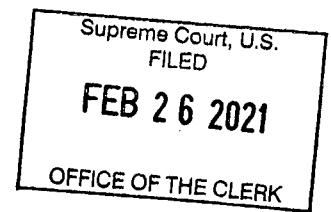


No. 20-1251

**In The Supreme Court of
the United States**



—◆—
DR. CLAUD ANDERSON,
Petitioner

v.

**THE HARBOR BANK OF
MARYLAND,**
Respondent.

—◆—
**Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Fourth Circuit**

—◆—
**PETITION FOR A WRIT OF CERTIORARI
with Appendix**

—◆—
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February, 2021

I. QUESTIONS PRESENTED

Whether the decision of the United States Court of Appeals for the Fourth Circuit in this matter that a possessory lien on insurance proceeds deposited into a deposit account survives notwithstanding deposit and commingling of the proceeds with other funds, can be reconciled with a contrary opinion reached in the United States Eighth Appellate Circuit where it was determined in *WEB2B Payment Solutions, Inc.* 2013 WL 1188041 (8th Cir. BA.P. March 25, 2013) that a bank's possessory lien was overcome by a trustee's control of the deposit account into which the funds were placed.

II. PARTIES

Petitioner, Waterland Fisheries, Inc., Chief Executive Officer, Dr. Claud Anderson, is a well known author, lecturer and proponent of redeveloping and industrializing Black communities. Dr. Anderson is a former United States Marine. Dr. Anderson served as State Coordinator of Education for Governor Reuben Askew's administration in Florida. Dr. Anderson also served as Assistant Secretary for the United States Department of Commerce where he headed the Coastal Plains Regional Commission during the administration of President Jimmy Carter.

Dr. Anderson is the founder and majority shareholder of Waterland Fisheries, Inc. ("WFI") located in Hurlock, Maryland. WFI was purchased in 2007 with roughly one million dollars in capital invested by Dr. Anderson. By reason of the events described hereinbelow Dr. Anderson's entire personal investment has been lost. Dr. Anderson filed a Petition under Chapter 7 of the United States Bankruptcy Code on June 22, 2015. Dr. Anderson is the sole petitioner and no corporation nor corporate entity are involved as petitioners in this case.

Respondent, Harbor Bank of Maryland, was Waterland's senior lender, and a defendant in all matters below.

III. FEDERAL COURT PROCEEDINGS

United States Court of Appeals for the Fourth Circuit
No. 19-1770, Decided July 29, 2020

United States District Court for the District of
Maryland
Civil Action No. TDC-18-0977, Decided March 15,
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“Good as Gold: Obtaining and Retaining Perfected Security Interests in Borrower Bank Accounts,” American Bankruptcy Institute, Deborah L. Thorne, Barnes and Thornbar, LLP 9

“Lender's Security Interest in Casualty Policy Proceeds.” Scott B. Osborne 12

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

VI. OPINIONS BELOW

September 29, 2020 Per Curiam Judgment Denying Rehearing and Rehearing En Banc (Appendix A)

July 29, 2020 Per Curiam Decision of the United States Court of Appeals for the Fourth Circuit Affirming District Court (Appendix B)

June 27, 2019 Decision of the United States District Court for the District of Maryland Denying Motion to Alter or Amending Decision of March 15, 2019 (Appendix C)

March 15, 2019 Decision of the United States District Court for the District of Maryland Affirming Decision of United States Bankruptcy Court (Appendix D)

VII. JURISDICTION

The Order denying Rehearing and Rehearing En Banc was entered on April 24, 2019. Jurisdiction here is based on 28 U.S.C. 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

11 U.S.C. §523(a)(6)

Section 523 - Exceptions to discharge

(a) A discharge under section 727, 1141, 1192 1 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt...

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

VIII. STATEMENT OF THE CASE

An Amended Complaint in Adversary Case No. 16-00002, the *Harbor Bank of Maryland v. Dr. Claud Anderson* was filed January 30, 2017. On May 4, 2016, Case No. 16-00002 was consolidated with Adversary No. 15-00685, *State of Maryland Agricultural & Resource Based Industry Development Corporation (hereinafter "MARBIDCO") and State of Maryland, Department of Commerce v. Dr. Claud Anderson*, Docket No. 28. An adversary trial was conducted on March 20, 2017 and on March 28, 2017 through March 30, 2017, Docket No. 161, Case No. 15-00685.

A Memorandum of Decision and Opinion entering judgment in favor of Harbor Bank of Maryland on Count III of its Amended Complaint 11 U.S.C. §523 (a)(6) for willful and malicious injury by the debtor to the property of another, and judgment on behalf of Dr. Claud Anderson on all remaining counts was entered on March 23, 2018.

On April 3, 2018, Dr. Claud Anderson timely filed Notice of Appeal to the United States District Court for the District of Maryland.

The district court entered a judgment in favor of the Harbor Bank of Maryland on March 15, 2019.

The district court denied Petitioner's motion to alter or amend on June 27, 2019. Petitioner filed a Notice of Appeal on July 17, 2019.

On July 29, 2020 the Circuit Court affirmed the district court. A Petition for Rehearing was denied on September 29, 2020.

**IX. REASONS FOR GRANTING THE
PETITION**

**A CONFLICT EXISTS BETWEEN THE FOURTH
AND EIGHTH CIRCUITS CONCERNING
WHETHER THE DEPOSIT OF FUNDS INTO
DEPOSIT ACCOUNT STRIPS THE FUNDS OF A
POSSESSORY LIEN**

X. ARGUMENT IN SUPPORT

A. INTRODUCTION

The central issue in this dispute, is whether the exercise by a secured creditor, who is also the spouse of the Debtor -Dr. Claud Anderson, of her rights under Article 9 of the Uniform Commercial Code and a demand note and security agreement that were fully disclosed to all parties in advance of any loans being

made and timely documented and perfected through UCC-1 filings in the Offices of both the Maryland and Michigan Secretary of State, should be grounds for denial of a discharge to the Debtor under 11 U.S.C. §§523(a)(4) or (a)(6) or under 11 U.S.C. 727(a)(2)(A), where the evidence establishes that casualty insurance proceeds upon which the spouse secured creditor foreclosed, were processed and deposited into the insured's deposit account as required by Maryland law.

The relevant insurance policy never identified Harbor as named insured, loss payee, or mortgage, or in any other capacity. Because Harbor were not identified on the policy and, therefore, had no rights under the policy, the insurance settlement check in dispute was, correctly, never made payable to or delivered to Harbor, but was deposited by counsel into WFI's deposit account where it was required by Maryland law to go. "The proceeds of an insurance policy are to be distributed according to the precise terms of the policy." *See, Globe American Cas. Co. v. Chung*, 76 Md. App. 524, 532 (1988), vacated on other grounds, 322 md. 713 (1991) This issue has been conclusively decided by the Circuit Court of Dorchester County. No argument advanced by Harbor can overcome the fact that any status their alleged lien on the insurance proceeds may have had

was stripped when the proceeds went into a deposit account over which another secured creditor had lawful control. For this reason, the Circuit court should be reversed. There is no authority to support the argument that once the proceeds reached the WFI deposit account, any lien by Harbor here, allegedly arising under a non-UCC based agreement, such as the deed of trust, assignment or other loan document, could overcome the superior right of possession of a UCC-secured creditor, like Joann Anderson, with control of the deposit account.

B. CONTROL OF WFI DEPOSIT ACCOUNT

Harbor did not have control of WFI's deposit account. Joann Anderson, a WFI secured creditor did have control and was entitled to foreclose on funds in the account.

The issue presented by Mrs. Anderson's foreclosure however is not whether Harbor by virtue of its right under a loss payable clause in an insurance policy takes precedence over the claim of a perfected security interest in the collateral that has been damaged. Mrs. Anderson's right arises from her control, within the meaning of Maryland Rule 9-104, of Waterland's deposit account and the fact that funds

were placed into that account through the acts of persons other than Mrs. Anderson or Dr. Anderson.

In other words, despite whatever character the insurance proceeds had prior to being placed, through no decision or action of Dr. Anderson, into WFI's deposit account, once the proceeds were placed into the deposit account, any lien held by Harbor or another creditor became subordinate to Mrs. Anderson by virtue of the Uniform Commercial Code. This was determined to be the case in a nearly analogous circumstance. *WEB2B Payment Solutions, Inc.* ___B.R. 2013___, 2013 WL 1188041, 5 (8th Cir. B.A.P. March 25, 2013), where a bank's possessory lien was overcome by the bankruptcy trustee's control of a deposit account. The 8th Circuit panel who addressed this precise question stated:

Section 9-314(a) of the Minnesota version of the Uniform Commercial Code ("UCC") provides that "a security interest in... deposit accounts ... may be perfected by control of the collateral under ... Section 9-104 " The filing of a UCC financing statement will not perfect a security interest in a deposit account, See UCC § 9-312(b)(1) ("security interest in a deposit account may be perfected only by control"). UCC § 9-104(a) (1) further provides that "[a]

secured party has control of a deposit account if " . the secured party is the bank with which the deposit account is maintained""

The Trustee conceded the Bank's contractual security interest in the account funds that "was perfected by possession as of the [bankruptcy] petition date." Id. Moreover, the Bank's "lien survived the bankruptcy filing itself' Id. The only issue was "the effect of the [Bank's] turnover" on its possessory lien, Id.

Id.; also see, "Secured Lender's Loss of Possessory Lien Affirmed" *The Bankruptcy Strategist*, Volume 30, Number 9, July 2013.

The Maryland substantive law concerning "control" is the same as Minnesota's.

Under Maryland law:

Perfection of Security Interests in Deposit Accounts

A security interest in deposit accounts is perfected so long as the secured creditor has control of the bank account. Unlike investment property including many brokerage accounts, filing is not required and is of no benefit unless the creditor has control. Once control is lost, however, the creditor's interest is no

longer perfected and may no longer exist. §9-314. A creditor may establish control in one of three ways: (1) automatically, if the creditor is also the bank holding the account; (2) pursuant to an account control agreement by which the bank agrees that it will follow instructions given by the secured lender; or (3) automatically, if the creditor holds the bank account in its own name. Importantly, an account control agreement need not restrict the borrower's ability funds in the account. §9-314(h). Thus, "control" in this context does not mean that the creditor must have exclusive control of account funds. The creditor's ability to control the account, not exclusive actual control, is sufficient to prove control. §9-104(b), Note that while this approach may work to establish control and perfect the interest in deposit accounts, it may not be a practical way to retain control since funds voluntarily removed from the deposit account are outside the creditor's control. Once outside the creditor's control, the perfected security interest is lost.

See, "Good as Gold: Obtaining and Retaining Perfected Security Interests in Borrower Bank Accounts," American Bankruptcy Institute, Deborah

L. Thorne, Barnes and Thornbar, LLP. Harbor's Complaint does not address control of the WFI deposit account. If it did it would be further evidence of the invalidity of Harbor's Complaint. It is undisputed that Joann Anderson had an agreement by which the bank agreed to follow instructions given by Joann Anderson. See, JA-1272. Joann Anderson was a signer on the account. Under the signature card at JA-1272. United Bank agreed to follow the instructions of Joann Anderson, among others.

C. POSSESSORY LIEN

Just as the case here the U.S. Bankruptcy Appellate Panel ("BAP") for the Eighth Circuit held on March 25, 2013, that a lender "lost its possessory lien when it turned the Debtor's account funds over to the Trustee *without first seeking adequate protection.*" *In re WEB2B Payment Solutions, Inc.*, ____ B.R. 2013 ____, 2013WL 1188041, *5 (8th Cir. B.A.P. March 25, 2013) (emphasis added). Affirming the bankruptcy court's granting of summary judgment to the trustee, the BAP stressed that "a possessory lien is, by definition, released when possession of the collateral is relinquished." *Id.*, at *3.

Section 9-314(a) of the Minnesota version of the Uniform Commercial Code ("UCC"), which is the same

as Maryland's, provides that "a security interest in . . . deposit accounts . . . may be perfected by control of the collateral under . . . Section 9-104 . . ." The filing of a UCC financing statement will not perfect a security interest in a deposit account. See UCC § 9-312(b)(1) ("security interest in a deposit account may be perfected only by control"). UCC § 9-104(a)(1) further provides that "[a] secured party has control of a deposit account if . . . the secured party is the bank with which the deposit account is maintained."

The critical fact in *WEB2B* was the Bank's holding of a possessory lien which, "by definition, released when possession of collateral was relinquished." *Id.* at *4. In other words, the Bank "voluntarily and affirmatively release[d] its lien by operation of law when it relinquished possession." *Id.* Unlike the secured lender in *Whiting Pools*, the Bank here had no non-possessory statutory lien and no other lien "perfected by the filing of a UCC-1 . . ." *Id.* The Bank's possessory lien in account funds is essentially the same as a setoff right. As the BAP put it, "in either situation the creditor's rights in funds are lost when possession is given up." *Id.* In this case since Joann Anderson had control of the deposit account, Harbor's purported lien could not survive placement of the fungible insurance proceeds into that account.

D. PROCEEDS

Under Maryland law, if a casualty policy has a loss payable clause in favor of a lender, the lender has a contractual right to receive the policy proceeds up to the value of the lender's mortgage. *See*, Scott B. Osborne, "Lender's Security Interest in Casualty Policy Proceeds." Under certain circumstances, such as those in the case of Waterland, the borrower has a right to insist on application of these proceeds toward reconstruction or improvements. *See*, *Paskow v. Calvert Fire Ins. Co.*, 579 F.2d, 949, 95 (5th Cir. 1978). The lender's contractual right to receive policy proceeds is not in the nature of a "security interest." *See*, *Osborne, supra*. It is in the nature of a contractual right to receive the proceeds.

Because the mortgagee has a contractual right to money payable under the loss payable clause, the mortgagor has no right to that money. Thus the money or right to receive the money is not property or a right to property belonging to the mortgagor. *See*, *Paskow*.

Simply stated, casualty policy proceeds belong to the lender if, as here, the policy contains a mortgagee loss payable clause. *Id.* However, the

borrower also has a right to insist that the proceeds are used to repair the property. Moreover, the lender has a duty to assert its claim to the proceeds at the time of distribution, which Harbor never did in this case. None of this however is directly relevant to the issue of whether Joann Anderson had a senior secured interest in Waterland's deposit account. Control of a deposit account is a UCC issue, not a contract issue. It is critical to this analysis therefore that neither Dr. nor Mrs. Anderson caused the insurance proceeds to be placed into Waterland's deposit account. The funds were required to be put into WFI's deposit account under Maryland law and the Circuit Court for Dorchester County has already decided that issue against Harbor.

Insurance policies are specifically excluded from the provisions of Article 9 of the UCC.

Sec 9-109(d) Inapplicability of Article.
This Article does not apply to:

(8) A transfer of an interest in or an assignment of a claim under a policy of insurance, other than an assignment by or to a health-care provider of a health-care-insurance receivable and any subsequent assignment of the right to payment, but 9-315 and 9-322 apply

with respect to proceeds and priorities in proceeds;

It is not possible under the UCC to create or perfect a security interest in a casualty insurance policy. The only method of obtaining rights to payment under a casualty insurance policy is to have a contractual right to receive that payment under the policy itself. *See, Osborne.*

The exception to this general statement arises in the context of determining whether insurance proceeds can constitute the "proceeds" of collateral. The UCC has continued the treatment of insurance payments as "proceeds" of personal property that were otherwise subject to a perfected security interest. The UCC makes it clear that it was possible to have a security interest vis a vis the borrower in "proceeds" arising from an insurance policy.

XI. CONCLUSION

In view of the above arguments, it is respectfully requested that a Writ of Certiorari issue.

February 25, 2021

Respectfully submitted,

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