DeJoria, Janvey, Zacarias,* and *Mendez,* and by opinions of other Circuits, and by the absence of clear authority from the Mississippi Supreme Court supporting the denial of Trustmark's Motion to Dismiss.

3) An immediate appeal would advance the ultimate termination of this litigation, since the absence of a legal injury under Mississippi law, and the availability of certain defenses under Mississippi law, would be dispositive of most or all of the Receiver's claims.

Respectfully submitted, this the 7th day of April, 2021.

TRUSTMARK NATIONAL BANK

By: /s/William F. Ray
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Certificate of Service

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to all counsel of record.

This the 7th day of April, 2021.

/s/William F. Ray
William F. Ray