BANKRUPTCY DECISIONS OF THE
ELEVENTH CIRCUIT COURT OF APPEALS
AND
SUPREME COURT OF THE UNITED STATES

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Decatur, Alabama

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NEW CASES

RECENTLY DECIDED SUPREME COURT CASES

11 U.S.C. § 522 Exemptions.

1. Law v. Siegel, 134 S. Ct. 1188 (U.S. 2014)(unanimous). Bankruptcy court imposed an equitable surcharge against debtor's $75,000 state-law homestead exemption to compensate the bankruptcy estate for litigation costs incurred as a result of debtor's bad faith litigation conduct.

Ch. 7 debtor valued his California home at $363,348, claiming $75K of that value was covered by California's homestead exemption and, thus, was exempt from his bankruptcy estate – § 522(b)(3)(A). Debtor also claimed that two liens against his residence exceeded the home's nonexempt value, leaving no equity to be recovered for the benefit of creditors.

Trustee filed an AP alleging that the second note and deed of trust in favor of Lin's Mortgage & Associates for $156,929.04 was fraudulent. After protracted litigation, the bankruptcy court determined that the debtor fabricated the note and deed of trust to preserve the equity in his home and defeat collection efforts of judgment creditors. The dispute between the debtor and the Ch. 7 trustee over the validity of the loan lasted five years causing the estate to incur more than $500K in legal fees to overcome the debtor's fraudulent misrepresentations. The bankruptcy court granted trustee's motion to "surcharge" debtor's entire homestead exemption, making those funds available to defray the trustee's attorney's fees. The Ninth Circuit BAP affirmed the surcharge order.

The Ninth Circuit affirmed finding: (1) the surcharge was calculated to compensate the estate for the actual monetary costs imposed by the debtor's misconduct; and (2) same was warranted to protect the integrity of the bankruptcy process.

Although the Justices appeared to have little sympathy for the deceitful debtor during oral arguments, an unanimous Court reversed and held that by surcharging the debtor's exemptions, the bankruptcy court exceeded its statutory authority and inherent sanction powers. Federal law provides no authority for bankruptcy courts to deny an exemption on a ground not specified in the Bankruptcy Code.

- **Section 522 specifies the criteria that render property exempt and a court may not refuse to honor a debtor's invocation of an exemption without a valid statutory basis.**
- **Hornbook law- § 105(a) "does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code." "Section 105(a) confers authority to 'carry out' the provisions of the Code, but it is quite impossible to do that by taking action that the Code prohibits."**
- **"[A] statute's general permission to take actions of a certain type must yield to a specific prohibition found elsewhere." "Courts' inherent sanctioning powers are likewise subordinate to valid statutory directives and prohibitions." Thus, the surcharge order was unauthorized if it contravened a specific provision of the**

Bankruptcy Code.

- **Section 522(b)(3)(A), by reference to California law, entitled the debtor to exempt $75K of equity in his home.**
- **Section 522(k) made that $75K "not liable for payment of any administrative expense."**

- **The trustee's attorney's fees were administrative expenses.**
  - **§ 503(b)(2) provides that administrative expenses include compensation awarded under § 330(a).**
  - **§ 330(a)(1) authorizes "reasonable compensation for actual, necessary services rendered by a "professional person employed under" § 327.**
  - **§ 327(a) authorizes the trustee to "employ one or more attorneys . . . to represent or assist the trustee in carrying out the trustee's duties..."**
- **Thus, the surcharge order violated § 522's express terms when it ordered that the $75K be made available to pay the trustee's attorney's fees which were an administrative expense.**

Bankruptcy courts are authorized to respond to debtor misconduct with other meaningful sanctions:

- **§ 727(a)(2)-(6) - denial of discharge. Not an option here due to a settlement agreement between the debtor and his largest creditor which left the debtor with no debts to discharge.**
- **Rule 9011(c)(2) sanctions for bad-faith litigation, which may include "an order directing payment . . . of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation."**
- **Because it arises postpetition, a bankruptcy court's monetary sanction survives the bankruptcy and is, thereafter, enforceable through the normal procedures for collecting money judgments. § 727(b)**
- **18 U.S.C. § 152 - fraudulent conduct in a bankruptcy case may subject a debtor to criminal prosecution carrying a maximum penalty of 5 years imprisonment.**

26 U.S.C. § 3121 Definitions.
2. United States v. Quality Stores, Inc., 134 S. Ct. 1395 (2014)(unanimous, with Justice Kagan not participating). Severance payments constituted "wages" for which debtor/employer was required to withhold FICA tax.

Pursuant to the terms of its Chapter 11 plan, the debtor paid severance payments to employees who were terminated postpetition as the company downsized. The severance payments varied based on the employees' positions in the company and their years of service. From the payments, the debtor withheld and paid the federal payroll tax imposed by FICA. Subsequently, the debtor believing that the payments should not have been taxed as wages under FICA sought a refund on behalf of itself and 1,850 former employees. After the IRS neither allowed nor denied the refund, the debtor filed a complaint in the bankruptcy court which granted summary judgment in favor of the debtor. The district court and Sixth Circuit

affirmed, finding that severance payments are not wages under FICA.

The Supreme Court reversed finding that the severance payments were taxable wages for purposes of FICA.

- **FICA's definition of "wages" encompasses severance payments –**
  - **FICA defines "wages" broadly as "all remuneration for employment." 26 U.S.C. § 3121(a) As a matter of plain meaning, severance payments fit this definition.**
  - **Severance payments are a form of remuneration made only to employees in consideration for employment.**
  - **Employment is "any service . . . performed . . by an employee" for an employer. § 3121(b).**
  - **Given this definition of employment, the Court concluded that severance payments constitute "remuneration for employment" as a matter of plain meaning and common sense.**
- **Additional evidence reinforcing the broad nature of FICA's definition of wages–**
  - **The exemption under § 3121(a)(13)(A) from taxable wages for any severance payments made "because of . . . retirement for disability" would be unnecessary were severance payments in general not within FICA's definition of "wages."**
  - **FICA's statutory history supports the finding that FICA does not contain an exception for severance payments. In 1939, Congress exempted "dismissal payments" from "wages," but Congress repealed that exemption in 1950. "When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Quality Stores, Inc.,* at *5.**
- **Debtor could not rely on Internal Revenue Code provision relating to income-tax withhold to limit the meaning of "wages" for FICA purposes.**
  - **Debtor argued that § 3402(o)'s instruction that severance payments be treated "as if" they are wages for purposes of income-tax withholding is an indirect means of stating that the definition of wages for income-tax withholding does not cover severance payments.**
  - **The more logical inference given the regulatory history in this area is that regardless of whether any particular severance payment falls within definition, all such payments must be treated as wages for purposes of withholding.**

11 U.S.C. § 506(d) Lien Avoidance Through Claims Allowance.

3. Bank of America v. Sinkfield, No. 13-700, *cert. denied* 3/31/14. The Supreme Court denied Bank of America's petition to review the 11th Circuit's decision in *McNeal v. GMAC Mortgage, LLC (In re McNeal),* 735 F.3d 1263 (11th Cir. 2012). In *McNeal*, the 11th Circuit held that *Dewsnup v. Timm*, 502 U.S. 410 (1992) does not prevent Ch. 7 debtors from "stripping off" wholly unsecured junior mortgages.

Dewsnup* held that Ch. 7 debtors cannot "strip down," or reduce, a mortgage lien to the collateral's current value. Although the 4th, 6th and 7th Circuits have extended *Dewsnup's

holding to the strip-off of wholly unsecured junior liens, the 11th Circuit declined to do so based on controlling11th Circuit precedent. In *Folendore v. United States Small Bus. Admin.*, 862 F.2d 1537 (11th Cir. 1989) the 11th Circuit concluded that an allowed claim that was wholly unsecured was voidable under the plain language of § 506(d). Under the court's prior precedent rule, the 11th Circuit explained that "a later panel may depart from an earlier panel's decision only when the intervening Supreme Court decision is 'clearly on point.'" Because *Dewsnup* disallowed only a "strip down" of a partially secured mortgage lien and did not address a "strip off"of a wholly unsecured lien, it is not "clearly on point" with the facts in *Folendore* or with the facts at issue in *McNeal.*

In *Sinkfield*, the Ch. 7 debtor had two mortgage liens on his home, and the balance owed on the first mortgage exceeded the property's current market value. Debtor filed a motion under § 506(d) to strip off the second mortgage.

Bank of America stipulated to a judgment against it at the trial court and the parties then agreed to have the case proceed through the district court and a panel of the 11th Circuit. Bank of America then sought *en banc* relief before the 11th Circuit, but the court of appeals declined to grant *en banc* consideration.

Bank of American then filed for *certiorari* arguing review was necessary to resolve the split among the circuits and to eliminate the 11th Circuit's "superficial distinction between strip-offs and strip-downs." Debtor responded that there is a "meaningful distinction" between strip-offs and strip-downs, and that the *Dewsnup* court limited its holding to the specific facts before it.

PENDING SUPREME COURT CASES

11 U.S.C. § 548 Fraudulent Transfers and Obligations.

4. Executive Benefits Ins. Agency v. Arkison (Bellingham Ins. Agency, Inc.), 702 F.3d 553 (9th Cir. 2012), *cert. granted,*133 S. Ct. 2880 (Docket No. 12-1200). The debtor sold insurance and annuity products. By early 2006, debtor was insolvent. Two weeks after the debtor closed its doors, the company irrevocably assigned insurance commissions from one of its largest clients to a longtime employee. Subsequently, the funds were shifted to a newly created entity (Executive Benefits Ins. Agency) via an inter-company transfer.

Subsequently, the debtor filed a voluntary Ch. 7 petition. The Ch. 7 trustee filed a complaint to recover the intercompany transfer as a fraudulent conveyance under § 548. The bankruptcy court granted summary judgment in favor of trustee and the district court affirmed.

The 9th Circuit held that fraudulent conveyance claims cannot be adjudicated by non-Article III judges because they do not fall within the public rights exception.

The court further ruled that bankruptcy courts have statutory authority to hear and enter

proposed findings of fact and conclusions of law in such matters subject to de novo review by district court. The court reasoned that the power "to hear and determine" under Title 28, § 157(b)(1) is capacious enough to include the power to submit proposed findings in a core proceeding. Actions for fraudulent conveyance are expressly designated as "core" by § 157.

Finally, the court found that the right of a defendant in a fraudulent conveyance proceeding to a hearing in an Art. III court is waivable. The court reasoned that if consent permits a non-Article III judge to finally decide a non-core proceeding pursuant to § 157(c)(2), "then it surely permits the same judge to decide a core proceeding in which he would, absent consent, be disentitled to enter final judgment." Here, the noncreditor's conduct bore the indicia of consent where: (1) the noncreditor petitioned the district court to stay consideration of its motion to withdraw the reference to give the bankruptcy court time to adjudicate the trustee's motion for summary judgment; and (2) the noncreditor waited to raise its constitutional objection to the bankruptcy court's authority until after the briefing in its appeal to the 9th Circuit was complete.

Noncreditor's petition for writ of certiorari presented the following questions:

- **Whether Art. III permits the exercise of the judicial power of the United States by bankruptcy courts based on consent, and if so whether implied consent is sufficient to satisfy Art. III?**
- **Whether a bankruptcy judge may submit proposed findings of fact and conclusions of law for de novo review in a 'core' proceeding under 28 U.S.C. § 157(b)?**

During oral arguments heard on January 14, 2014, Chief Justice Roberts questioned why "two parties who come in off the street" should be allowed to consent and take away the authority of Article III judges to decide cases which is their "Constitutional birthright" when the Court has already said in *Stern* that Congress cannot take away that right from Article III judges.[1]

Justice Alito stated that he did not see any difference between a district judge referring a motion for summary judgment to a magistrate judge and what happened in this case.

Justice Kagan expressed concern that a ruling curbing bankruptcy judges' powers would hinder magistrate judges and arbitrators.

11 U.S.C. § 522 Exemptions.

5. Clark v. Rameker (In re Clark), 714 F.3d 559 (7th Cir. 2013), *cert. granted,* 134 S. Ct. 678 (Docket No. 13-299). In this appeal, the issue before the Supreme Court is whether an individual retirement account that a debtor has inherited from someone other than the

[1] Transcript of Oral Argument at 50-51.

debtor's spouse is exempt from the debtor's bankruptcy estate under § 522(b)(3)(C) which exempts "retirement funds to the extent that those funds are in a fund or account that is exempt from taxation" under certain provisions of the IRC. The retirement fund exemption in § 522(b)(3)(C) applies to debtors in opt out states, i.e. Alabama. Section 522(d)(12) provides an identical retirement fund exemption for debtors in opt in states.

When a debtor inherits an IRA from his or her spouse, the IRA remains "retirement funds." The surviving spouse cannot withdraw the money before age 59½ without paying a penalty and must start withdrawals no later than age 70½. Different rules govern non-spousal inherited IRAs: (1) no new contribution can be made; (2) balance cannot be rolled over or merged; (3) asset distributions must begin within a year of the original owner's death; and (4) payout must be complete within five years.

In this case, the debtor inherited an IRA from her mother worth $300K. The bankruptcy judge held that the inherited IRA did not represent "retirement funds" in the debtor's hands and was, thus, not exempt under § 522(b)(3)(C). Funds count as "retirement funds" only when held for the owner's retirement while an inherited IRA must be distributed earlier.

The district court reversed finding that any money representing "retirement funds" in the decedent's hands must be treated the same way in a successor's hands. The Fifth Circuit agrees with this approach.

The Seventh Circuit reversed holding that funds held in a non-spousal inherited IRA were not "retirement funds" within the meaning of the Bankruptcy Code under § 522(b)(3)(C). Exemptions are dependent upon how the debtor uses the property, not how the property was used by another.

Oral arguments were held March 24, 2014.

RECENTLY DECIDED ELEVENTH CIRCUIT CASES

11 U.S.C. § 506 Determination of Secured Status.
6. Santander Consumer USA, Inc. v. Brown (In re Brown), 2014 WL 1245266 (11th Cir. March 27, 2014)(Wilson, Bucklew, and Lazzara, JJ.) The 11th Cir. held that § 506(a)(2)'s replacement valuation standard applies when a Chapter 13 debtor surrenders a vehicle under § 1325(a)(5)(C).
Debtor purchased a recreational vehicle and entered into a loan agreement secured by the vehicle. Five years later the debtor filed a Chapter 13 petition. Santander filed a proof of secured claim for $36,587.53, the outstanding payoff as of the petition date. Debtor's Ch. 13 plan proposed to surrender the vehicle in full satisfaction of Santander's claim.

Santander filed an objection to confirmation. At the hearing, Santander argued that the surrendered vehicle's value should be based on its foreclosure value, but debtor argued § 506(a)(2)'s replacement value standard controlled.

Debtor contended that if his vehicle's replacement value exceeded his debt, surrendering his vehicle would satisfy Santander's entire claim, and his debt, under § 1325(a)(5)(C). Santander argued that a surrendered vehicle's value should be based on its foreclosure value, not replacement value.

The bankruptcy court overruled Santander's objection and held that § 506(a)(2) required that the debtor's vehicle be valued based on its replacement value. The court explained that although *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997) supported the foreclosure value, *Rash* preceded BAPCPA's addition of § 506(a)(2) which requires replacement value.

Following a valuation and confirmation hearing, the bankruptcy court determined that the vehicle's replacement value at least equaled the debt and confirmed Brown's Ch. 13 plan. The district court and 11th Cir. affirmed.

- **§ 1325(a)(5) provides that a plan's treatment of an "allowed secured claim" can be confirmed if: (1) the secured creditor accepts the plan; (2) the debtor retains the collateral and makes payments; or (3) the debtor surrenders the collateral.**
- **§ 506(a)(1) bifurcates a secured creditor's allowed claim into secured and unsecured portions based on the collateral's value. Such value is to be "determined in light of the purpose of the valuation and of the proposed disposition or use of such property . . ."**
- ***Rash* held that the replacement value is the proper standard in the retention context.**
- **After *Rash*, BAPCPA added § 506(a)(2), which reads:**

> **If the debtor is an individual in a case under chapter 7 or 13, *such value* with respect to personal property securing an allowed claim *shall be determined based on the replacement value* of such property as of the date of the filing of the petition without deduction for costs of sale or marketing. With respect to property acquired for personal, family, or household purposes, replacement**

> **value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.**

(emphasis added)

- **§ 506(a)(2)'s replacement value standard applies when the debtor exercises the surrender option under § 1325(a)(5)(C).**
  - **§ 506(a)(2) expressly requires a replacement value standard in cases falling within its ambit.**
  - **The cases that fall under § 506(a)(2) include those involving a Ch. 13 debtor's personal property or property for personal, family, or household use which includes the debtor's recreational vehicle. Thus, the 11th Cir. determined that § 506(a)(2), by its plain terms, applied to the case.**
- **Although § 506(a)(2)'s replacement value standard seemingly contradicts § 506(a)(1)'s broader "disposition and use" valuation language, the 11th Cir. applied the canon of statutory construction that the specific governs the general. § 506(a)(2) specifies how to value certain property in Ch. 7 and Ch. 13 cases, while § 506(a)(1) is more broadly worded and says nothing about Ch. 7 or Ch. 13 cases. When a case falls within § 506(a)(2)'s ambit, its specific requirements control.**
- **Surrender would satisfy the creditor's secured claim, not the entire debt. If a creditor has an unsecured claim, the creditor would still have an unsecured claim to the extent the debt exceeds the collateral's judicially determined replacement value.**

Santander also argues that applying § 506(a)(2) would be absurd because it eliminates creditor's contract and state law rights to liquidate and pursue an unsecured claim for any deficiency. But state law does not govern if the Bankruptcy Code requires a different result.

11 U.S.C. § 707 Dismissal of a Case or Conversion to a Case Under Chapter 11 or 13.
7. Piazza v. Nueterra Healthcare Physical Therapy, LLC (In re Piazza), 719 F.3d 1253 (11th Cir. 2013)(Marcus, Black, and Siler, JJ.).

Issue: § 707(a) can be used to dismiss a business Chapter 7 individual case based on prepetition bad faith as a stand alone ground. Circuit split: 3rd and 6th Cir. - yes; 8th and 9th Cir. - no.

- **Totality of circumstances – bad faith under § 707(a).**
  - **Bk filed to avoid paying large single debt debtor failed to pay for over two years; motivating factor in filing. On eve of sanctions hearing in state court debtor filed for Chapter 7 protection. The debtor's unsecured debt totaled $319K of which more than half, $161K was owed to judgment creditor.**
  - **Paid debts of insiders and transferred thousands to wife every month; paid great aunt's**

mortgage.
  - **Failed to make lifestyle adjustments – cosigned sister's car loan, leased luxury vehicle, transferred money to wife who spent $2K on credit cards each month, monthly charitable contribution of $2K.**
  - **Ability to pay where joint income exceeded $10K per month.**
- **Code does not define "for cause" – examples listed in § 707(a) [unreasonable delay, nonpayment of fees, and failure to timely file schedules] are not exhaustive.**
  - **Debtor argued *ejusdem generis* -"of the same kind," as the other items referenced in § 707(a).**
  - **11th Circuit used *Noscitur a sociis* - associated words cannon - statutory terms, ambiguous when considered alone, should be given related meaning when grouped together. The 11th Cir. looked to see what "cause" was defined as elsewhere throughout the Code and found very broad interpretation.**
  - **Sections 1112(b) and 1307(c) permit dismissal "for cause."**
- **"For cause" defined in *Black's* § 707 to mean "reason," "justification," or "[f]or a legal reason."**
- **Bad-faith filings are a significant burden on the legal system – refused to limit tools available to courts.**
- **Rejected superfluity argument – § 707(b) requires courts to consider whether the debtor filed in bad faith, but concerns consumer debt.**
- **"Selective inclusion" presumption – inclusion of bad faith in § 707(b) did not, by implication, transform § 707(a) into a safe harbor for bad faith debtors.**

***See also* – *In re Matthews*, 2013 WL 1385221 (Bankr. E.D. Va. 2013). The Chapter 7 case of an individual debtor who does not have primarily consumer debts may be dismissed for cause under § 707(a) if the debtor has an ability to repay unsecured debts and there is some evidence of debtor misconduct.**

***See also* - *Proudfoot Consulting Co. v. Gordon (In re Gordon)*, 465 B.R. 683 (Bankr. N.D. 2012). Ch. 7 case converted to Ch. 11 - debtor argued involuntary servitude, but the ct. allowed it anyway.**

8. Kulakowski v. Walton (In re Kulakowski), 735 F.3d 1296 (11th Cir. 2013)(Jordan, Dubina, and Baldock, JJ.). Debtor sought to discharge her debts under Chapter 7. The trustee moved to dismiss the case under the abuse provisions under § 707(b)(1) which provides that a bankruptcy court "may dismiss a case filed by an individual debtor under [Chapter 7] whose debts are primarily consumer debts . . . if it finds that the granting of relief would be an abuse."

Issue: Whether it is appropriate to consider entirety of non-filing spouse's income in totality of the circumstances analysis for purposes of dismissal?

- **$136,470.75 unsecured debts**

- **Debtors were married over 20 years. During the course of their marriage, they have operated as a financial unit, maintaining a joint checking account, filing joint tax returns, and pooling their income and expenses. Debtor does not currently earn any income, but husband deposits all of his income into the couple's joint account. Husband's monthly take-home pay is $5,491.20, about $1,100 more than the monthly household expenses of $4,338.33, which are paid through the joint account funded by the husband. Much of the debt was credit card debt which was incurred by the wife for the mutual benefit of the couple.**
- **Debtor asserts that husband's income can only be considered to the extent that it is used "for the household expenses of the debtor" pursuant to § 101(10A)(A) and (B) of the Code which provide that current monthly income (CMI):**

> **(A) means the average monthly income from all sources that the debtor receives . . .; and**
> **(B) includes any amount paid by any entity other than the debtor . . . on a regular basis for the household expenses of the debtor . . .**

- **Totality of the circumstances inquiry is not limited to consideration of CMI.**
- **Debtor notably does not contest the consideration of her husband's income as part of the totality of the circumstances inquiry. She instead argues that the bankruptcy court should have limited its consideration to the amount of her husband's income contributed for her household expenses.**
- **Few if any tests are as open-ended as the totality of the circumstances. The inherent flexibility and wide breadth of the totality of the circumstances inquiry, coupled with Congress' decision not to include "current monthly income" as an explicit limiting factor under § 707(b)(3)(B), constitute sufficient textual evidence to overcome the general/specific canon.**
- **The term "current monthly income" is not made a part of the totality of the circumstances test.**
- **The inherent flexibility and wide breadth of the totality of the circumstances inquiry, coupled with Congress' decision not to include "current monthly income" as an explicit limiting factor under § 707(b)(3)(B).**
- **Bk ct. did not abuse discretion in interpreting the totality of circumstances under § 707(b)(3)(B) to include the entire income of debtor's non-filing spouse, not just that part of income that was contributed to the debtor's household expenses.**

11 U.S.C. § 1325(a) Confirmation of Plan.
9. Brown v. Gore (In re Brown), 742 F.3d 1309 (11th Cir. Feb. 14, 2014)(Carnes, C.J., Hull, and Cox, JJ.). Bankruptcy court denied confirmation of "attorney-fee-centric" Ch. 13 plan as having been filed in bad faith where Ch. 7 was clearly more beneficial to debtor except for the fact that his attorney's fees could not be financed through Ch. 7. Debtor sought relief under Ch. 13, not to adjust debts and preserve assets, but to accommodate payment of attorney fees. District court and the Eleventh Circuit affirmed.

Facts:

- **Debtor listed monthly social security income of $1,364 and monthly expenses of $1,214, leaving monthly net income of $150.**
- **Debtor did not own any real property, a vehicle, nor any other non-exempt assets. Debtor scheduled unsecured, non-priority debts totaling $16,203 to ten different creditors. Only three creditors filed claims totaling $1,355.08.**
- **Debtor's Ch. 13 plan proposed to pay $150 per month for 36 months, for a total of $5,400. From this amount, debtor would pay $2,000 for attorney's fees, a filing fee of $281, other miscellaneous fees and $1,355.08 to creditors. Debtor's plan proposed to pay all attorney's fees and administrative expenses before any distributions to creditors which meant creditors would not being receiving payments for almost 17 months.**
- **The trustee objected to confirmation on the grounds that the plan was not filed in good faith because the debtor would be better served by a Ch. 7 and it did not appear that the debtor would be able to comply with the plan.**

Ruling:

- **Chapter 13 contains two "good faith" requirements:**
  - **§ 1325(a)(3) - was the plan was filed in good faith?**
  - **§ 1325(a)(7) - was the petition filed in good faith?**
- **Because the Code does not define "good faith" in subsections (a)(3) or (a)(7), the 11th Cir. has applied the following non-exhaustive list of *Kitchens* factors to the subsections:**
  1. **the amount of the debtor's income from all sources;**
  2. **the living expenses of the debtor and his dependents;**
  3. **the amount of attorney's fees;**
  4. **the probable or expected duration of the debtor's Ch. 13 plan;**
  5. **the motivations of the debtor and his sincerity in seeking relief under the provisions of Ch. 13;**
  6. **the debtor's degree of effort;**
  7. **the debtor's ability to earn and the likelihood of fluctuation in his earnings;**
  8. **special circumstances such as inordinate medical expenses;**
  9. **the frequency with which the debtor has sought bankruptcy relief;**
  10. **the circumstances under which the debtor has contracted his debts and his dealings with his creditors;**
  11. **the burden which the plan's administration would place on the trustee;**
  12. **the extent claims are modified and preferential treatment among classes of creditors;**
  13. **substantiality of repayment to unsecured creditors; and**
  14. **other factors or exceptional circumstances.**

- **Applying the *Kitchens* factors, the bankruptcy court held that: (1) the debtor's motivations and sincerity were tainted because he sought relief under Ch. 13, not to adjust his debts and preserve assets, but to accommodate payment of attorney's fees; (2) although the plan proposed small distributions to creditors there was little likelihood of success given the**

"abysmal failure rate of chapter 13 cases" and the lack of incentive for the debtor to "stay the course for three years;" and (3) the burden placed on the trustee was substantial because her primary job would be to collect and distribute plan payments to counsel for the debtor.

- **The Eleventh Circuit explained that *Kitchens* basically adopted a "totality of the circumstances" approach for determining good faith which must be ascertained on a case by case basis.**
- **Here, the record supported the finding that the debtor did not file his petition or propose his plan in good faith.**
  - **Debtor sought Ch. 13 relief not to adjust debts and preserve assets, but to pay his attorney's fees, and that debtor was better off in a Ch. 7 case.**
  - **Debtor had no non-exempt assets for the trustee to liquidate; nor did he have a home or a vehicle that he was trying to preserve in Ch. 13.**
  - **Debtor's monthly income was low and barely exceeded his expenses, leaving no room for emergencies. Debtor's social security income was fixed and debtor did not have an ability to earn more money during the plan. Debtor's social security income would not have been subject to garnishment in Ch. 7.**
  - **Debtor's Ch. 13 plan was all about attorney's fees and not the debtor's best interest or the creditors.**
  - **As to the administrative burden placed on the trustee, the Eleventh Circuit noted that the trustee would basically be working for the attorney for 17 months because the attorney was being paid in full before the creditors received a dime.**
  - **As to the substantially of repayment to creditors, there was a reasonable likelihood that the debtor would not complete his Ch. 13 plan and would never pay creditors anything.**
    - **There was no room left in the debtor's budget for emergencies. If debtor could not save $150 for five months to pay his attorney's fees for a Ch. 7 case ($750), a three year plan of $150 seemed doomed to failure.**
    - **Approximately two-thirds of all Ch. 13 plans fail - 65% in the Eastern District, Northern Division of Alabama.**
    - **Even if the plan was confirmed, debtor would most likely convert to Ch. 7 after the attorney's fees were paid. "[T]here is no good faith to be found in a temporary chapter 13 case filed to accommodate payment of attorney fees as a prelude to a conversion to chapter 7." To allow this would circumvent the Supreme Court's holding in *Lamie v. U.S.,* 540 U.S. 526 (2004) that attorney's fees cannot be paid out of the funds of a Ch. 7 estate, absent the approval of the trustee and the court.**

11 U.S.C. § 1325(a)(5) Confirmation of Plan.
10. Colburne v. Ocwen (In re Colbourne), 2013 WL 5789159 (11th Cir. 2013)(*not selected for*

publication)[2]**(Martin, Fay, and Edmondson, JJ.). Debtors who are ineligible for Ch. 13 discharge under § 1328(f)(1) are not permitted to modify a secured creditor's rights via cram down.**

Facts:

- **In August of 2009, debtor filed a Ch. 7 case in which he listed two first-priority mortgage claims held by Ocwen on two investment properties. Debtor received a Ch. 7 no-asset discharge and the case was closed in December 2009.**
- **In January of 2010, the debtor filed a Ch. 13 case and sought to cram down Ocwen's claims pursuant to 11 U.S.C. § 506(a) and 1325(a)(5). Current appraised values of the properties were substantially less than the amount owed on the mortgages.**
- **Bk ct. denied the motions to value the bank's claims because debtor was ineligible to receive a Ch. 13 discharge pursuant to § 1328(f)(1). The district court affirmed.**

Ruling:

- **Ch. 13 debtors generally enjoy broad power to modify the rights of holders of secured claims.**
- **§ 1325(a)(5) is recognized as the source of a Ch. 13 debtor's authority to bifurcate a secured claim and to 'strip down' the value of the claim to an amount equal to the value of the collateral.**
- **§ 1325(a)(5) specifies the conditions under which a Ch. 13 plan must address the treatment of "allowed secured claims" in order for the plan to be confirmed.**
- **An "allowed secured claim" under § 506(a) is "[a]n allowed claim . . . secured by a lien on property . . . to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim."**
- **§ 1325(a)(5)(B)(i)(I)'s lien retention provision requires Ch. 13 plans to provide that the holder of each allowed secured claim retain the lien securing such claim until the earlier of**
  - **the payment of the underlying debt determined under nonbankruptcy law; or**
  - **discharge under section 1328.**
- **Pursuant to § 1325(a)(5)(B)(i)(I), a creditor whose claim has been bifurcated may not be forced to release its lien upon payment of only the secured payment where the debtor is ineligible for a discharge. The creditor retains its lien "until the entire amount of the debt, calculated without regard to the modifications permitted in bankruptcy, is paid."**

[2] *See* 11th Cir. R. 36-2. Unpublished Opinions.

> An opinion shall be unpublished unless a majority of the panel decides to publish it. Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority. If the text of an unpublished opinion is not available on the internet, a copy of the unpublished opinion must be attached to or incorporated within the brief, petition, motion or response in which such citation is made. But see I.O.P. 7, Citation to Unpublished Opinions by the Court, following this rule.

- **Thus, without a discharge, any modifications to a creditor's rights imposed in a plan are not permanent and have no binding effect once the plan ends.**
- **The 11th Cir. noted that other courts have further found that debtors ineligible for discharge are not permitted to modify a secured creditor's rights through cram down or strip off and was persuaded by this reasoning.**
- **Although a debtor that is ineligible to receive a Ch. 13 discharge cannot cram down or strip off a secured claim, such debtors are not prohibited from receiving other Ch. 13 benefits.**

11 U.S.C. § 1327 Effect of Confirmation.
11. Hope v. Acorn Financial (In re Fluellen), 731 F.3d 1189 (11th Cir. 2013)(Barkett, Jordan, and Schlesinger, JJ.). Postconfirmation, a Chapter 13 trustee filed an adversary proceeding against a secured creditor under § 547 seeking to avoid its lien as a preferential transfer and designate its claims as unsecured. The bankruptcy court granted summary judgment in favor of the creditor finding that the trustee was bound by the terms of the confirmation order and as a result her complaint was barred by *res judicata*. The district court and Eleventh Circuit affirmed.

The Eleventh Circuit held that "[a] confirmed Chapter 13 plan which gives a creditor a secured position is binding on a trustee who, aware of defects in that creditor's security interest, does not assert any objections to, and affirmatively recommends confirmation of, the plan." *Id.* at *1.

The facts of this case are:

- **June of 2010, debtor purchased a car and financed the purchase through Acorn Financial.**
- **July 21, 2010, debtor filed a Chapter 13 petition.**
- **August 12, 2010, Acorn filed a proof of claim in debtor's bankruptcy case.**
- **The trustee's office discovered that Acorn's lien was not perfected until July 27, 2010, six days after debtor filed for bankruptcy relief.**
- **Debtor's proposed bankruptcy plan treated Acorn as a secured creditor entitled to monthly payments of $146.**
- **Trustee filed a report recommending that the plan be confirmed because it complied with the requirements of § 1325.**
- **On September 30, 2010, the bankruptcy court confirmed the proposed plan.**
- **On October 8, 2010, the trustee filed the AP to avoid Acorn's lien as a preferential transfer.**

The bankruptcy court found that the trustee knew about the defects in Acorn's security interest 30 days prior to the confirmation hearing and entered summary judgment in favor of the creditor.

Trustee argued:

- **§ 1327(a) states that "the provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." It does not specifically say that trustees are also bound by a confirmed plan, thus, they can pursue postconfirmation avoidance actions within the two-year limitations period set forth in § 546(a)(1)(A).**
- **Several other provisions of Chapter 13 specifically mention trustees, thus, the exclusion of trustees from § 1327(a) was not a mere legislative oversight (*citing Russello v. United States*, 464 U.S. 16 (1983) holding that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").**
- **Eleventh Circuit has previously refused in the bankruptcy context to add or read in missing statutory language.**

The court stated that this was a close case, but concluded that trustee's argument under *Russello* did not carry the day:

- **The Chapter 13 trustee acts in a representative capacity when she seeks postconfirmation avoidance; confirmation generally vests property of the estate in the debtor pursuant to § 1327(b); and the primary purpose of the Chapter 13 trustee is to serve the interests of all creditors.**

Next, the Eleventh Circuit explained the relevancy of prior Eleventh Circuit case law to the issue presented:

- ***Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.),*898 F.2d 1544 (11th Cir. 1990) - the court held that a creditor in a Chapter 11 case waived its right to object to a claim of another creditor by failing to object prior to confirmation. When an objection is based on "'an argument that the plan misclassified the objectionable claim, the objection must be made prior to confirmation' . . . the right to object is lost 'when the bankruptcy court confirm[s] the plan.'" *Id.* at *4.**

- ***Universal Am. Mortg. Co. v. Bateman (In re Bateman)*, 331 F.3d 821 (11th Cir. 2003) - applying *Justice Oaks* in the Chapter 13 context and holding that "a secured creditor cannot collaterally attack a confirmed Chapter 13 plan, even though the plan conflicted with mandatory provisions of the [B]ankruptcy [C]ode . . ." *Id.* at *4. Unless an objection is filed, a proof of claim is "'deemed allowed' and is 'prima facie evidence of the validity and amount' of [the debt]." *Id.* at *4.**

- **Bankruptcy Code provisions pertaining to a Chapter 13 trustee's duties to object to allowance of improper claims [(§§ 1302(b)(1), 704(a)(5)] and to appear at confirmation hearings [§1302(b)(2)(B)], taken together, generally require a Chapter 13 trustee to object to the confirmation of a plan if a claim is invalid or improperly characterized.**

- **Given the principles articulated in *Justice Oaks* and *Bateman* and the requirement that a Chapter 13 trustee must objection to confirmation if a claim is invalid, the Court found that the bankruptcy court correctly precluded the trustee from filing a postconfirmation avoidance action.**

Limited holding - recognized that in certain cases confirmation takes place prior to the claims bar date and that not all creditors file proofs of claims. Holding is, therefore, limited to the facts of this case where a Chapter 13 trustee is aware, prior to confirmation regarding defects in a creditor's security interest and does not object to the claim and affirmatively recommends confirmation of a plan giving the creditor a secured position.

"If a plan is not final as to all, it is not final as to any." *Id.* at *5.

12. Heatherwood Holdings, LLC v. HGC, Inc. (In re Heatherwood Holdings, LLC), 2014 WL 1243859 (11th Cir. 2014)(Carnes, C.J., Tjoflat, and Marra, JJ.). 11th Circuit affirmed order denying debtor's complaint to sell real property free and clear of all restrictions based on implied restrictive covenant limiting use of property to use as a golf course.

Appellants challenge the bankruptcy court's determination that there was an implied restrictive covenant limiting the use of real property at issue to a golf course.

Debtor Heatherwood Holdings (hereinafter "Heatherwood") was the owner, operator and manager of Heatherwood Golf Club in Shelby County, Alabama. The golf course property was the centerpiece of the Heatherwood subdivision developed in the 1970s. Subdivision plat maps showed a golf course in the heart of the subdivision. Covenants, restrictions and easements for the subdivision referenced a golf course and required each residential lot to have a "golf cart storage area," barred fences "adjacent to the golf course," and required both initial and subsequent purchasers of homes in the area to become members of the Golf Club.

In 1999, equity members of the Golf Club formed HGC, Inc. in order to purchase, operate, and maintain the Club. A special warranty deed transferred the Club to HGC, but the deed did not restrict HGC or any subsequent owner's use, maintenance, or development of the golf course.

Because the HGC needed capital improvements of $2M, it decided to transfer the property to Pine Cone Capital based on its reputation for running golf courses and its willingness to agree to commit to operating the property as a golf course for 25 years. Pine Cone assigned its rights to the debtor. In July of 2000, HGC and Heatherwood entered into an agreement that committed Heatherwood to operate the Club for the next 25 years as a golf course. That same day, HGC transferred the real property to Heatherwood, but the deed lacked any express

restrictions limiting the use of the property.

Heatherwood promptly closed the Club and began renovations. To secure additional money for its renovations, Heatherwood obtained a $4M loan from FCB. Heatherwood secured the loan in part with a first mortgage on the golf course property.

Heatherwood filed for a Ch. 11 petition on January 6, 2009 and filed an adversary proceeding against FCB to determine the extent, priority, and validity of any interests and encumbrances on the golf course property and in particular sought a determination that Heatherwood could sell the property free of all restrictions that limited the property to use as a golf course. At trial, FCB's representative testified that FCB would have required more collateral had it known that the property was limited to use as a golf course. FCB's representative admitted that he toured the property and was aware a subdivision was built around the golf course.

The bankruptcy court certified three questions to the Alabama Supreme Court, but the court answered only one of the questions, finding that "as an abstract question of law" Alabama recognizes or will imply a restrictive covenant as to a golf course constructed as part of a residential development where the evidence presented indicated that the original grantor intended a common scheme of development that included the golf course property as an integral part of the development and as an inducement to purchasers of the residential lots. The Alabama Supreme Court did not, however, express an opinion as to the merits of the case because a number of factual disputes remained.

After a three day trial, the bankruptcy court held: (1) that the initial development and marketing of the Heatherwood subdivision, as well as the sign, street names, easements, plat maps and actual use created an implied restrictive covenant restricting the use of the golf course property to use as a golf course; (2) there was ample evidence that Heatherwood had actual as well as constructive and inquiry notice of the implied restrictive covenant limiting the property at issue to use as a golf course; and (3) that the doctrine of estoppel by deed did not apply to prevent enforcement of implied restrictive covenant based on the availability of information in open view and for public viewing.

The district court and Eleventh Circuit affirmed, finding:

- FCB had standing to appeal under the person aggrieved doctrine. FCB holds title to the real property as mortgagee and the bankruptcy court order restricts that property to use as a golf course which clearly impacts resale value.
- Bankruptcy court's factual findings supported holding that an implied restrictive covenant existed to limit the use of the property: (1) plat maps identified the property as a golf course and listed golf-themed subdivision street names; (2) deeds to residential lots referenced covenants that the subdivision was planned as a golfing community; (3) deeds required residential owners to construct golf cart storage areas, prohibited the construction of fences on the golf course, and required homeowners to be members of the Golf Club; (4) subdivision entrance sign described subdivision as a "golf course

community;" and (5) homeowners were induced to buy based on the inclusion of the golf course in the subdivision.

- **FCB and Heatherwood had actual and constructive notice of implied restrictive covenant given availability of information in plain view of representatives that toured the property.**
- **The estoppel by deed defense failed for both FCB and Heatherwood based on the availability of information in open view and for public viewing.**
- **Benefit to homeowners from the continued existence of the covenant outweighed the detriment borne by FCB and Heatherwood.**

11 U.S.C. §523(a)(4) Discharge Exception for Fiduciary Debts, Embezzlement or Larceny.

13. Fernandez v. Havana Gardens, LLC (In re Fernandez), 2014 WL 1329253 (11th Cir. 2014)*(not selected for publication)*(Tjoflat, Pryor, and Edmondson, JJ.). Determination by bankruptcy court that debtor did not have fraudulent intent for purposes of § 523(a)(2)(A) did not preclude bankruptcy court from finding debtor had fraudulent intent for purposes of § 523(a)(4).

Prepetition debtor entered into a business relationship to develop a parcel of real property into a condominium. The debtor and his partner formed a limited liability company, Havana Gardens, LLC, and were the LLC's only managing members. Postpetition, Havana Gardens filed an action against the debtor under §§ 523(a)(2)(A) and (a)(4) for money debtor allegedly diverted from Havana Gardens and used for his personal benefit.

The bankruptcy court entered judgment in favor of the debtor under § 523(a)(2)(A) because the evidence did not show that debtor "obtained money under false pretenses." The court also found that many of the debtor's personal expenses that were improperly paid using Havana Garden's funds were not the product of embezzlement under § 523(a)(4) because the debtor made no attempt to conceal the personal nature of the expenditures. The bankruptcy court did find, however, that certain personal expenditures were excepted under § 523(a)(4) because the debtor acted with fraudulent intent with respect to certain undeposited rent payments and unexplained credit card charges.

Debtor appealed and argued that once the bankruptcy court determined that he had no fraudulent intent for purposes of § 523(a)(2)(A), the court had to also conclude that debtor had no fraudulent intent for purposes of § 523(a)(4).

The district court and the Eleventh Circuit affirmed. The Eleventh Circuit rejected debtor's argument on appeal and explained that the analysis under sections 523(a)(2)(A) and (a)(4) are entirely different.

- **Under § 523(a)(2)(A), the issue is whether debtor had fraudulent intent when he *obtained* money or property from a creditor.**
- **Debtor, as the co-manager of Havana Gardens, was in lawful possession of the LLC's money. Thus, he had no fraudulent intent to *obtain* the money for purposes of § 523(a)(2)(A).**
- **Under § 523(a)(4), a discharge in bankruptcy will not discharge a debtor for debts for embezzlement. Under federal common law, embezzlement is "the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come."**
- **Under § 523(a)(4), the issue was whether the debtor had fraudulent intent to *appropriate* Havana Garden's money for his own personal benefit, and the bankruptcy court did not err in finding that the debtor had not testified credibly regarding his deposit of partnership checks into his personal account and regarding unexplained charges on the company credit card.**

11 U.S.C. § 523(a)(2)(A) Discharge Exception for Debts from False Representations or Actual Fraud

14. Sears v. United States (In re Sears), 533 Fed. Appx. 941 (11th Cir. 2013)(*not selected for publication*)(Carnes, C.J., Martin, and Fay, JJ.). Pre-petition the debtor, doing business as ABBA Bonding Company, issued several surety bonds for various government projects. After the debtor filed bankruptcy, one of the government contractors for whom debtor was surety defaulted on his contract which triggered the debtor's obligations under the surety agreement. Because the debtor was already in bankruptcy, the government could not collect under the debtor's bond and was required to hire another contractor to finish the job at an additional cost of $1,055,724.10. The government filed an adversary proceeding challenging the dischargeability of this debt, arguing that the debtor induced it to accept him as surety using false pretenses, false representations, or actual fraud under § 523(a)(2)(A).

"To prove that a debt is nondischargeable under § 523(a)(2)(A), a creditor must show that (1) the debtor made a false representation to deceive the creditor, (2) the creditor relied on the misrepresentation, (3) the reliance was justified, and (4) the creditor sustained a loss as a result of the misrepresentation." *Sears* at *3.

The debtor was required to submit an Affidavit of Individual Surety in which he pledged collateral to secure each bond. Each affidavit required the debtor to list the real estate pledged and attach supporting certified documents. On each affidavit the debtor listed various parcels of real estate. On some, but not all, he also attached a financial statement listing the net worth of ABBA Bonding as approximately $126 million. Debtor further indicated that there were no mortgages or liens on any of the pledged collateral. Each affidavit required the debtor to

identify any bonds for which the pledged assets were pledged within the prior 3 years. Debtor responded, "0."

The government approved ten bonds at issue, but later found out that: (1) the debtor did not own many of the properties pledged as collateral; (2) did not hold clear title to one of the properties; (3) debtor had pledged properties more than once for the various bond issues; and (4) the net worth of debtor's bonding company was substantially less than $126 million.

Intent: The bankruptcy court found that the debtor's intent to deceive could be inferred where the debtor repeatedly pledged property he did not own in support of the surety bonds, debtor misrepresented the net worth of his bonding company, and consistently misrepresented the state of the title of the properties he pledged as collateral. The court also reasoned that he must have known that he was pledging the same properties as bond collateral in affidavits executed within days or months of each other. The debtor pointed out that he actually performed his obligations under some of the bonds and argued that his performance should negate the other evidence of intent to deceive.

The Eleventh Circuit disagreed. The fact that the debtor fulfilled some of his obligations did not "negate" his initial intent to deceive.

Justifiable reliance: The bankruptcy court reasoned that debtor's misrepresentations were not apparent to the contracting officers reviewing the affidavits because same were completely filled out and submitted under oath. Debtor argued that the government did not justifiably rely on same because he failed to attach required supporting documents to the affidavits and same were, therefore, facially incomplete.

"Justifiable reliance is gauged by an *individual standard* of the plaintiff's own capacity and the knowledge which he has, or which may fairly be charged against him from the facts within his observation in the light of his individual case." . . . "[I]t is only where, under the circumstances, the facts should be apparent to one of plaintiff's knowledge and intelligence from a cursory glance, or he has discovered something which should serve as a warning that he is being deceived, that he is required to make an investigation of his own." *Sears* at *3 (citations omitted).

The Eleventh Circuit found justifiable reliance where "it was not apparent from a 'cursory glance' at his affidavits that they were fraudulent." *Sears* at *4. Even though the debtor did not attach supporting documentation, he answered every question on each of the affidavits, and the affidavits were signed and notarized. Moreover, the court explained that the debtor's own failure to provide documents to support his fraudulent statements should not allow him to avoid his obligation to the party to whom he lied.

Loss: The Eleventh Circuit rejected the debtor's argument that the government's losses were caused by the failure of the contractor who defaulted, and not the debtor's own default on the bond. But for debtor's misrepresentations about the collateral supporting the bonds, the government never would have approved him as surety. Had debtor not been approved as surety and defaulted, the government would not have expended over one million dollars to hire a new contractor.

The Eleventh Circuit did, however, reverse the bankruptcy court's additional finding that the commissions paid by the government to the debtor on each of the ten bonds at issue constituted an "actual" loss. The debtor paid and defended claims related to nine of the bonds. Because the government never had to look to the collateral supporting those nine bonds, debtor's misrepresentations concerning those bonds did not cause the government any losses. However, the commission paid on the bond on which debtor defaulted was nondischargeable. Section 523(a)(2)(A) "bars the discharge of all liability arising from fraud," including "the value of any money, property, etc. fraudulently obtained by the debtor." ***Sears*** **at *4 (*****quoting Cohen v. de la Cruz*****, 523 U.S. 213 (1998)). The commission received constituted money fraudulently obtained by the debtor as the government would not have accepted the debtor as a surety and paid him a commission but for his false statements.**

18 U.S.C. § 157 Bankruptcy Fraud

15. Torrens v. Hood (In re Hood), 727 F.3d 1360 (11th Cir. 2013)(Tjoflat, Wilson, and Coogler, JJ.). The bankruptcy court held that law firm acted as ghostwriters by failing to sign a pro se debtor's Chapter 13 petition and, thus, perpetrated fraud on the court pursuant to 18 U.S.C. § 157(3) and the Florida Rules of Professional Conduct. The court suspended one attorney in the law firm and barred another from applying for admission to practice before the court for six months. The court also prohibited the law firm from filing any papers in court during the period of suspension.

In January of 2012, the debtor met with the attorneys to discuss the pending foreclosure sale of his Florida business. A member of the law firm discussed foreclosure defense services provided by the firm as well as the impact bankruptcy would have on the foreclosure process. On the day prior to the scheduled foreclosure, the debtor paid a $1000 retainer to the firm to provide foreclosure defense work. The debtor was unable to afford to hire the firm to also represent him in bankruptcy. However, the firm's secretary filled out the petition for the debtor by writing his oral responses into the corresponding blanks on the petition. A courier then filed the petition on behalf of the debtor via a power of attorney notarized by a partner at the firm.

Post-petition, the debtor apparently had "buyer's remorse" and filed a motion for order to

show cause against the law firm for filing the petition. Debtor contended that he had no knowledge that he had filed for bankruptcy. The bankruptcy court found that despite debtor's remorse he signed several documents containing the word bankruptcy in multiple places. Nevertheless, the court subsequently entered the suspension order against the firm's lawyers for ghostwriting the petition. The district court affirmed.

The Florida Rules of Professional Conduct provide that a lawyer shall not make a false statement of fact or law to the court, but the rules further provide that a lawyer and client may agree to limit the scope of the lawyer's representation of the client. In practice then, "[i]f the lawyer assists a pro se litigant by drafting any document to be submitted to a court, the lawyer is not obligated to sign the document." ***Hood*** **at 1363 (quoting Florida Rule of Professional Conduct 4-1.2(c)) "But 'the lawyer must indicate 'Prepared with the assistance of counsel' on the document to avoid misleading the court . . . ."** ***Id.*** **(quoting Rule 4-12.(c)).**

The Eleventh Circuit held that the law firm did not "draft" a document within the scope of Rule 4-1.2(c) and did not commit fraud in violation of 18 U.S.C. § 157(3) by filling in the blanks in a standardized document form. To determine the ordinary meaning of the word "draft," the court turned to ***Black's Law Dictionary*** **which defines the term as "'[t]o write or compose." It was apparent to the court that the law firm did not "draft" a document for the debtor. They did not "write or compose" the pre-formatted Chapter 13 petition. Instead, the court found that the firm merely recorded answers on the standard fill-in-the-blank Chapter 13 petition based on the debtor's verbal responses.**

The Eleventh Circuit explained that a Chapter 13 petition "stands in stark contrast to a ghostwritten pro se brief . . . . A legal brief is a substantive pleading that requires extensive preparation, much more than is necessary for the completion of a basic, fill-in-the-blank bankruptcy petition." ***Hood*** **at 1364.**

The court of appeals found no fraudulent intent. The firm was merely "attempting to assist [the debtor] with the completion of a straightforward pro se Chapter 13 petition for which there was no unfair advantage to be gained." ***Hood*** **at 1365. The debtor could have filled out the form himself and likely obtained the same result.**

Fed. R. Civ. P. 60 Relief from Judgment or Order.

16. Dunn v. Advanced Medical Specialties, Inc. (In re Tronge-Knoepffler), 2014 WL 503050 (11th Cir. 2014)(*not selected for publication*)(Marcus, Dubina, and Hodges, JJ.). Chapter 7 trustee barred by laches from continuing to pursue debtor's discrimination claims in district court.

Facts:

- **Prepetition on November 5, 2008, Advanced Medical Specialties, Inc. ("AMS") terminated debtor's employment. Debtor suffers from neuropathy and double vision.**
- **On May 16, 2011, debtor filed a discrimination lawsuit against AMS.**
- **In July of 2011, the debtor and her husband filed a Chapter 7 petition. The debtor did not disclose her lawsuit as a contingent asset under schedule B "Personal Property."**
- **Postpetition on August 2, 2011, debtor filed an amended complaint in the discrimination lawsuit.**
- **November 9, 2011 - Ch. 7 discharge order.**
- **On December 20, 2011, AMS filed a motion for summary judgment based on judicial estoppel.**
- **On December 22, 2011, debtor notified the trustee of the pending lawsuit by giving the trustee the case number, and explaining the nature and status of the case. The trustee took no action in the lawsuit for approximately six months.**
- **On February 6, 2012, the district court entered judgment in favor of AMS finding debtor had both knowledge of her lawsuit and a significant motive to conceal the action from the bankruptcy court.**
- **On February 28, 2012, debtor filed a notice of appeal.**
- **On July 18, 2012, Ch. 7 trustee filed a motion to vacate under Fed. R. Civ. P. 60(b)(4). The trustee amended the motion to vacate on July 19, 2012 alleging that the judgment was void because the trustee was the real party in interest in the lawsuit. District court denied the motion to vacate.**

Judicial Estoppel:

- **11th Cir. has repeatedly recognized that when a debtor fails to disclose a pending lawsuit while having knowledge of same and a motive to conceal, the doctrine of judicial estoppel bars the undisclosed action from proceeding.**
- **Here debtor represented under oath that she did not have any contingent or unliquidated claims and denied that she had brought any lawsuits within the past year. Debtor made these representations on July 18, 2011 even though she had filed her lawsuit two months earlier. Debtor signed several statements acknowledging her obligation to be truthful in her filings, and acknowledged, under oath, that she had read her petition and other papers before filing them. Yet, the debtor proceeded to litigate the lawsuit seeking damages of more than $1.8 million.**
- **The 11th Cir. rejected as a "sham" the affidavit filed by the debtor arguing that she had informed her lawyer of the lawsuit and believed the lawsuit had been included in her petition.**
- **Even assuming the debtor notified her lawyer of the lawsuit and he failed to include same**

in the bankruptcy filings, same would not forestall the application of the doctrine of judicial estoppel. In *Barger v. City of Cartersville*, 348 F.3d 1289 (11th Cir. 2003), the Eleventh Circuit rejected debtor's attempt to blame concealment on debtor's counsel. Same is of "no consequence."

Rule 60(b)(4) - relief from judgment where "the judgment is void."

- **Trustee failed to show that the district court acted without jurisdiction or due process where the trustee received notice of the lawsuit two days after the defendant filed for summary judgment yet took no action for six months. "At a minimum, the Trustee could have made an appearance in the action, sought a stay to investigate the claim, or filed an objection to Debtor's continued prosecution of the action." Instead, the trustee "sat on her hands" and slept on her rights by electing to "stay silent."**
- **The defendant, who was not a party to the bankruptcy proceeding, did not have a duty to notify the trustee regarding the pending motion for summary judgment.**
- **Trustee argued that the district court lacked "subject matter jurisdiction" because the trustee had exclusive standing to prosecute the claim.**
  - **Trustee confused the principle of jurisdictional standing under Art. III which would impact the district court's subject matter jurisdiction, with the principal of real party in interest, which does not impact the court's subject matter jurisdiction.**
  - **In *Barger,* the 11th Cir. explained that the "Trustee, as the real party in interest, 'simply takes (the Debtor's) place'" in the pending action once the trustee makes an appearance. Yet, the trustee is bound by whatever action the debtor has theretofore taken. Thus, after substituting the trustee in this action, the 11th Cir. affirmed the district court's order granting summary judgment based on the principle of judicial estoppel.**

11 U.S.C. § 523(a)(8) Discharge Exception for Student Loans.

17. In re Zumbro, 536 Fed. Appx. 991 (11th Cir. 2013)(*not selected for publication*)(Pryor, Jordan, and Cox, JJ.). Ineligibility for restructuring satisfied *Brunner*.

- **Debtor cosigned three student loans for her former husband's medical education.**
- **Debtor's former husband only practiced medicine for a few years before surrendering his medical license in 2003. In 2005, he was incarcerated for molesting his young daughter and remains incarcerated.**
- **The student loan debts were not the only debts the debtor incurred because of her marriage. Her ex-husband lived a lavish lifestyle and incurred large consumer debts as well.**

- **After her former husband's incarceration, the debtor filed a Ch. 13 petition.**
- **Debtor filed an AP to discharge the student loan debt.**
- **The bk ct. initially found the loans to be nondischargeable because it believed the debtor was eligible to restructure the student loan debt under 34 C.F.R. § 685.208 and had, thus, not satisfied her burden that she meet the second prong under *Brunner* – that her current state of affairs was likely to persist for a significant portion of the repayment period.**
- **The bk ct. reversed its initial ruling after reconsideration upon learning that the debtor was not eligible to restructure the student loans pursuant to the government extended loan repayment program. "34 C.F.R. § 685.208 allows *borrowers* of certain *government issued student loans* to restructure their payments for up to a thirty year period." *Zumbro* at *993 (emphasis added) Here, the student loans at issue were not government issued, and the debtor's ex-husband was the borrower for purposes of 34 C.F.R. § 685.208, not the debtor.**

- **Thus, the debtor was ineligible for the extended loan repayment period.**
- **District ct. and 11th Cir. affirmed. Debtor showed that her current state of affairs was likely to persist for a significant portion of the repayment period so as to satisfy the second prong of the *Brunner* undue hardship test where debtor was not eligible to restructure the student loan debt.**

11 U.S.C. § 362 Automatic Stay.

18. Disciplinary Board of the Supreme Court of Pennsylvania v. Feingold (In re Feingold), 730 F.3d 1268 (11th Cir. 2013)(Hull, Martin, and Hinkle, JJ.). Eleventh Circuit determined that a claim's nondischargeability, without more, is not cause for stay relief.

Prepetition, Chapter 7 debtor/attorney was disbarred. The Disciplinary Board of the Supreme Court of Pennsylvania obtained a judgment against debtor appointing a conservator to take over debtor's client files, and to take other steps to protect debtor's clients. The judgment also assessed debtor $44,889.92 for the costs and expenses associated with the disciplinary proceeding.

Postpetition, the Board filed a motion to lift the stay to enforce its judgment pursuant to § 362(b)(4) under which "the filing of a petition . . . does not operate as a stay . . . [against] the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's . . . police or regulatory power[.]" Alternatively, the board requested relief for "cause" under § 362(d)(1).

The bankruptcy court denied the motion to lift stay finding that the judgment was not a debt excepted from discharge pursuant to § 523(a)(7). Had the claim been nondischargeable, the bankruptcy court explained that cause must have existed to lift the stay.

The district court reversed finding that the debt was nondischargeable and ordered that the Board be granted relief from the stay pursuant to § 362(d)(1).

The Eleventh Circuit reversed in part and affirmed in part finding that the debt was nondischargeable, but holding that nondischargeability alone does not constitute "cause" under § 362(d)(1) to lift the stay. The court of appeals remanded the case for further findings based on the totality of the circumstances as to whether the Board is entitled to relief from the stay.

Nondischargeability: Section 523(a)(7) provides that Chapter 7 does not discharge a debtor from any debt "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss..."

- **Fine, Penalty, Forfeiture - despite there being no express language in the state disciplinary rule authorizing the assessment of costs and fees against disciplined attorneys, the 11th Cir. explained that same are properly viewed as penalties where their purpose is deterrence and protection of the public. Nearly every other court to consider the issue has held that such costs assessments are fines or penalties. Most cite *Kelly v. Robinson*, 479 U.S. 36 (1986), in which the Supreme Court held that restitution orders are sufficiently penal in nature to fall under § 523(a)(7).**

    - **11th Cir. extended the *Kelly* rationale to costs assessments arising out of attorney disciplinary proceedings.**
        - **Ultimate goal in both criminal and attorney disciplinary proceedings is to protect the public.**
        - **Cost assessment provision in disciplinary rule is discretionary rather than mandatory. By making the imposition of costs discretionary, the award is more like a sanction than like the civil litigation analogue of awarding costs to prevailing parties as a matter of course. The court distinguished cases holding costs awards are not a fine or penalty where same involved rules mandating that disciplined attorneys pay the cost of their disciplinary proceedings making those awards more like the award of costs to prevailing parties in civil litigation and less like penal sanctions imposed with discretion for misconduct based on the individual circumstances of each case.**

- **Not Compensation for Actual Pecuniary Loss - the 11th Cir. looked to the context in which the penalty was imposed to determine whether its purpose was truly compensatory. "Even where a debt is intended to help defray the expenses of government, it may not be dischargeable if its primary purpose is penal."**
  - **That the cost assessment was determine based on the actual costs incurred by the Board was not determinative. What matters is the Board's purpose which the 11th Cir. found to be penal in nature.**

Cause for Lifting the Stay:

- **Under § 362(d)(1), the term "cause" is not defined. To determine cause, courts have looked to a variety of case-specific factors: (1) whether the debtor has acted in bad faith; (2) the hardships imposed on the parties; and (3) pending state court proceedings.**
- **Here, the district court focused solely on the debt's dischargeability.**
- **Majority of courts have concluded that a debt's nondischargeability, standing alone, does not constitute "cause" to lift the stay.**
- **To rule otherwise, the statutory exceptions for the enumerated nondischargeable debts like domestic support obligations found in § 362(b) would be meaningless . . . i.e. collection of a domestic obligation from property that is not property of the estate.**
- **Nondischargeability may be a factor, even a weighty factor, but without more nondischargeability does not constitute cause.**
- **Bankruptcy court should have looked at the totality of the circumstances to determine if stay relief was warranted.**
- **The 11th Cir. explained that the § 362(b)(4) exception was inapplicable by its plain language as same is inapplicable to money judgments and the portion of the judgment at issue was a money judgment.**

11 U.S.C. § 363 Use, Sale or Lease of Property.

19. Cardenas v. Biscayne Park, LLC (In re Biscayne Park, LLC), 540 Fed. Appx. 952 (11th Cir. 2013)(*not selected for publication*)(Hull, Martin, and Bowen, JJ.). Unambiguous sale order transferred Wal-Mart lawsuit to buyer.

Facts:

- **In November of 2006 debtor borrowed $8,150,000 from Madison Realty Capital, ("Madison"), to purchase a 16 acre tract of land which the debtor planned to resell to a big box retailer.**
- **Initially, debtor entered into a purchase agreement with Wal-Mart which fell through after**

Wal-mart installed wells on the property in order to test the groundwater at the site.

- **Wal-Mart then sued debtor and obtained a temporary injunction permitting Wal-Mart to seal the wells which inhibited the debtor's ability to market the property.**
- **May of 2009 - Madison began foreclosure proceedings.**
- **April of 2010 - debtor filed a Ch. 11 bk petition.**
- **Between the beginning of the foreclosure proceedings and the petition date, a Florida appellate court reversed and remanded the decision granting the injunction. Because the wells were destroyed following the entry of an improper injunction, the Florida appellate court held that on remand the debtor could proceed against Wal-Mart's posted bond on its claim for damages.**
- **Debtor removed the state court action to the bk ct. The notice of removal provided that "Upon removal of the *claim or cause of action* this proceeding is core; or, if non-core, [Biscayne] consents to entry of final order or judgment by the bankruptcy judge." emphasis added**
- **August of 2010 - bk ct. entered a cash collateral order granting Madison a first priority lien on all of the real and personal property of the debtor "of any description whatsoever, wherever located and whenever arising or acquired."**
- **October of 2010 - bk ct. entered bid procedure order for the sale of "substantially all of the assets of" the debtor. Madison was the highest bidder.**
- **Sale order included "[a]ll causes of actions and judgments pursuant thereto relating to the Premises," "[a]ll contract rights, causes of actions, claims [and] demands of" debtor.**
- **Sale order excluded "the $230,000 supersedeas bond posted by Wal-Mart...."**
- **After the sale, Madison filed a motion seeking a ruling that debtor's counterclaim against Wal-Mart was included in the sale of assets to Madison. Debtor's majority shareholder argued that the sale order did not transfer the Wal-Mart cause of action because the language included in the sale order did not "talk about tort claims." The shareholder also moved to dismiss the bankruptcy because the Wal-Mart cause of action had been included in the sale order "in a confusing manner" which was not intended.**
- **October 2011 - bk ct. enter an order finding:**
  - **Madison had a lien on the cause of action under the cash collateral order.**
  - **Madison purchased the cause of action pursuant to the sale order.**
- **District ct. affirmed finding that the bk ct. correctly distinguished the bond from the causes of action associated with it, and debtor waived her argument that the cause of action could not be assigned as a matter of Florida law.**

Ruling: Bk ct. did not err in determining cause of action was included in sale order despite contentions of debtor's majority shareholder that she and others "believed" they were keeping the cause of action and that it was never debtor's "intent" to sell the cause of action.

- **Plain meaning of the sale order's language governs. No genuine dispute that lawsuit is a "claim" or "cause of action."**
- **Sale order provided that buyer bought "[a]ll contract rights, causes of action, claims, [and] demands of" debtor.**
- **"All" means without exception.**
- **The subject cause of action was a "claim" or "cause of action" and was identified as such by the debtor in its notice of removal.**
- **By including "all" causes of action, the sale order encompassed the Wal-Mart cause of action.**
- **Other items, including the supersedeas bond posted in association with the cause of action, were expressly carved out of the sale order.**
- **By expressly carving out the bond, parties indicated they knew how to carve something out of the sale order, but the cause of action was not excluded.**
- **Debtor's majority shareholder waived argument that because the cause of action sounded in tort it could not be transferred as a matter of Florida law.**
- **The one comment that shareholder's attorney made to the bk ct. regarding a security interest in a tort cause of action did not clearly raise the issue and was, thus, insufficient to preserve the issue on appeal.**
- **Shareholder failed to satisfy the plain error standard which allows consideration of an issue not raised in the district court: (1) if it involves a pure question of law, and if refusal to consider it would result in a clear miscarriage of justice; (2) where the appellant raises an objection to an order which he had no opportunity to raise at the district ct. level; (3) interest of substantial justice is at stake; (4) the proper resolution is beyond doubt; or (5) the issue presents significant questions of general impact or of great public concern.**

11 U.S.C. § 363(m) Sales Pending Appeal.

20. Steffen v. Menchise (In re Steffen), 2014 WL 170860 (11th Cir. 2014)(*not selected for publication*)(Hull, Marcus, and Jordan, JJ.). Appeal of order approving the sale of real property pursuant to 11 U.S.C. § 363 was moot where debtor sought stay pending appeal and relief was denied.

Facts:

- **February 6, 2012 - Bk ct. entered an order authorizing Ch. 7 trustee to sell non-exempt real property in accordance with a sale contract the trustee had negotiated with a buyer.**
- **Sale contract provided for a closing date of February 10, 2012.**
- **February 8, 2012 - Trustee and buyer consummated the sale two days early.**

- **February 14, 2012 - Debtor filed motion for stay pending appeal.**
- **February 21, 2012 - Bk ct. orally denied motion for stay. On April 5, 2012, the bk ct. entered a written order confirming the ruling.**
- **District ct. dismissed appeal on grounds that § 363(m) prevents an appellate court from granting relief if the bankruptcy court has not issued a stay. Section 363(m) reads as follows:**

> **The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.**

Issue: Debtor argued that the bankruptcy court's denial of her motion for stay was "illusory" because the trustee had already sold the property when the motion was filed and, thus, violated Bankruptcy Rule 6004(h), which provides for an automatic 14-day stay period following an "order authorizing the use, sale, or lease of property other than cash collateral."

Ruling:

- **11th Cir. recognized "flat rule governing all appeals of section 363 authorizations," that because § 363 "prevents an appellate court from granting effective relief if a sale is not stayed, the failure to obtain a stay renders the appeal moot." (emphasis added)**
- **There is no exception to this rule where the debtor has sought a stay pending appeal and the stay was denied.**
- **Plain language of § 363(m) states that an appellate court order cannot invalidate a sale that the bankruptcy court authorized "unless such authorization and such sale . . . were stayed pending appeal."**
- **This rule applies even where the debtor believes the sale has been wrongly authorized. Section 363(m) does not say that the sale must be *proper* under § 363(b) – it says the sale must be *authorized*. It does not matter whether the authorization was correct.**
- **Debtor's appeal was moot because she did not obtain a stay pending appeal. The fact that debtor filed a motion for stay does not change this result.**
- **There is also no exception where the trustee has sold the property before the 14-day automatic stay period provided by Rule 6004(h) has expired.**
    - **Rule 6004(h) provides that the 14-day period applies "unless the court orders otherwise ."**
    - **Here the order approving sale authorized a closing date that was four days after date of the sale order. Thus, the 14-day period arguably did not apply at all.**

- **Debtor suffered no prejudice because she was able to file a motion for stay during the 14-day period. The fact that the closing had already taken place was of no consequence because the district court could have invalidated the sale if the debtor had obtained a stay.**
- **Rule 6004(h) merely allows a debtor to file a motion for stay within the 14-day window. It does not require the bankruptcy court to decide the motion within that time period.**

11 U.S.C. § 541 Property of the Estate.

21. Zucker v. FDIC (In re BankUnited Fin. Corp.), 727 F.3d 1100 (11th Cir. 2013)(Tjoflat, Pryor, and Fay, JJ.), *cert. denied,* 2014 WL 335047 (U.S. Mar. 3, 2014). On direct appeal, the Eleventh Circuit ordered Chapter 11 debtor to hand tax refunds over to its subsidiary bank. The bankruptcy court erred in declaring tax refunds an asset of the debtor's bankruptcy estate. The tax refunds belonged to the FDIC as the receiver of the debtor's subsidiary bank pursuant to the terms of a tax sharing agreement ("TSA") entered into by the debtor and the subsidiary bank.

Treasury regulations provide that a parent corporation may file in its own name a consolidated income tax return for itself and its subsidiaries (the Group). The parent corporation receives, in its name, any income tax refunds due the members of the consolidated group. Federal law does not govern the allocation of the group's tax refunds. A parent and its subsidiaries are free to provide for the allocation of tax refunds by contract.

In 1997, the parent corporation (the holding company) and the bank (one of the group subsidiaries) entered into a TSA which provided that the parent debtor was to file the group's income tax return and the subsidiary bank was to pay all taxes due. Within 30 days after the return was filed and taxes paid, group members were to reimburse the subsidiary bank for their share of taxes paid by the bank. Within 30 days of parent's filing of the consolidated income tax return, the bank was to pay group members any refund each member expected or was entitled to receive.

In May of 2009, the Office of Thrift Supervision closed the subsidiary bank and appointed the FDIC as the bank's receiver. The next day the parent holding company petitioned for bankruptcy relief in the Southern District of Florida. Post-petition, the parent debtor and the subsidiary bank requested refunds from the IRS in the amount of $5.5 million and $42.5 million for the 2007 and 2008 tax years. The request was granted and the refunds were sent to the parent debtor. Rather than forward the refunds to the subsidiary bank for distribution to the consolidated group as provided in the TSA, the debtor holding company retained the refunds as an asset of its bankruptcy estate.

The FDIC, as the bank's receiver, filed a claim in the bankruptcy estate asserting that it was entitled to receive the refunds so that it could comply with its contractual obligations under the TSA. The debtor filed a complaint against the FDIC challenging its claim and seeking a declaration that the refunds constituted an asset of the bankruptcy estate. The bankruptcy court granted summary judgment in favor of the debtor finding that upon receipt, the refunds became property of the estate, but because the debtor was at some point in time to transfer the refunds to the FDIC, the debtor became indebted to the FDIC.

The Eleventh Circuit reversed. Although the TSA did not contain a provision expressly requiring the debtor to forward refunds to the bank on receipt, the Eleventh Circuit determined that was clearly what the parties intended so that the bank could then forward refunds to group members. To do that, the bank had to have possession of the refunds.

Section 2 of the TSA provides:

> **Determination of Income Tax Assets and Liabilities. [The Holding Company] and [the Bank] agree to determine the current and deferred income tax assets and liabilities of each member of the [Group] on a separate-entity basis. Each member of the Group will determine its individual portion of the consolidated income tax assets and liabilities in accordance with the [Internal Revenue] Code without regard to any income tax expenses or benefits of other members of the Group and shall record the amounts so determined in accordance with Generally Accepted Accounting Principles ("GAAP"). Each member of the Group shall allocate its income tax assets and liabilities between current and deferred in accordance with GAAP no less frequently than on an annual basis.**

The TSA was ambiguous in two respects: (1) it did not state that the debtor must forward the tax refunds to the bank; and (2) it did not explain whether the debtor owned the refunds before forwarding them to the bank. Where operative provisions of a contract are ambiguous, the court must determine the intent of the parties. Under Delaware law which governed the TSA, the contract had to be read in the light of the intent of the parties as determined by the facts and circumstances surrounding the transaction, i.e. the court had to infer the parties' intent.

The Eleventh circuit rejected the bankruptcy court's reasoning with respect to the parties' intent. The bankruptcy court began with the assumption that the debtor had to forward the tax refunds to the bank at some point, but then contradicted this presumption when it stated that there was no question that the TSA did not require the debtor to deliver the refunds to the bank because there was nothing in the TSA to suggest that the debtor accepted the funds from the IRS in a trust or agency capacity. Thus, according to the bankruptcy court the debtor was the bank's debtor. The refunds were property of the estate and if the debtor did not forward the refunds to the bank, the bank's only recourse would be to file a claim as an

unsecured creditor in the debtor's bankruptcy.

Instead, the Eleventh Circuit found that although the TSA did not contain a provision expressly requiring the debtor to forward the tax refunds to the bank, "it is obvious to us what the parties intended. That is, they did not intend that the [debtor] keep the refunds and incorporate them into its own portfolio, as if the Bank had loaned the refunds to the [debtor] unencumbered." If, as the bankruptcy court concluded, the parties created a debtor-creditor relationship one would expect to find protection for the creditor such as a fixed interest rate, maturity date or the ability to accelerate upon default. There were no such provisions and, in sum, no debtor-creditor relationship. Instead, the parties clearly intended that the debtor would forward the refunds to the bank so the bank could, in turn, forward same on to the group's members.

The Eleventh Circuit held that the relationship between the Holding Company and the bank is not a debtor-creditor relationship. When the Holding Company received the tax refunds, it held the funds intact—as if in escrow—for the benefit of the bank and thus the remaining members of the Consolidated Group. The parties intended that the Holding Company would promptly forward the refunds to the bank so that the bank could, in turn, forward them on to the Group's members. In the bank's hands, the tax refunds occupied the same status as they did in the Holding Company's hands—they were tax refunds for distribution in accordance with the TSA.

22. FDIC v. NetBank, Inc. (In re NetBank, Inc.), 729 F.3d 1344 (11th Cir. 2013)(Hull, Anderson, and Farris, JJ.). Tax refund under a consolidated return was not property of the debtor's estate where debtor and its subsidiaries intended that a tax sharing agreement ("TSA") would create an agency relationship, not a debtor-creditor relationship. The facts in this case are similar to those in *BankUnited Financial Corp.* which was decided by another panel of the Eleventh Circuit.

Debtor, NetBank, Inc., was the parent company of NetBank, f.s.b. ("bank"). Prepetition, debtor filed consolidated tax returns on behalf of itself and its subsidiaries under a TSA entered into by all members of its consolidated group. The 2005 consolidated return reported taxable income of $17.9 million and tax liability of $6.1 million.

In September of 2007, the Office of Thrift Supervision closed the bank and appointed the FDIC as its receiver. Debtor filed its Chapter 11 petition on the same day. Postpetition, debtor and the bank filed for a federal tax refund of $5.7 million which was attributable to carryback tax losses attributable solely to the bank. Debtor's estate and the FDIC each

claimed ownership of the refund.

Debtor's estate filed an AP seeking a declaratory judgment that the refund was property of the estate under § 541(a). The bankruptcy court entered judgment declaring the refunds to be assets of the debtor's estate relying on the discretion given to debtor under the TSA, the fact that debtor's obligation to pay the bank was irrespective of whether the consolidated group received a refund, and the absence of language in the TSA requiring the debtor to segregate funds or hold same in trust or escrow. District court affirmed.

Eleventh Circuit reversed finding that: (1) the language in the TSA was ambiguous; and (2) under Georgia law, the parties to the TSA intended to create an agency relationship, not a debtor-creditor relationship, with respect to the tax refunds attributable to the bank.

The Eleventh Circuit analyzed three relevant sections of the TSA:

- **Section 4 required the debtor to pay any refunds owed to subsidiaries based on carryback losses applied to prior taxable years not later than 30 days after the date on which a credit is allowed or refund is received. The Eleventh Circuit found that § 4 of the TSA required the debtor to pay the entire amount of the refund at issue to the bank within 30 days of its receipt from the IRS.**
- **Section 9 gave "sole discretion" to the debtor regarding the manner of filing returns and the ability to elect gains, losses, etc. on behalf of the group. The section further irrevocably appointed the debtor "as its agent and attorney-in-fact to take such action . . ."**
- **Section 10 required the debtor to pay amounts owed to subsidiaries "regardless of whether the . . . consolidated group is receiving a refund."**

Under Georgia law, the interpretation of a contract involves three steps. "First, the court decides if the contract language is unambiguous, and if so the court enforces the contract's clear terms. Second, if the contract is ambiguous, the court must apply the rules of contract construction to resolve the ambiguity. And third, if the ambiguity remains after use of the construction rules, the meaning of the contract must be decided by a jury." ***Id.*** **at *4.**

Having found the TSA to be ambiguous, the court applied the rules of contract construction which required the court to "consider the background of the contract and the circumstances under which it was entered into, particularly the purpose for the particular language to be construed." ***Id.*** **at *4. Considering the background against which the TSA was entered, the court considered an Interagency Policy Statement which read in part:**

> Regardless of the treatment of an institution's tax loss for regulatory reporting and supervisory purposes, a parent company that receives a tax refund from a taxing authority obtains these funds as agent for the consolidated group on behalf of the group members. Accordingly, an organization's tax allocation agreement or other corporate policies should not purport to characterize refunds attributable to a subsidiary depository institution that the parent receives from a taxing authority as the property of the parent.

***Id.* at *5.**

Because the parties expressly stated their intent to comply with the policy statement, the Eleventh Circuit explained that to the extent the TSA was ambiguous regarding the issue of ownership, the Policy Statement strongly supported the finding of an agency relationship.

Fed. R. Civ. P. 56 Summary Judgment.

23. Avenue CLO Fund, Ltd. v. Sumitomo Mitsui Banking Corp., 723 F.3d 1287 (11th Cir. 2013)(Tjoflat, Martin, and Bucklew, JJ.). Term lenders for construction of Las Vegas casino filed a complaint against Bank of America in its capacity as the disbursement agent for the development. Term lenders alleged that Bank of America breached the disbursement agreement between September 2008 and March 2009 by improperly approving advance requests that failed to meet one or more conditions precedent under the agreement, improperly failing to issue stop funding notices, and improperly disbursing funds to debtors/borrowers from a bank proceeds account.

The district court granted summary judgment in favor of Bank of America finding that the term lenders failed to raise a genuine issue of material fact as to whether Bank of America breached the disbursement agreement or acted with bad faith, gross negligence, or willful misconduct.

The Eleventh Circuit held that: (1) the disbursement agreement did not impose a general duty on Bank of America to determine the accuracy of borrowers' representations regarding conditions precedent to draws; (2) Bank of America could not rely on borrowers' representations if it had actual knowledge to the contrary; and (3) fact issues existed regarding Bank of America's actual knowledge and whether its actions amounted to gross negligence. Remanded for further proceedings.

15 U.S.C. § 1641 Liability of Assignees.

24. Reed v. Chase Home Fin., LLC, 723 F.3d 1301 (11th Cir. 2013)(Martin, Fay, and Goldberg, JJ.). District court ruled that loan servicer fell into the "safe harbor" exception of 15 U.S.C. § 1641(f), which provides that a servicer is exempt from TILA's § 1641(g) disclosure requirements when a loan assignment is "solely for the administrative convenience of the servicer in servicing the obligation." § 1641(f)(2). The Eleventh Circuit affirmed. The facts of this case are:

- **Debtors signed a promissory note to Pensacola Guarantee Mortgage. The mortgage named Pensacola as the lender, MERS as the nominee for the lender, and MERS as the mortgagee.**

- **Shortly after closing, Pensacola transferred ownership of the promissory note to SunTrust Mortgage. SunTrust then transferred ownership of the note to Fannie Mae. Pensacola also transferred servicing responsibilities for the loan to SunTrust. SunTrust then transferred servicing of the loan to Chase.**

- **As servicer of the loan, Chase gave the debtors notice of intent to foreclose after they missed several payments. A few days later, MERS executed an assignment of mortgage transferring to Chase "all right, title and interest of [MERS] in and to that certain Mortgage executed by [debtors]."**

- **Debtors sued Chase claiming that Chase did not comply with the disclosure requirements in § 1641(g) when Chase failed to inform them that it had been assigned an interest in their mortgage.**

Section 1641(g) provides that no later than 30 days after a mortgage loan is sold, transferred or assigned, the new owner or assignee of the debt must notify the borrower in writing of the transfer.

Chase argued that MERS assigned its interest in the mortgage so that Chase could service the loan because Chase could not have foreclosed without the assignment. Chase claimed that the assignment "was solely for the administrative convenience of the servicer" within the meaning of § 1641(f).

The Eleventh Circuit agreed that Chase was exempt from § 1641(g)'s disclosure requirement because the assignment was made "solely for the administrative convenience of the servicer in servicing the obligation." Because TILA does not define the term "administrative convenience," the court looked to the ordinary meaning of the words. "The word

"convenience" is defined by Merriam-Webster as 'fitness or suitability for performing an action or fulfilling a requirement.'" ***Reed*** **at *1. "The word "administrative" connotes the act or process of managing or supervising."** ***Reed*** **at *1. Thus, the Eleventh Circuit concluded that the ordinary meaning of "administrative convenience" is that which allows performance of a managerial action or requirement.**

Here it was not disputed that the purpose of the assignment was to allow Chase to foreclose on the debtor's property and Chase could not have foreclosed without the assignment. Thus, the assignment was an administrative convenience because it allowed Chase to perform foreclosure, a requirment for servicing the loan.

Bankruptcy Rule 8002 Time for Filing Notice of Appeal.

25. Hansjurgens v. Bailey (In re Bailey), 521 Fed. Appx. 920 (11th Cir. 2013)(*not selected for publication)*(Hull, Jordan, and Anderson, JJ.). Debtor's reliance on his former attorney's erroneous advice that he had 30 days to file a bankruptcy appeal did not establish that untimely appeal was the result of excusable neglect.

Plaintiff filed his notice of appeal 22 days after the bankruptcy court issued final judgment. The appeal was 8 days late. The district court dismissed same as being untimely and plaintiff, proceeding *pro se*, appealed the dismissal.

Plaintiff argued that his untimely filing stemmed from excusable neglect because he relied upon his former attorney's advice that he had 30 days to appeal instead of the 14 days that Rule 8002(a) requires.

The 11th Circuit affirmed:

- **Timely filing of a notice of appeal is mandatory and jurisdictional. An appellate court lacks jurisdiction to hear an appeal if the notice is not timely filed.**

- **Rule 8002(a) requires a bankruptcy appeal to be filed within 14 days of the date of the order.**

- **Rule 8002(c)(1)-(2) provides that a bankruptcy court may extend the time for filing under certain circumstances "upon a showing of excusable neglect."**

- **Excusable neglect is an equitable concept that considers all relevant circumstances surrounding the omission. Four-factor test:**

  (1) the risk of prejudice to the debtor;

  (2) length of delay and its potential impact on judicial proceedings;

  (3) the reason for the delay, including whether it was within the reasonable control of the moving party; and

  (4) whether the movant acted in good faith.

- **"[A]ttorney error based on a misunderstanding of the law [is] an insufficient basis for excusing a failure to comply with a deadline."** ***Id.*** **at *921.**

- **Although pleadings filed by** ***pro se*** **litigants are to be construed liberally,** ***pro se*** **litigants must nonetheless conform to procedural rules, including deadlines.**

- **11th Circuit rejected plaintiff's argument that even if his former counsel was not excusably negligent in misstating the appeals deadline, plaintiff was excusably negligent to the extent that he relied on the attorney's erroneous advice. Eleventh Circuit precedent that** ***pro se*** **litigants must conform to procedural rules, including deadlines, was fatal to that argument.**

Fed. R. Civ. P. 55(c) Default Judgment.

26. Macias v. Dillworth (In re Macias), 536 Fed. Appx. 985 (11th Cir. 2013)(*not selected for publication)*(Wilson, Martin, and Anderson, JJ.). The Eleventh Circuit affirmed bankruptcy court order denying debtor's motion to set aside default judgment for an abuse of discretion. The facts of this case are:

- **On October 28, 2011, Chapter 7 trustee filed an adversary proceeding against the debtor contending that she made a post-petition transfer to her husband of a tax refund in violation of § 727(a)(2)(B) [debtor with intent to hinder, delay or defraud has transferred property of the estate after the petition date]. Three days later, the bankruptcy court clerk issued a summons to debtor requiring that she respond within 30 days. Debtor received the summons on November 19, but failed to respond within the 30 time period.**

- **On December 1, the trustee filed a motion for entry of default, which the clerk entered.**

- **On December 5, the trustee filed a motion for entry of default judgment, which the bankruptcy court granted.**

- **Also on December 5, debtor filed a *pro se* motion to dismiss the complaint. The motion was filed after the default judgment was entered, so the debtor filed a motion to vacate the judgment. Debtor argued that she should not have been subject to a default judgment because she answered within 30 days of *receiving* the summons which she thought was the appropriate deadline.**

- **Rule 7012 provides that "[i]f a complaint is duly served, the defendant shall serve an answer *within 30 days after issuance of the summons*," not within 30 days of receipt.**

The bankruptcy court ruled that the debtor had presented nothing that would legally entitle her to vacatur of the default judgment. Nevertheless, the court offered to reconsider if the debtor hired an attorney within 7 days who was ready to go to trial in 14 days. Rather than hire an attorney, the debtor appealed. Both the district court and 11th Circuit affirmed.

FED. R. CIV. P. 55(c) permits a court to set aside a default judgment for any reason listed in Rule 60(b), including excusable neglect. Debtor argued that the bankruptcy court applied the wrong standard for determining whether she showed excusable neglect when it applied the test the Eleventh Circuit established in *In re Worldwide Web Sys., Inc.*, 328 F.3d 1291 (11th Cir. 2003) under which a defaulting party must show that:

1. **it had a meritorious defense that might have affected the outcome;**
2. **granting the motion would not result in prejudice to the non-defaulting party; and**
3. **a good reason existed for failing to reply to the complaint.**

Debtor argued that the bankruptcy court improperly ignored the Supreme Court's equitable test established in *Pioneer Inv. Servs. Co.,* 507 U.S. 380 (1993). In *Pioneer*, the Supreme Court explained that the test is "at bottom an equitable one, taking into account of all relevant circumstances surrounding the party's omission." 507 U.S. at 395. Debtor argued she satisfied *Pioneer* which contains no requirement that she assert a meritorious defense to the adversary proceeding. However, in *In re Worldwide Web Systems,* the Eleventh Circuit acknowledged that *Pioneer* "di[d] not alter the fact that a determination of excusable neglect is an equitable one that necessarily involves consideration of all three elements – a meritorious defense, prejudice, and a good reason for not responding to the complaint. . . . Rather, *Pioneer* simply emphasized the importance of efficient judicial administration and the presence or absence of prejudice to the nonmoving party." *Id.* at *2.

Applying the three part test announced in *Worldwide Web*, the Eleventh Circuit affirmed the bankruptcy court's finding that the debtor failed to meet the first of these three requirements – a meritorious defense that might have affected the outcome. Ultimately, the bankruptcy court found that the debtor's arguments amounted only to "a lot of gibberish and incompetent machinations," and the Eleventh Circuit agreed.

Finally, the Eleventh Circuit found that the bankruptcy court did not deny the debtor her right to represent herself in bankruptcy proceedings in violation of 28 U.S.C. § 1654 by requiring her to hire a lawyer to go to trial. That the bankruptcy court offered the debtor the second chance opportunity to revive her defense did not violate any right she had to proceed *pro se*.

27. Lodge v. Kondaur Capital Corp. (In re Lodge), 2014 WL 1813298 (11th Cir. 2014)(Hull, Black, and Walter, JJ.). Debtors filed an adversary proceeding against mortgage company and its attorney for violation of the automatic stay.

To support their claim of emotional distress, the wife contended: (1) that her husband became unbearable before they discovered the foreclosure sale would not occur; (2) she was "stressed out;" (3) a doctor prescribed her medication for stress and back pain; and (3) she needed medication to sleep. The husband asserted: (1) that he was "so stressed out" that he had difficulties performing his job as a car salesman; (2) he was unable to sleep "for the entire rest of the month;" (3) he began having migraine headaches; (4) his doctor prescribed medication for preexisting acid reflux which worsened; and (5) his children and co-workers avoided him.

District court entered summary judgment in favor of defendants and the Eleventh Circuit affirmed.

- **Generalized evidence, without any additional specific detail does not establish significant emotional distress as opposed to "fleeting or trivial anxiety or distress." *Id.* at *8.**
- **Corroborating evidence may not be necessary to prove emotional distress in cases of "egregious conduct," but there was no such conduct here where defendants canceled the notice of sale the same day it ran.**

The 11th Cir. adopted a three part test for recovering "actual" damages for emotional distress under § 362(k). A plaintiff must:

(1) suffer significant emotional distress;

(2) clearly establish the significant emotional distress, and

(3) demonstrate a causal connection between that significant emotional distress and the violation of the automatic stay.

PRESENTATION EXHIBIT
BANKRUPTCY AT THE BEACH

1. Law v. Siegel, 134 S. Ct. 1188 (2014)(unanimous). Bk ct. imposed an equitable surcharge against debtor's $75k state-law homestead exemption to compensate the bankruptcy estate for litigation costs incurred as a result of debtor's bad faith litigation conduct. The S. Ct. reversed.

- **By surcharging debtor's exemptions, bk ct. exceeded its statutory authority and inherent sanctioning powers.**
- **§ 522 specifies the criteria that render property exempt and a court may not refuse to honor an exemption without a valid statutory basis.**
- **Hornbook law- § 105(a) "does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code."**
- **Courts' inherent sanctioning powers are subordinate to valid statutory directives.**
- **Surcharge order was unauthorized if it contravened a specific provision of the Code - § 522(b)(3)(A), by reference to California law, entitled the debtor to $75k exemption.**
- **§ 522(k) provides -**

  > **Property that the debtor exempts under this section is not liable for payment of any administrative expense except .... [inapplicable].**

- **Surcharge order violated § 522's express terms when it ordered the $75k be made available to pay the trustee's attorney's fees which were an administrative expense.**
- **Trustee's attorney fees are administrative expenses under § 330(a).**
- **Other meaningful sanctions: (1) § 727(a)(2)-(6) - denial of discharge; (2) Rule 9011(c)(2) sanctions for bad-faith litigation would result in a post petition monetary judgment; (3) 18 U.S.C. § 152 - fraudulent conduct in a bk case subjects a debtor to criminal prosecution with a max penalty of 5 years imprisonment.**

2. United States v. Quality Stores, Inc., 2014 WL 1168968 (2014)(unanimous, with Justice Kagan not participating). Severance payments constituted "wages" for which debtor/employer was required to withhold FICA tax. Federal Insurance Contributions Act (FICA - tax to fund benefits for Social Security and Medicare).

- **FICA defines "wages" broadly as "all remuneration for employment." 26 U.S.C. § 3121(a)**
- **Severance payments are a form of remuneration made only to employees in consideration for employment.**
- **Employment is "any service . . . performed . . by an employee" for an employer. § 3121(b)**
- **Given this definition of employment, severance payments constitute "remuneration for employment" as a matter of plain meaning and common sense.**
- **The more logical inference given the regulatory history in this area is that regardless of whether any particular severance payment falls within this definition, all such**

payments must be treated as wages for purposes of withholding.

3. Bank of America v. Sinkfield, No. 13-700, *cert. denied* 3/31/14. S. Ct. denied petition to review *McNeal v. GMAC Mortgage, LLC (In re McNeal),* 735 F.3d 1263 (11th Cir. 2012). *McNeal* held that *Dewsnup v. Timm*, 502 U.S. 410 (1992) does not prevent Ch. 7 debtors from "stripping off" wholly unsecured junior mortgages.

- **4th, 6th and 7th Circuits extended *Dewsnup* to the strip-off of wholly unsecured junior liens.**
- ***Sinkfield* - Ch. 7 debtor had two mortgage liens on his home, and the balance owed on the first mortgage exceeded the property's current market value. Debtor filed a motion under § 506(d) to strip off the second mortgage.**
- **Bank of America stipulated to a judgment against it at the trial court and the parties agreed to have the case proceed through the district court and a panel of the 11th Circuit. Bank of America then sought *en banc* relief before the 11th Cir., but the court of appeals declined to grant *en banc* consideration.**

4. Executive Benefits Ins. Agency v. Arkison (Bellingham Ins. Agency, Inc.), 702 F.3d 553 (9th Cir. 2012), *cert. granted,* 2013 WL 3155257 (Docket No. 12-1200). F.C. action 3rd party - non-claimant - *Stern* and *Granfinanciera* made clear bk judge cannot determine.

- **Held F.C. even though called core that bk ct. without consent cannot finally determine.**
- **Here, however, defendant consented by implication or conduct -**
  1. **Raised for 1st time on appeal, just before oral argument, bk ct.'s authority.**
  2. **Asked for jury trial, but withdrew same & elected to pursue argument on Art. III issue.**
  3. **Agreed to let bk ct. proceed with summary judgment.**
  4. **Did not argue issue on appeal to district court.**
  5. **Did not raise until after briefing time at circuit court.**

     ***Bellingham* states "the judicial power of U.S. serves to protect primarily personal rather than structural interests . . . . *Stern* further made clear that § 157 does not implicate questions of subject matter jurisdiction." Thus, "as a personal right . . . is subject to waiver." *Bellingham* at 567.**
  6. **Did not complain until he lost.**

5. Clark v. Rameker (In re Clark), 714 F.3d 559 (7th Cir. 2013), *cert. granted,* 134 S. Ct. 678 (Docket No. 13-299).

Issue: Whether an individual retirement account that a debtor has inherited from someone other than the debtor's spouse is exempt under § 522(b)(3)(C). Section 522(b)(3)(C) exempts -

retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408(A), 414, 457, or 501(a) of the Internal Revenue Code of 1986.

- **§ 522(b)(3)(C) retirement fund exemption applies to debtors in opt-out states, i.e. Alabama. Section 522(d)(12) provides an identical retirement fund exemption for debtors in opt-in states.**
- **Debtor inherited an IRA from her mother worth $300K. The bankruptcy judge held that the inherited IRA did not represent "retirement funds" in the debtor's hands and was, thus, not exempt under § 522(b)(3)(C).**
- **District court reversed finding that any money representing "retirement funds" in the decedent's hands must be treated the same way in a successor's hands.**
- **Different treatments for spousal and non-spousal inherited IRA -**
  - **Spousal IRAs - If a married holder of an IRA dies, the decedent's spouse inherits the account and can keep it separate or roll it over into his or her own IRA - either way the money remains retirement funds [no withdrawal before age 59 ½ without paying a penalty tax, and must start withdrawals no later than the year in which the survivor reaches 70 ½].**
  - **Inherited IRAs - Funds remain sheltered from taxation until the money is withdrawn, but no new contributions can be made. Balance cannot be rolled over or merged with another account. Must be distributed within one year of the original owner's death and payout must be completed within 5 years. Timed-limited tax deferral vehicle, but no a place to hold wealth until the new owner's retirement.**
- **The 7th Cir. reversed - funds held in a non-spousal inherited IRA are not "retirement funds" under § 522(b)(3)(C). Exemptions are dependent upon how the debtor uses the property, not how the property was used by another.**

6. Santander Consumer USA, Inc. v. Brown (In re Brown), 2014 WL 1245266 (11th Cir. 2014)(Wilson, Bucklew, and Lazzara, JJ.) § 506(a)(2)'s replacement valuation standard applies when a Chapter 13 debtor surrenders a vehicle under § 1325(a)(5)(C).

Facts:

- **Prepetition, debtor purchased a 37-foot RV and entered into a loan agreement secured by the RV. Five years later, debtor filed a Ch. 13 petition. Santander filed a secured claim for $36,587.53 based on the outstanding payoff balance due on the petition date.**
- **Debtor's Ch. 13 plan proposed to surrender the vehicle in full satisfaction of Santander's claim.**
- **Santander filed an objection arguing that the RV was worth less than the amount of its claim because based on the RV's foreclosure value. Debtor argued § 506(a)(2)'s replacement value standard controlled. The bk ct. confirmed the plan over Santander's objection.**

Ruling:

- **§ 506(a)(1) and (a)(2) provide -**

  (a)(1) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

  (2) If the debtor is an individual in a case under chapter 7 or 13, such value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing. With respect to property acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.

- **§ 506(a)(1) bifurcates an allowed claim into secured and unsecured portions based on the collateral value which is to be "determined in light of the purpose of the valuation and of the proposed disposition or use of such property...."**
- **When the S. Ct. ruled in *Rash* that surrendered collateral should be valued based on its foreclosure value, it did so based on the "disposition or use" language in what was then § 506(a) [and presumably retained collateral should be valued at its "replacement value." BAPCA sought to codify *Rash*].**
- **BAPCPA amended § 506 by adding § 506(a)(2) which provides that when the debtor is an individual under Ch. 7 or 13 and the collateral is personal property, then the value of the collateral "shall be determined based on the replacement value of such property" as of the petition date. "[R]eplacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined." § 506(a)(2)**
- **Santander argued that applying § 506(a)(2) would be absurd because it eliminates creditor's contract and state law rights to liquidate and pursue an unsecured claim for any deficiency. But state law does not govern if the Bankruptcy Code requires a different result.**

§706(b) On request of a party in interest and after notice and hearing, the court may convert a case under this chapter to a case under chapter 11 of this title at any time.

Piazza
719 F.3d 1253
(11th Cir. 2013)
(business debts)

§ 707(a) The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including –

(1) unreasonable delay . . .
(2) nonpayment of any fees . . .
(3) failure of the debtor . . . to file . . . the information required by paragraph (1) of section 521(a) . . .

Witcher
702 F.3d 619
(11th Cir. 2012)
(consumer debts)

§ 707(b)(1) **After notice and a hearing, the court, on its own motion or on a motion by the . . . trustee (or bankruptcy administrator, if any) . . . may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 ... if it finds that the granting of relief would be an abuse of the provisions of this chapter.**

§ 707(b)(2) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii) and (iv), and multiplied by 60 is not less than the lesser of – [means test]

Kulakowski
735 F.3d 1296
(11th Cir. 2013)
(entire income of non-filing spouse)

§ 707(b)(3) **In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in paragraph (2)(A)(i) does not arise or is rebutted, the court shall consider –**

(A) whether the debtor filed the petition in bad faith; or

(B) the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse.

7. Piazza v. Nueterra Healthcare Physical Therapy, LLC (In re Piazza), 719 F.3d 1253 (11th Cir. 2013)(Marcus, Black, and Siler, JJ.). § 707(a) can be used to dismiss a business Chapter 7 individual case based on prepetition bad faith as a stand alone ground. Circuit split: 3rd and 6th Cir. - yes; 8th and 9th Cir. - no.

- **Totality of circumstances – bad faith under § 707(a).**
  - **Bk filed to avoid paying large single debt debtor failed to pay for over two years; motivating factor in filing. On eve of sanctions hearing in state court debtor filed for Ch. 7 protection. Debtor's unsecured debt totaled $319k of which more than half, $161k, was owed to judgment creditor.**
  - **Paid debts of insiders and transferred thousands to wife every month; paid great aunts mortgage.**
  - **Failed to make lifestyle adjustments – cosigned sister's car loan, leased luxury vehicle, transferred money to wife who spent $2k on credit cards each month, monthly charitable contribution of $2k.**
  - **Ability to pay where joint income exceeded $10k per month.**
- **Code does not define "for cause" – examples listed in § 707(a) [unreasonable delay, nonpayment of fees, and failure to timely file schedules] are not exhaustive.**
  - **Debtor argued *ejusdem generis* - "of the same kind," as the other items referenced in § 707(a).**
  - **11th Cir. used *Noscitur a sociis* - associated words cannon - statutory terms, ambiguous when considered alone, should be given related meaning when grouped together. The 11th Cir. looked to see what "cause" was defined as elsewhere throughout the Code and found very broad interpretation.**
  - **Sections 1112(b) and 1307(c) permit dismissal "for cause."**
- **"For cause" defined in *Black's* § 707 to mean "reason," "justification," or "[f]or a legal reason."**
- **Bad-faith filings are a significant burden on the legal system – refused to limit tools available to courts.**
- **Rejected superfluity argument – § 707(b) requires courts to consider whether the debtor filed in bad faith, but concerns consumer debt.**
- **"Selective inclusion" presumption – inclusion of bad faith in § 707(b) did not, by implication, transform § 707(a) into a safe harbor for bad faith debtors.**

8. Kulakowski v. Walton (In re Kulakowski), 735 F.3d 1296 (11th Cir. 2013)(Jordan, Dubina, and Baldock, JJ.). Ch. 7 trustee moved to dismiss the case under the § 707(b)(1) abuse provisions which provide that a bk ct. "may dismiss a case filed by an individual debtor under [Chapter 7] whose debts are primarily consumer debts . . if it finds that the granting of relief would be an abuse."

Issue: Whether it is appropriate to consider entirety of non-filing spouse's income in totality of the circumstances analysis for purposes of dismissal?

- **Bk ct. did not abuse its discretion by considering non-filing husband's income in applying the totality of the circumstances test under § 707(b)(3)(B).**
- **$136,470.75 unsecured debts**
- **Debtors were married over 20 years, shared a joint checking account, filed joint tax returns, pooled their income and expenses, and husband deposited all of his income into the couple's joint account. Husband's monthly take-home pay of $5,491.20 exceeded the couple's**

household expenses of $4,338.33. Much of debt was credit card debt incurred by wife for mutual benefit of couple.

- **Debtor asserts that husband's income can only be considered to the extent that it is used "for the household expenses of the debtor" pursuant to § 101(10A)(A) and (B) of the Code which provide that current monthly income (CMI):**

  > **(A) means the average monthly income from all sources that the debtor receives . . .; and**
  >
  > **(B) includes any amount paid by any entity other than the debtor . . . on a regular basis for the household expenses of the debtor . . .**

- **Totality of the circumstances inquiry is not limited to consideration of CMI.**
- **Totality of the circumstances - open-ended, inherent flexibility and wide breadth of the totality of the circumstances inquiry, coupled with Congress' decision not to include "current monthly income" as an explicit limiting factor under § 707(b)(3)(B), constitute sufficient textual evidence to overcome the general/specific canon.**
- **Bk ct. did not abuse discretion in interpreting the totality of circumstances under § 707(b)(3)(B) to include the husband's entire income, not just that part of income that was contributed to the debtor's household expenses.**

***See also Witcher v. Early (In re Witcher)*, 702 F.3d 619 (11th Cir. 2012):**

- **§ 707(b) covers consumer debts only.**
- **Debtors passed the means test (§ 707(b)(2)) rebutting presumption of abuse, but failed bad faith/totality of circumstances test under § 707(b)(3).**
- **Debtors lived lavish lifestyle - kept luxury items - camper, boat, trailer, tractor (all secured).**
- **Lower courts held that debtors would have ability to make a meaningful distribution to unsecured creditors if debtors surrendered those items.**
- **The bk ct. dismissed under § 707(b)(3). Debtors argued that ability to pay could not be considered under § 707(b)(3) if they passed the means test under § 707(b)(2). 11th Cir. noted debtors were not willing to engage in the give and take process of bankruptcy.**
- **11th Cir. affirmed the bk ct. with limited holding –**
  - **"totality of circumstances clearly includes 'ability to pay,'" and should be considered along with the other factors;**
- **The only question reached was whether ability to pay could be considered. "We do not decide whether a debtor's ability to pay his or her debts can alone be dispositive under the totality-of-the-circumstances test."**
- **Legislative history - ability to pay alone, not grounds for dismissal.**

9. Brown v. Gore (In re Brown), 742 F.3d 1309 (11th Cir. 2014)(Carnes, C.J., Hull, and Cox, JJ.). Bk ct. denied confirmation of "attorney-fee-centric" Ch. 13 plan as having been filed in bad faith where Ch. 7 was clearly more beneficial to debtor except for the fact that his attorney's fees could not be financed through Ch. 7.

Facts:

- **Monthly social security income $1,364; monthly expenses $1,214; monthly net income $150.**
- **Debtor did not own any real property, a vehicle, nor any other non-exempt assets. Debtor scheduled unsecured, non-priority debts totaling $16,203 to ten different creditors. Only three**

creditors filed claims totaling $1,355.08.

- **Ch. 13 plan proposed to pay $150 per month for 36 months, for a total of $5,400. [$2,000 attorney's fees, $281 filing fee of $281; $1,355.08 to creditors.] Plan proposed to pay all attorney's fees and administrative expenses before any distributions to creditors which meant creditors would not being receiving payments for almost 17 months.**

Ruling:

- **Ch. 13 contains two "good faith" requirements:**
  - **§ 1325(a)(3) - plan filed in good faith?**
  - **§ 1325(a)(7) - petition filed in good faith?**

- **Apply *Kitchens* factors to determine "good faith."**
- **Petition not filed in good faith where -**
  - **Debtor's Ch. 13 plan was all about attorney's fees and not the debtor's best interest or the creditors. Debtor was better off in a Ch. 7 case where: (1) debtor had no non-exempt assets for the trustee to liquidate, nor a home or a vehicle that he was trying to preserve in Ch. 13; (2) debtor's monthly income was low and barely exceeded his expenses; (3) debtor's social security income [not subject to garnishment in a Ch. 7] was fixed and debtor did not have an ability to earn more money during the plan.**
  - **Administrative burden - trustee would basically be working for debtor's attorney for 17 months because the attorney was being paid in full before the creditors received a dime.**
  - **Reasonable likelihood that the debtor would not complete his Ch. 13 plan and would never pay creditors anything.**
    - **If debtor could not save $150 for five months to pay his attorney's fees for a Ch. 7 case ($750), a three year plan of $150 seemed doomed to failure.**
    - **Approximately two-thirds of all Ch. 13 plans fail - 65% in the Eastern District, Northern Division of Alabama.**
    - **Temporary Ch. 13 case due to likelihood of conversion - would circumvent holding in *Lamie v. U.S.,* 540 U.S. 526 (2004) that attorney's fees cannot be paid out of the funds of a Ch. 7 estate, absent the approval of the trustee and the court.**

10. Colburne v. Ocwen (In re Colbourne), 2013 WL 5789159 (11th Cir. 2013)(*not selected for publication)*(Martin, Fay, and Edmondson, JJ.). Debtors ineligible to receive a Ch. 13 discharge under § 1328(f)(1) are not permitted to modify a secured creditor's rights via cram down.

Facts:

- **August of 2009 - debtor filed Ch. 7 and listed two first-priority mortgage claims held by Ocwen on separate investment properties. Debtor received a Ch. 7 no-asset discharge and the case was closed in December 2009.**
- **January of 2010 - debtor filed Ch. 13 and sought to cram down Ocwen's claims pursuant to § 506(a) and § 1325(a)(5). Current appraised values of the properties were substantially less than the amount owed on the mortgages.**
- **Bk ct. denied the motions to value the bank's claims because debtor was ineligible to receive a Ch. 13 discharge.**

Ruling:

- **§ 1325(a)(5) permits bifurcation of secured claims and allows debtors to 'strip down' the value of the claim to an amount equal to the value of the collateral.**
- **§ 506(a) - an "allowed secured claim" is "[a]n allowed claim . . . secured by a lien on property . . . to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim."**
- **§ 1325(a)(5)(B)(i)(I)'s lien retention provision requires Ch. 13 plans to provide that the holder of an allowed secured claim retains the lien securing such claim until the earlier of -**
  - **payment of the underlying debt determined under nonbankruptcy law; or**
  - **discharge under § 1328.**
- **Pursuant to § 1325(a)(5)(B)(i)(I), a creditor whose claim has been bifurcated may not be forced to release its lien upon payment of only the secured portion where the debtor is ineligible for a discharge.**
- **Without a discharge, any modifications to a creditor's rights imposed in a plan are not permanent and have no binding effect once the plan ends.**

11. Hope v. Acorn Financial (In re Fluellen), 731 F.3d 1189 (11th Cir. 2013)(Barkett, Jordan, and Schlesinger, JJ.). A confirmed Ch. 13 plan is binding on a trustee who, aware of defects in a creditor's security interest, does not assert any objections to same, and affirmatively recommends confirmation of, the plan.

Facts:

- **Preconfirmation - trustee discovered creditor failed to perfect its lien on debtor's automobile until six days after debtor filed for bankruptcy relief.**
- **Ch. 13 plan treated the creditor as a secured creditor.**
- **Trustee filed a report recommending confirmation under § 1325.**
- **Postconfirmation trustee filed an AP to avoid creditor's lien as a preferential transfer.**

Ruling:

- **11th Cir. rejected trustee's argument that § 1327(a) does not bind trustees even though § 1327(a) merely states that "the provisions of a confirmed plan bind *the debtor and each creditor*, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." (emphasis added)**
- **Code provisions pertaining to Ch. 13 trustee's duties to object to allowance of improper claims [(§§ 1302(b)(1), 704(a)(5)] and to appear at confirmation hearings [§1302(b)(2)(B)], taken together, generally require a Ch. 13 trustee to object to the confirmation of a plan if a claim is invalid or improperly characterized.**
- **Given the principles articulated in *Justice Oaks* [right to object to a claim is lost when a ct. confirms the plan] and *Bateman* [POC is deemed allowed unless an objection is filed] and the requirement that a Ch. 13 trustee must objection to confirmation if a claim is invalid, the 11th Cir. found that the bk ct. correctly precluded the trustee from filing a postconfirmation avoidance action.**
- **Limited holding - where a Chapter 13 trustee is aware, prior to confirmation regarding defects in a creditor's security interest and does not object to the claim and affirmatively recommends**

confirmation of a plan giving the creditor a secured position.

- **"If a plan is not final as to all, it is not final as to any."** ***Id.*** **at *5.**

12. Heatherwood Holdings, LLC v. HGC, Inc. (In re Heatherwood Holdings, LLC), 2014 WL 1243859 (11th Cir. 2014)(Carnes, C.J., Tjoflat, and Marra, JJ.). Debtor lost bid to sell golf course property free and clear of restrictions limiting use as a golf course.

- **11th Cir. affirmed bk ct. ruling that implied restrictive covenant running with the land limited the use of the debtor's real property to that of a golf course.**
- **The bankruptcy court certified three questions to the Alabama Supreme Court, but the court answered only one of the questions, finding that "as an abstract question of law" Alabama recognizes or will imply a restrictive covenant as to a golf course constructed as part of a residential development where the evidence presented indicated that the original grantor intended a common scheme of development that included the golf course property as an integral part of the development and as an inducement to purchasers of the residential lots. The Alabama Supreme Court did not, however, express an opinion as to the merits of the case stating the following factual disputes remained -**

  > **(1) the extent to which the subsequent purchaser of the property at issue would be bound by the implied restriction that the property be used as a golf course may turn on the extent to which the purchaser had notice of the implied restriction;**
  >
  > **(2) the duration of the implied restrictive covenant and whether changed economic circumstances would warrant a judicial declaration terminating the implied restrictive covenant; and**
  >
  > **(3) whether "economic frustration" rendered the golf course restriction unenforceable.**

- **Bk court's factual findings supported holding that an implied restrictive covenant existed to limit the use of the property: (1) plat maps identified the property as a golf course and listed golf-themed subdivision street names; (2) deeds to residential lots referenced covenants that the subdivision was planned as a golfing community; (3) deeds required residential owners to construct golf cart storage areas, prohibited the construction of fences around the golf course, and required homeowners to be members of the golf club; (4) entrance sign described subdivision as a "golf course community;" and (5) homeowners were induced to buy based on the inclusion of the golf course in the subdivision.**
- **Mortgage lender and Heatherwood had actual and constructive notice of implied restrictive covenant given availability of information in plain view of representatives that toured the property.**

13. Fernandez v. Havana Gardens, LLC (In re Fernandez), 2014 WL 1329253 (11th Cir. 2014)*(not selected for publication)*(Tjoflat, Pryor, and Edmondson, JJ.). Determination by bk ct. that debtor

did not have fraudulent intent for purposes of § 523(a)(2)(4) did not preclude ct. from finding debtor had fraudulent intent for purposes of § 523(a)(4).

- **Under § 523(a)(2)(A), the issue is whether debtor had fraudulent intent when he *obtained* money or property from a creditor.**
- **Debtor, as the co-manager of Havana Gardens, was in lawful possession of the LLC's money. Thus, he had no fraudulent intent to *obtain* the money for purposes of § 523(a)(2)(A).**
- **Under § 523(a)(4), a discharge in bankruptcy will not discharge a debtor for debts for embezzlement. Under federal common law, embezzlement is "the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come."**
- **Under § 523(a)(4), the issue was whether the debtor had fraudulent intent to *appropriate* LLC's money for his own personal benefit. Bk ct. did not err in finding that the debtor had not testified credibly regarding deposit of partnership checks into his personal account and regarding unexplained charges on the company credit card.**

14. Sears v. United States (In re Sears), 533 Fed. Appx. 941 (11th Cir. 2013)(*not selected for publication*)(Carnes, C.J. Martin, and Fay, JJ.).

- **Debtor's company issued several surety bonds for various gvt. construction contracts.**
- **U.S. filed AP against debtor seeking determination that debts arising out of surety bonds fell within in discharge exception for debts obtained by false pretenses, false representation, or actual fraud.**
- **Elements under § 523(a)(2)(A) - (1) debtor made a false representation to deceive the creditor, (2) creditor relied on the misrepresentation, (3) the reliance was justified, and (4) creditor sustained a loss as a result of the misrepresentation.**
- **Intent to deceive could be inferred where the debtor: (1) repeatedly pledged property he did not own in support of the surety bonds; (2) misrepresented the net worth of his bonding company; (3) and consistently misrepresented the state of the title of the properties he pledged as collateral.**
- **Justifiable reliance - debtor's misrepresentations were not apparent to the contracting officers reviewing the affidavits because same were completely filled out and submitted under oath. Even though the debtor did not attach supporting documentation, he answered every question on each of the affidavits, and the affidavits were signed and notarized. Debtor's own failure to provide documents to support his fraudulent statements should not allow him to avoid his obligation to the party to whom he lied.**
- **Loss - Had debtor not made the misrepresentations about the collateral supporting the bonds, the gvt. never would have approved him as surety. Had debtor not been approved as surety, he could not have defaulted which caused the gvt. to spend more than $1M to hire a new contractor to complete the job.**

15. Torrens v. Hood (In re Hood), 727 F.3d 1360 (11th Cir. 2013)(Tjoflat, Wilson, and Coogler, JJ.). Bk ct. improperly sanctioned attorney for "ghostwriting" bk petition.

- **Debtor paid a $1000 retainer to the law firm to provide foreclosure defense work, but debtor was unable to afford to hire the firm to also represent him in bankruptcy. However, the firm's secretary filled out the petition for the debtor by writing his oral responses into the corresponding blanks on the petition. A courier then filed the petition on behalf of the debtor via a power of attorney notarized by a partner at the firm.**
- **The law firm did not "draft" a document within the scope of Florida Rules of Professional Conduct and did not commit fraud in violation of 18 U.S.C. § 157(3) by filling in the blanks in a standardized document form.**
- **A document is "drafted" if it is "written" or "composed. Here, the firm merely recorded answers on a standard fill-in-the-blank Ch. 13 petition based on the debtor's verbal responses.**
- **A Ch. 13 petition "stands in stark contrast to a ghostwritten pro se brief . . . . A legal brief is a substantive pleading that requires extensive preparation, much more than is necessary for the completion of a basic, fill-in-the-blank bankruptcy petition."**
- **No fraudulent intent where the debtor could have filled out the form himself and likely obtained the same result.**

16. Dunn v. Advanced Medical Specialties, Inc. (In re Tronge-Knoepffler), 2014 WL 503050 (11th Cir. 2014)(*not selected for publication*)(Marcus, Dubina, and Hodges, JJ.). Ch. 7 trustee barred by laches from pursing debtor's discrimination claims.

Facts:

- **May 16, 2011 - debtor filed a discrimination lawsuit against former employer.**
- **July of 2011 - debtor filed Ch. 7 petition and failed to disclose the pending lawsuit.**
- **August 2, 2011 - debtor filed an amended complaint in the discrimination lawsuit.**
- **November 9, 2011 - Ch. 7 discharge order.**
- **December 20, 2011 - former employer filed a motion for summary judgment based on judicial estoppel.**
- **December 22, 2011 - debtor notified the trustee of the pending lawsuit. The trustee took no action in the lawsuit for six months.**
- **February 6, 2012 - district court entered judgment in favor of former employer based on judcicial estoppel.**
- **February 28, 2012 - debtor filed a notice of appeal.**
- **July 19, 2012 - Ch. 7 trustee filed motion to vacate alleging judgment was void because the trustee was the real party in interest. District court denied the motion to vacate.**

Ruling:

- **11th Cir. has repeatedly recognized that when a debtor fails to disclose a pending lawsuit while having knowledge of same and a motive to conceal, the doctrine of judicial estoppel bars the undisclosed action from proceeding.**
- **Rejected debtor's attempt to blame concealment on debtor's counsel. Same is of "no consequence" for purposes of judicial estoppel.**
- **Rule 60(b)(4) - relief from judgment where "the judgment is void." Trustee failed to show that the district court acted without jurisdiction or due process where the trustee received notice of the lawsuit two days after the defendant filed for summary judgment yet took no action for six months.**
- **Trustee "sat on her hands" an slept on her rights by electing to "stay silent."**
- **Defendant, who was not a party to the bankruptcy proceeding, did not have a duty to notify the trustee regarding the pending motion for summary judgment.**
- **Trustee confused the principle of jurisdictional standing under Art. III which would impact the district court's subject matter jurisdiction, with the principal of real party in interest, which does not impact the court's subject matter jurisdiction.**
    - **Trustee, as the real party in interest, simply takes the debtor's place in a pending action once the trustee makes an appearance.**
    - **Trustee is bound by whatever action the debtor has already taken.**

17. In re Zumbro, 536 Fed. Appx. 991 (11th Cir. 2013)(*not selected for publication*)(Pryor, Jordan, and Cox, JJ.). Ineligibility for restructuring satisfied *Brunner*.

Facts:

- **Debtor cosigned three student loans for her ex-husband's medical education.**
- **Post-petition debtor filed an AP to discharge the student loan debt.**
- **The bk ct. initially found the loans to be nondischargeable because it believed the debtor was eligible to restructure the student loan debt under 34 C.F.R. § 685.208.**
- **The bk ct. reversed its initial ruling upon learning that the debtor was not eligible to restructure the student loans pursuant to the gvt. extended loan repayment program. "34 C.F.R. § 685.208 allows *borrowers* of certain *government issued student loans* to restructure their payments for up to a thirty year period." *Zumbro* at *993 (emphasis added.)**

Ruling:

- **Debtor demonstrated that her current state of affairs was likely to persist for a significant portion of the repayment period so as to satisfy the second prong of the *Brunner* undue hardship test where debtor was not eligible to restructure the student loan debt because –**
    - **the loans were not government issued; and**

- **the debtor's ex-husband was the borrower, not the debtor.**

18. Disciplinary Board of the Supreme Court of Pennsylvania v. Feingold (In re Feingold), 730 F.3d 1268 (11th Cir. 2013)(Hull, Martin, and Hinkle, JJ.). A claim's nondischargeability, without more, is not cause for stay relief.

- **State Disciplinary Board obtained judgment against Ch. 7 debtor/attorney. Judgment assessed debtor $44k for costs and expenses associated with disciplinary proceeding.**
- **A debt is nondischargeable under § 523(a)(7) –**

> **to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss . . . .**

- **In this case, the 11th Cir. affirmed the district court decision finding that even though the amount of the judgment was reimbursement for the costs actually incurred by the Disciplinary Board, the judgment went beyond that because the costs imposed furthered the purpose to protect the public, preserve the integrity of the courts, and deter unethical conduct.**
- ***See Kelly v. Robinson*, 479 U.S. 36 (1986), in which the Supreme Court held that restitution orders are sufficiently penal in nature to fall under § 523(a)(7).**
- **Creditor first argued under § 362(b)(4) that the filing of a petition does not operate as a stay against the enforcement of a judgment, other than a money judgment, to enforce such governmental unit's police or regulatory power.**
- **The 11th Cir. explained that the § 362(b)(4) exception was inapplicable by its plain language as same is inapplicable to money judgments and the portion of the judgment at issue was a money judgment.**
- **Further, the 11th Cir. found that to allow the stay to lift just because a debt is nondischargeable would make other exceptions to the stay meaningless, e.g. § 362(b)(2) [continuation of action to establish DSO, or to collect DSO from property that is not property of the estate].**
- **Thus, creditor was left with seeking recourse for lifting the stay pursuant to § 362(d)(1) "for cause," including lack of adequate protection of interest in property.**
- **Nondischargeability alone is not sufficient cause for relief from stay under § 362(d)(1).**
- **Nondischargeability may be a factor, even a weighty factor, but without more nondischargeability does not constitute cause.**
- **Here, the 11th Cir. found no overwhelming cause and remanded for the bankruptcy court to look at the totality of the circumstances to determine if stay relief was warranted.**

19. Cardenas v. Biscayne Park, LLC (In re Biscayne Park, LLC), 540 Fed. Appx. 952 (11th Cir. 2013)(*not selected for publication)*(Hull, Martin, and Bowen, JJ.). Unambiguous sale order transferred Wal-Mart lawsuit to buyer.

- **Ch. 11 debtor's prepetition state-court cause of action against Wal-mart was included in a sale order entered in conjunction with the sale of substantially all of the debtor's assets.**
- **Debtor removed the state court action to the bk ct. The notice of removal provided that "Upon removal of the *claim or cause of action* this proceeding is core; or, if non-core, [debtor] consents to entry of final order or judgment by the bankruptcy judge."**
- **Subsequently, the bk ct. entered bid procedure order for the sale of "substantially all of the assets of" the debtor.**
- **The sale order provided that the highest bidder bought "[a]ll contract rights, causes of action, claims [and] demands" of the debtor.**
- **The action against Wal-Mart was identified as a "claim" or "cause of action" by the debtor in the notice of removal, and by including "all" causes of action the sale order encompassed same.**
- **Other items, including a supersedeas bond posted in connection with the cause of action, were expressly carved out of the sale order.**
- **By expressly carving out the bond, parties indicated they knew how to carve something out of the sale order, but the cause of action was not excluded.**

20. Steffen v. Menchise (In re Steffen), 2014 WL 170860 (11th Cir. 2014)(*not selected for publication*)(Hull, Marcus, and Jordan, JJ.). Appeal of order approving the sale of real property pursuant to 11 U.S.C. § 363 was moot where debtor sought stay pending appeal and relief was denied. Facts:

- **February 6, 2012 - order authorizing Ch. 7 trustee to sell non-exempt real property on Feb. 10th.**
- **February 14, 2012 - Debtor filed motion for stay pending appeal. Bk. ct. denied the motion to stay and debtor appealed.**
- **District ct. dismissed appeal pursuant to § 363(m).**

Ruling:

- **Because § 363 "prevents an appellate court from granting effective relief if a sale is not stayed, the failure to obtain a stay renders the appeal moot."**
- **Plain language of § 363(m) states that a court cannot invalidate a sale that the bankruptcy court authorized "unless such authorization and such sale . . . were stayed pending appeal."**
- **§ 363(m) applies even where the debtor believes the sale has been wrongly authorized. Section 363(m) does not say that the sale must be *proper* under § 363(b) – it says the sale must be *authorized*. It does not matter whether the authorization was correct.**
- **Rule 6004(h) provides that the 14-day period applies "unless the court orders otherwise."**
- **Here the order approving sale authorized a closing date that was four days after date of the sale order. Thus, the 14-day period arguably did not apply at all.**
- **Debtor suffered no prejudice because she was able to file a motion for stay during the 14-day period. The fact that the closing had already taken place was of no consequence because the district**

court could have invalidated the sale if the debtor had obtained a stay.

21. Zucker v. FDIC (In re BankUnited Fin. Corp.), 727 F.3d 1100 (11th Cir. 2013)(Tjoflat, Pryor, and Fay, JJ.), *cert. denied,* 2014 WL 335047 (U.S. Mar. 3, 2014).

- **Tax refunds of consolidated tax group that included debtor-holding company and subsidiary bank were not property of the debtor, but belonged to FDIC as bank's receiver.**

- **Tax sharing agreement provided debtor-holding company was to file group's tax return and subsidiary bank was to pay all taxes due, that within 30 days after return was filed and taxes paid, group members were to reimburse bank for their share of taxes that bank paid, and that bank, within 30 days of debtor's filing of income tax return, was to pay group members any tax refund they expected or were entitled to receive.**
- **Although the TSA did not contain a provision expressly requiring debtor to forward tax refunds to bank on receipt, that was what the parties intended so that bank could then forward refunds to group members. They did not intend to create a debtor-creditor relationship.**

22. FDIC v. NetBank, Inc. (In re NetBank, Inc.), 729 F.3d 1344 (11th Cir. 2013)(Hull, Anderson, and Farris, JJ.).

- **Tax refund under a consolidated return was not property of the debtor's estate where debtor and its subsidiaries intended that a TSA would create an agency relationship, not a debtor-creditor relationship.**
- **11th Cir. held: (1) the language in the TSA was ambiguous; and (2) under Georgia law, the parties to the TSA intended to create an agency relationship, not a debtor-creditor relationship, with respect to the tax refunds attributable to the bank.**
- **Under Georgia law, the interpretation of a contract involves three steps: (1) is the contract language unambiguous; (2) if so the court enfo rces the contract's clear terms; (3) if the contract is ambiguous, the court must apply the rules of contract construction to resolve the ambiguity.**
- **Having found the TSA at issue to be ambiguous, the court applied the rules of contract construction which required the court to "consider the background of the contract and the circumstances under which it was entered into, particularly the purpose for the particular language to be construed."**
- **Considering the background against which the TSA was entered, the court considered an Interagency Policy Statement which provided in part that the parent company was to receive tax refunds as an agent for the consolidated group and that refunds attributable to a subsidiary should not be construed as property of the parent.**

23. Avenue CLO Fund, Ltd. v. Sumitomo Mitsui Banking Corp.**, 723 F.3d 1287 (11th Cir. 2013)(Tjoflat, Martin, and Bucklew, JJ.). Lenders for construction of Las Vegas casino filed a complaint against Bank of America in its capacity as the disbursement agent asserting claims for breach of disbursement agreement, failure to issue stop funding notices, and improper disbursement of funds to debtors/borrowers. District court granted summary judgment in favor of Bank of America. The Eleventh Circuit held -**

- **disbursement agreement did not impose a general duty on Bank of America to determine the accuracy of borrowers' representations regarding conditions precedent to draws;**
- **Bank of America could not rely on borrowers' representations if it had actual knowledge to the contrary; and**
- **(3) fact issues existed regarding Bank of America's actual knowledge and whether its actions amounted to gross negligence.**

24. Reed v. Chase Home Fin., LLC**, 723 F.3d 1301 (11th Cir. 2013)(Martin, Fay, and Goldberg, JJ.). Mortgagors brought action against Chase, as loan servicer, alleging same failed to provide them notice required by the TILA.**

- **Chase fell into the "safe harbor" exception of 15 U.S.C. § 1641(f), which provides that a servicer is exempt from TILA's § 1641(g) disclosure requirements when a loan assignment is "solely for the administrative convenience of the servicer in servicing the obligation." § 1641(f)(2).**
- **Section 1641(g) provides that no later than 30 days after a mortgage loan is sold, transferred or assigned, the new owner or assignee of the debt must notify the borrower in writing of the transfer.**
- **Chase was exempt from § 1641(g)'s disclosure requirement because the loan assignment was made "solely for the administrative convenience of the servicer in servicing the obligation."**
- **The ordinary meaning of "administrative convenience" is that which allows performance of a managerial action or requirement.**
- **No dispute that the purpose of the assignment was to allow Chase to foreclose on the debtor's property and Chase could not have foreclosed without the assignment. Thus, the assignment was an administrative convenience because it allowed Chase to foreclosure, a requirement for servicing the loan.**

25. Hansjurgens v. Bailey (In re Bailey)**, 521 Fed. Appx. 920 (11th Cir. 2013)(*not selected for publication*)(Hull, Jordan, and Anderson, JJ.). Debtor's reliance on his former attorney's erroneous advice that he had 30 days to file a bankruptcy appeal did not establish that untimely appeal was the result of excusable neglect.**

- **Appeal filed 8 days late.**
- **Plaintiff argued that his untimely filing stemmed from excusable neglect because he relied upon former attorney's advice that he had 30 days to appeal instead of the 14 days that Rule 8002(a) requires.**

Ruling:

- **Timely filing of a notice of appeal is mandatory and jurisdictional. An appellate court lacks jurisdiction to hear an appeal if the notice is not timely filed.**
- **Rule 8002(c)(1)-(2): Extension "upon a showing of excusable neglect." The request must be made before the time for the filing of a notice of appeal has expired except the following test applies. Four-factor test:**

  (1) the risk of prejudice to the debtor;

  (2) length of delay and its potential impact on judicial proceedings;

  (3) the reason for the delay, including whether it was within the reasonable control of the moving party; and

  (4) whether the movant acted in good faith.
- **"[A]ttorney error based on a misunderstanding of the law [is] an insufficient basis for excusing a failure to comply with a deadline."**

26. Macias v. Dillworth (In re Macias), 536 Fed. Appx. 985 (11th Cir. 2013)(*not selected for publication)*(Wilson, Martin, and Anderson, JJ.). Affirmed order denying debtor's motion to set aside default judgment.

Facts:

- **October 28, 2011 - Ch. 7 trustee filed AP against the debtor based on post-petition transfer to debtor's husband of a tax refund in violation of § 727(a)(2)(B) [debtor with intent to hinder, delay or defraud has transferred property of the estate after the petition date]. Debtor failed to respond to summons within the 30 time period.**
- **December 1 - clerk's entry of default.**
- **December 5 - Bk ct. granted motion for entry of default judgment. Debtor filed a *pro se* motion to dismiss the complaint on the same day, but after the default judgment was entered.**
- **Subsequently, debtor filed a motion to vacate the judgment arguing she was not subject to a default judgment because she answered within 30 days of *receiving* the summons.**
- **Bk ct. conditionally denied motion to vacate, but provided the ct. would reconsider if the debtor hired an attorney within 7 days. Debtor appealed and District ct. affirmed.**

Ruling:

- **FED. R. CIV. P. 55(c) permits a court to set aside a default judgment for any reason listed in Rule 60(b), including excusable neglect.**
- **Bk ct. correctly applied equitable test set forth in *In re Worldwide Web Sys., Inc.*, 328 F.3d 1291 (11th Cir. 2003) under which a defaulting party must show that:**

  (1) it had a meritorious defense that might have affected the outcome;

  (2) granting the motion would not result in prejudice to the non-defaulting party; and

  (3) a good reason existed for failing to reply to the complaint.

- **Debtor failed to establish first requirement - meritorious defense where debtor's arguments amounted only to "a lot of gibberish."**
- **Bk. ct. did not deny debtor her right to represent herself in bankruptcy proceedings in violation of 28 U.S.C. § 1654 by requiring her to hire a lawyer to proceed to trial. That the bankruptcy court offered the debtor the second chance opportunity to revive her defense did not violate any right she had to proceed *pro se*.**

27. Lodge v. Kondaur Capital Corp. (In re Lodge), 2014 WL 1813298 (11th Cir. 2014)(Hull, Black, and Walter, JJ.). Debtors filed an adversary proceeding against mortgage company and its attorney for violation of the automatic stay.

To support their claim of emotional distress, the wife contended: (1) that her husband became unbearable before they discovered the foreclosure sale would not occur; (2) she was "stressed out;" (3) a doctor prescribed her medication for stress and back pain; and (3) she needed medication to sleep. The husband asserted: (1) that he was "so stressed out" that he had difficulties performing his job as a car salesman; (2) he was unable to sleep "for the entire rest of the month;" (3) he began having migraine headaches; (4) his doctor prescribed medication for preexisting acid reflux which worsened; and (5) his children and co-workers avoided him.

District court entered summary judgment in favor of defendants and the Eleventh Circuit affirmed.

- **Generalized evidence, without any additional specific detail does not establish significant emotional distress as opposed to "fleeting or trivial anxiety or distress." *Id.* at *8.**
- **Corroborating evidence may not be necessary to prove emotional distress in cases of "egregious conduct," but there was no such conduct here where defendants canceled the notice of sale the same day it ran.**

The 11th Cir. adopted a three part test for recovering "actual" damages for emotional distress under § 362(k). A plaintiff must:

(1) suffer significant emotional distress;

(2) clearly establish the significant emotional distress, and

(3) demonstrate a causal connection between that significant emotional distress and the violation of the automatic stay.

CASES UNDER THE BANKRUPTCY CODE

§ 101 Definitions.

U.S. v. Milavetz, Gallop & Milavetz, P.A.,130 S. Ct. 1324 (2010). Attorneys who provide "bankruptcy assistance" to "assisted persons" are debt relief agencies under § 101(12A). While Congress listed several exclusions from the definition of "debt relief agency" in subsections § 101(12A)(A)-(E), Congress gave no indication that it intended to exclude attorneys.

§ 101(5) Definition of Claim.

Johnson v. Home State Bank, 501 U.S. 78, 111 S. Ct. 2150 (1991). Debtor filed Chapter 13 case after receiving Chapter 7 discharge. Lower courts held the remaining *in rem* liability after the Chapter 7 was not a claim under § 101(5) and thus could not be the subject of a Chapter 13 case. Supreme Court disagreed holding that a mortgage interest that survives the discharge of a debtor's personal liability is a "claim" within the terms of § 101(5). Even after the debtor's personal obligations were extinguished, the mortgage holder still retained a "right to payment" in the form of its right to the proceeds from the sale of the debtor's property.

Pennsylvania Department of Public Welfare v. Davenport, 495 U.S. 552, 110 S. Ct. 2126 (1990). Congress intended by the language in § 101(5) to adopt the broadest available definition of "claim." Thus, restitution orders imposed as a condition of probation in state criminal proceedings were "claims" dischargeable in a Chapter 13 reorganization. Although neither the probation department nor the victim can enforce restitution obligations in civil proceedings, the obligation is enforceable by the substantial threat of revocation of probation and the threat of incarceration, and, thus creates "a right of payment." Even though Congress subsequently overruled Davenport, it did not restrict the scope of, or otherwise amend, the definition of "claim" under § 101(5).

Ohio v. Kovacs, 469 U.S. 274, 105 S. Ct. 705 (1985). Debtor's obligation under state court injunction requiring clean up of a hazardous materials site was considered a "debt" or "liability on a claim" under § 101(5) and, therefore, subject to a discharge in bankruptcy.

Epstein v. Official Committee of Unsecured Creditors of the Estate of Piper Aircraft Corp. (*In re* Piper Aircraft Corp.), 58 F.3d 1573 (11th Cir. 1995). In a case of first impression, the Circuit established a new test to define claims under § 101(5). Plaintiff represented a class of future claimants, including all persons who may assert a claim after confirmation based on debtor's pre-petition acts. The Circuit adopted what it termed as the "Piper test" to determine the scope of the term claim under § 101(5). An individual has a § 101(5) claim against a debtor manufacturer if (i) events occurring before confirmation create a relationship, such as contact, exposure, impact, or privity, between the claimant and the debtor's product; and (ii) the basis for liability is the debtor's prepetition conduct in designing, manufacturing and selling the allegedly defective or dangerous product. In this case, the alleged claimants failed the minimum requirements of the Piper test. There was no preconfirmation exposure to a specific identifiable defective product or any other preconfirmation relationship between the debtor and the broadly defined class of future claimants.

With no preconfirmation connection established between the debtor and the future claimants, the future claimants did not hold a § 101(5) claim arising out of the debtor's prepetition design, manufacture, sale, and distribution of allegedly defective aircraft.

§ 101(11) Definition of Custodian.

Flournoy v. City Finance of Columbus, Inc., 679 F.2d 821 (11th Cir. 1982). Where trustee sought turnover of repossessed automobile pursuant to § 543 only, the repossessing creditor was not a "custodian" within the meaning of that section.

§ 101(13) Definition of Debtor.

Goerg, *In re*, 930 F.2d 1563 (11th Cir. 1991). The Code's definition of "person," and therefore its definition of "debtor," excludes insolvent decedents' estates.

§ 101(21) Definition of Farming Operation.

Watford, *In re*, 898 F.2d 1525 (11th Cir. 1990). Chapter 12 debtors appealed the dismissal of their bankruptcy case. Bankruptcy court had concluded the neither the debtors' stone crabbing business, the development of ponds for recreational use, not the storage and maintenance of soybeans awaiting sale were farming operations under § 101(20). Circuit held the list of activities in § 101(20) was not all-inclusive. To determine whether debtor's activities are a "farming operation," the bankruptcy court must determine whether, in view of the totality of the circumstances, the debtor intends to continue to engage in a "farming operation" even though he or she was not engaged in the physical activity of farming at the time the bankruptcy petition was filed. Bankruptcy court and district court erroneously concluded that debtor's intent to continue farming was irrelevant.

McNeal, *In re*, 848 F.2d 170 (11th Cir. 1988). Income earned from a chicken coop cleaning service and sale of manure was not "income from farming" as required for eligibility as a Chapter 12 debtor. The mere purchase and sale of farm by-products is not necessarily a "farming operation."

§ 101(41) Definition of Person.

Goerg, *In re*, 930 F.2d 1563 (11th Cir. 1991). The Code's definition of "person," and therefore its definition of "debtor," excludes insolvent decedents' estates.

§ 101(54) Definition of Transfer.

Barnhill v. Johnson, 503 U.S. 393, 112 S. Ct. 1386 (1992). Debtor delivered check to creditor. Trustee sued for recovery of funds. Supreme Court held that for the purposes of payment by ordinary check, a "transfer" as defined by § 101(54) occurs on the date of honor, and not before. Since it was undisputed that honor occurred within the 90-day preference period, the trustee presumptively could avoid the transfer.

§ 105(a) Power of the Court.

Bank of New York v. Sunshine Jr. Stores, Inc. (In re Sunshine Jr. Stores, Inc.), 456 F.3d 1291 (11th Cir. 2006). The bankruptcy court sanctioned a bank for repeatedly refusing to obey court orders. The court invoked its inherent powers and struck the bank's defense to the debtor's claim for interest on funds the bank held as a fiduciary for the debtor, awarded the debtor a default judgment for the interest on the funds, and ordered the bank to pay the debtor's attorney's fees. The Eleventh Circuit affirmed finding that the bankruptcy court was well within its discretion to conclude that the bank had forfeited its opportunity to dispute both its liability to the debtor for interest and the amount of interest earned given the bank's clear history of bad faith stonewalling. The key to unlocking a court's inherent power is a finding of bad faith. The severe sanction of dismissal or default judgment is appropriate only as a last resort when less drastic sanctions will not ensure compliance with the court's orders. However severe the sanctions, the court of appeals stated that it will not interfere unless important findings are clearly erroneous or there has been an abuse of discretion.

Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 119 S. Ct. 1961 (1999). Federal court equitable powers can only be expanded by Congress. An enforceable judgment is required before property rights may be restricted. Federal courts may not enjoin the use of property of a guarantor while the liability of contract rights is being litigated. The equitable powers in federal court are those existing in the English Court of Chancery in 1789. In the Bankruptcy Act of 1978, bankruptcy courts had the powers of a court of equity. In the 1984 Act, the bankruptcy court became a unit of the district court. District courts may exercise equity jurisdiction authorized by the Constitution. If bankruptcy courts remain courts of equity after the 1984 legislation, this case could restrict equitable concepts such as § 105 and substantive consolidation.

Morgan v. United States (*In re* Morgan), 182 F.3d 775 (11th Cir. 1999). Even though § 108(c) does not toll the three year priority claim period under § 507(a)(8)(A)(i) during the pendency of a prior bankruptcy proceeding, § 105(a) may support tolling the priority period. Section 105(a) grants the bankruptcy court the power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code and take "any action or mak[e] any determination necessary to enforce or implement court orders or rules, or to prevent an abuse of process." Circuit concluded that § 105(a) was broad enough to permit a bankruptcy court, exercising its equitable powers, to toll the three- year priority period, where appropriate, during the pendency of a debtor's prior bankruptcy proceeding.

Jove Engineering, Inc. v. Internal Revenue Service, 92 F.3d 1539 (11th Cir. 1996). Corporate or partnership debtor cannot recover damages for violation of the automatic stay pursuant to § 362(h). However, § 105(a) should be used as an alternative. Contempt requires knowledge of pending bankruptcy and an intentional act. IRS repeated collection efforts violated automatic stay. One department failed to stop another department in different city from attempting collection of the debt.

Commodore Holdings, Inc. v. Exxon Mobil Corp. (*In re* Anastasia Cruises, Inc.), 331 F.3d 1257 (11th Cir. 2003). A debt collector sought to collect from an asset of the estate and was held in contempt for violating the automatic stay. Debtor then moved to hold other parties with an interest in the debt in contempt on the grounds that they were imputed with the acts of the debt collector. The creditor had assigned the debt to a debt collector for $10,000, and retained a $40,000 contingent interest, in the event that the collector recovered more than $100,000. The trial court found the assignor was not affiliated with the debt collector, nor did the assignor take any action to advise, assist or request the debt collector to collect the debt in violation of the stay. An assignment for consideration and retention of a contingent interest is not an unlawful collection practice. The assignor is not imputed with the acts of the debt collector and is not in contempt.

Munford v. Valuation Research Corp. (*In re* Munford), 97 F.3d 449 (11th Cir. 1996). Bankruptcy court could use § 105(a) to enter an order barring non-settling defendants from asserting claims of contribution and indemnity against settling defendant. This is supported by public policy which strongly favors pretrial settlement and because litigation costs can be particularly burdensome on a bankrupt estate given the financial instability of the estate.

Hardy v. United States (*In re* Hardy), 97 F.3d 1384 (11th Cir. 1996). IRS attempted to collect discharged debt. Debtor argued §§ 105 and 524 authorized monetary sanctions. While not expressly deciding if § 524 can afford monetary relief, IRS may be liable for contempt under § 105 if it willfully violated the permanent injunction of § 524. Circuit held § 105 grants statutory contempt powers to the bankruptcy court. Therefore, § 105(a) granted the bankruptcy court the independent statutory powers to award monetary and other forms of relief for discharge injunction violations to the extent such awards are 'necessary and appropriate' to carry out the provisions of the Bankruptcy Code.

Matter of Saybrook Mfg. Co., 963 F.2d 1490 (11th Cir. 1992). Bankruptcy courts cannot use powers granted under § 105(a) to allow cross-collateralization to create their own rules of superpriority within a single class.

United States v. Sanford (*In re* Sanford), 979 F.2d 1511 (11th Cir. 1992). Allowance of claims by § 502(b) must be according to the applicable substantive legal standards. Equitable powers under § 105(a) may not be used to reduce, or partially disallow, the amount of the tax penalties owed by the Debtor. Reducing the amount of the penalties would supplant Congress' determination of the proper amount of penalty, as set forth in the Internal Revenue Code.

Fox, *In re*, 725 F.2d 661 (11th Cir. 1984). Mobile home dealer brought dischargeability action against debtor in connection with sale of commercial inventory. Bankruptcy court ruled in debtor's favor and ordered dealer to pay debtor's attorney fees. Circuit held the § 523(d) provision for awarding attorneys fees to debtor in creditor's unsuccessful dischargeability complaint applies only to consumer debts and not to commercial debts. Bankruptcy court could not use § 105(a) to expand on statutory allowances of fees to commercial debts.

§ 106 Waiver of Sovereign Immunity.

Omine v. Florida Dept. of Rev. (In re Omine), 485 F.3d 1305 (11th Cir. 2007). The Eleventh Circuit extended the Supreme Court's ruling in *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006) ruling to find that a state could be liable for damages for violation of the automatic stay. The Court explained that the "States agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to 'Laws on the subject of Bankruptcies.'" The court's previous ruling in *In re Crow*, 394 F.3d 918 (11th Cir. 2004) that § 106(a) was unconstitutional is no longer good law because of *Katz.* Just because *Katz* held § 106(a) was surplus or unnecessary, § 106(a)(3) which limits punitive damages against a state is not void or bad law.

Central Virginia Community College v. Katz (In re Wallace's Bookstores, Inc.), 546 U.S. 356, 126 S. Ct. 990 (2006). Adversary proceeding brought by Chapter 11 trustee pursuant to §§ 547(b) and 550(a) to set aside preferential transfers to state agencies was not barred by the agencies' sovereign immunity. The bankruptcy clause was intended not just as a grant of legislative authority to Congress, but also to authorize limited subordination of state sovereign immunity in bankruptcy. Bankruptcy jurisdiction, which at its core is in rem, does not implicate States' sovereignty to the same degree as other kinds of jurisdiction. To the extent orders ancillary to the bankruptcy courts' in rem jurisdiction, like orders directing turnover of preferential transfers, implicate States' sovereign immunity from suit, the States agreed in the plan of the Constitutional Convention not to assert that immunity. States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the in rem jurisdiction of the bankruptcy courts.

Miami Police Relief & Pension Fund v. Tabas (In re Florida Fund of Coral Gables, Ltd.), 144 Fed.Appx. 72 (11th Cir. 2005)(*not selected for publication)*. Trustee brought adversary proceeding against police pension fund to avoid preferential transfers and the police fund raised the issue of sovereign immunity. Pursuant to § 106(b), the fund waived any alleged right to invoke sovereign immunity by filing a proof of claim. The court rejected the defendant's argument that it could not be sued as an entity and that the proper defendants were the individual police officers as beneficiaries of the fund. The fund filed a proof of claim in its own name, and could likewise be sued in its own name.

§ 106(a) Abrogation of Sovereign Immunity.

Alexander v. Sandoval, 532 U.S. 275 (2001). Section 1003 of the Rehabilitation Act Amendments of 1986 expressly abrogated States' sovereign immunity against suits brought in federal court to enforce Title VI and provided that in a suit against a State, legal and equitable remedies are available to the same extent as such remedies are available in the suit against an entity other than a State.

Kimel v. Florida Bd. Of Regents, 528 U.S. 62, 120 S. Ct. 631 (2000). State sued in federal court for ADEA claims. Question presented was whether the ADEA statutes were adopted under the Enforcement Clause, CONST., amend XIV, § 5. If not, the claim is barred by the Eleventh

Amendment. To fit under § 5, there must be a congruence and proportionality between the injury to be prevented and the means adopted. The ADEA violates the Eleventh Amendment because the means or requirements imposed on the states is disproportionate to any conduct made illegal by the Act. The state is immune from the federal rights against discrimination.

Alden v. Maine, 527 U.S. 706, 119 S. Ct. 2240 (1999). Extending the restrictions of abrogation of state immunity, a state court has no jurisdiction to impose money damages for violations of federal laws. State employees sued the State for violations of Fair Labor Standards Act. Suit in federal court was dismissed following Seminole Tribe. Then suit was filed in state court. Recognizing the Eleventh Amendment does not address suits in state courts, the Supreme Court held that immunity exists "by fundamental postulates implicit in the constitutional design." The dissent by Justice Souter called this analysis an application of natural law over textual law.

Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999). The enforcement clause, CONST., amend XIV, § 5, does not support a private suit to enforce patent laws. Restricting the loophole left open in Seminole Tribe, the Supreme Court limited the enforcement clause to federal remedies that are congruent and proportional to the state violation of the Fourteenth Amendment. Uniformity in enforcing federal law is an insufficient justification for the enforcement clause. In enacting a statute under the authority of the enforcement clause, Congress must demonstrate a pattern of federal right violations by the states, as well as a pattern of constitutional violations. Certainly, the Tenth Amendment has been born again.

College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999). A state is not deemed to waive its immunity by certain acts. Forced waiver of a state is the same as abrogation and is not permitted. Constructive waiver is strictly scrutinized to determine if there is a knowing and voluntary relinquishment of a known privilege. A state bank sued the state in federal court for violations of federal patent and trademark laws. The statutes waived a state's immunity when the state engaged in commercial activities, here false advertising. Congress is not able to impose federal policy on states by private suit enforcement. The majority held there may be a permissible waiver of immunity by accepting federal appropriations with restrictions attached.

Tennessee v. Lane, 124 S. Ct. 1978 (May 17, 2004). Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12134, prohibits public entities from discriminating agains tpersons with disabilities in the provision of public services. In the ADA, Congress expressed unequivocally its intent to abrogate state immunity. Title II, "as it applies to the class of cases implicating the fundamental rights of access to the courts, constitutes a valid exercise of Congress's § 5 authority to enforce the guarantees of the Fourteenth Amendment." The Eleventh Amendment does not afford the states immunity from suit in this class of cases.

Tennessee Student Assistance Corp. v. Hood, 124 S. Ct. 1905 (May 17, 2004). The trial court denied the dismissal sought on 11th Amendment and the 6th Circuit affirmed on the Constitutional

Compact analysis, which permits enforcement of § 106 (a). In a completely new approach to this issue, the Court held that the suit is not a suit covered by the 11th Amendment. The Bankruptcy Court exercised *in rem* jurisdiction in this suit. Like admiralty, bankruptcy may determine States' rights in the property. Jurisdiction over the res permits the court to bind the parties, including the states, even absent their participation. In discharging the debt, the debtor does not seek a money judgment or subject the state to judicial process.

The application of service of process is procedural and does not change the analysis. Current bankruptcy rules require the debtor to file an adversary proceeding against the state to be able to discharge his/her student loan debt. Because of the similarity to a civil suit in serving the summons and complaint in an adversary proceeding, Justice Thomas argues that this is infringement on sovereign immunity. For the same reasons stated above, in that the bankruptcy court only exercises *in rem* rather than *in personam* jurisdiction, the similarities are irrelevant, and sovereignty is not impinged upon. Debtor Hood was only seeking to discharge a debt; she was not arguing for personal jurisdiction. Thus a suit objecting to discharge of a debt is not a suit. (And we thought the Marathon distinction of public versus private rights was tough.) With this analysis of discharge suits, the Court declined to consider if the exercise of personal jurisdiction over the State (like violations of the automatic stay or discharge) would be permitted under the 11th Amendment.

Ga. Higher Educ. Assistance Corp. v. Crow (In re Crow), 394 F.3d 918 (11th Cir 2004). Debtors claimed that their student loan debts to the Georgia Higher Education Assistance Corp. were dischargeable and brought an action for damages for violation of the automatic stay. Defendant state agencies claimed that the action was barred by their Eleventh Amendment Immunity. On appeal, the Eleventh Circuit held that Congress's attempt under Section 106(a) to abrogate Eleventh Immunity in proceedings under Section 362 was an unconstitutional overreaching of its bankruptcy clause powers.

The Eleventh Circuit analyzed the United States Supreme Court decision of Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440 (2004), in which the Court determined that the Eleventh Amendment was not implicated by the requirement that a debtor serve a state agency to determine the dischargeability of a student loan debt. In Hood, the Supreme Court held that a bankruptcy court's jurisdiction over a discharge action is derived from it jurisdiction over the debtor's property and that exercise of *in rem* jurisdiction does not infringe upon state sovereignty.

In debtor's complaint to discharge a student loan, the State of Georgia did not have Eleventh Amendment immunity. However, as opposed to a dischargeability determination, the Court of Appeals held that because a Section 362(h) action seeks affirmative relief through a coercive judicial process, the jurisdiction is *in personam* and not *in rem*. Because the action is *in personam*, Hood does not alleviate the Eleventh Amendment concerns. The Eleventh Circuit joined five of the six other circuits that have considered the issue and held that the Section 106(a)'s purported abrogation of Eleventh Amendment Immunity in bankruptcy proceedings is invalid. Even though Congress' intent to abrogate is clearly stated, the abrogation is not pursuant to a valid exercise of power under the holding of Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

Seminole Tribe of Florida v. Florida, 517 U.S. 44, 116 S. Ct. 1114 (1996). The Indian Gaming Regulatory Act, passed under Article I, Section 8, United States Constitution, is unconstitutional,

violating the Eleventh Amendment. Pennsylvania v. Union Gas Co., 491 U.S. 1, 109 S. Ct. 1 (1989), found authority for Congress to set aside the state's right of sovereign immunity in the Commerce Clause, and it is overruled. The Eleventh Amendment restricts federal court jurisdiction under Article III, and Congress may not expand that jurisdiction under Article I. The power under the Fourteenth Amendment is distinguished and not restricted by this opinion. Federal question jurisdiction and some contempt powers against states are preserved, if the state has consented to be sued. Injunctive relief against a state official is to be used very cautiously.

United States v. Nordic Village, Inc., 503 U.S. 30, 112 S. Ct. 1011 (1992). Any waivers of the government 's sovereign immunity must be "unequivocally expressed"to be effective. Waivers of sovereign immunity are not generally to be "liberally construed." Under Bankruptcy Code, Government's sovereign immunity is waived with regard to monetary relief in the setting of compulsory counterclaims to governmental claims and permissive counterclaims to governmental claims capped by setoff limitation. Sovereign immunity of United States was not unambiguously waived with respect to § 106. As such, damages may not be awarded against the sovereign due to sovereign immunity. The Legislative History of §106 provides that the 1994 Amendments would effectively overrule this case. Section 106, as amended by the 1994 Amendments, expressly provides for a waiver of sovereign immunity by governmental units with respect to both monetary recoveries as well as declaratory and injunctive relief. Of course, considering the Seminole Tribe decision above, there is some question as to the validity of the 1994 Amendment's ability to abrogate sovereign immunity.

Hoffman v. Connecticut Department of Income Maintenance, 492 U.S. 96, 109 S. Ct. 2818 (1989). In enacting § 106(c), Congress did not expressly abrogate the Eleventh Amendment immunity of the States. Trustee's actions under §§ 542(b) and 547(b) against a state were barred by the Eleventh Amendment. The Legislative History of §106 provides that the 1994 Amendments would effectively overrule this case. Those Amendments expressly abrogate sovereign immunity for §§ 542 and 547 actions. Of course, considering the Seminole Tribe decision above, there is some question as to the validity of the 1994 Amendment's ability to abrogate sovereign immunity.

Downing v. Board of Trustees of the U. of Ala., U. of Ala. at Birmingham, & Strunk, 321 F.3d 1017 (11th Cir. 2003). Former university employee brought suit against university's Board of Trustees for same-sex sexual harassment under Title VII. The Board filed a motion to dismiss on the ground of Eleventh Amendment sovereign immunity. When the district court denied the motion, the Board appealed. Affirming the district court, the Eleventh Circuit found that Congress' amendment of Title VII to apply to state and local governments evidenced its clear intent to revoke sovereign immunity in actions arising under Title VII, which in addition to the Equal Protection Clause, offered remedies for same-sex sexual discrimination and/or harassment.

Hundertmark v. State of Fla. Dept. of Transp., 205 F.3d 1272 (11th Cir. 2000). Application of Equal Pay Act to states was valid exercise of enforcement powers under Fourteenth Amendment. In determining whether Congress has constitutionally abrogated states' sovereign immunity, court must determine whether Congress has unequivocally expressed its intent to abrogate states' sovereign immunity and whether Congress has acted pursuant to valid exercise of its enforcement

power under Fourteenth Amendment. Congress acts pursuant to valid exercise of its enforcement power under Fourteenth Amendment if statute purporting to do so: (1) may be regarded as enactment to enforce equal protection clause; (2) is plainly adapted to that end; and (3) is consistent with and not prohibited by letter of constitution. Enforcement clause of Fourteenth Amendment grants Congress authority to abrogate states' sovereign immunity. Congress need not explicitly state basis of its power to legislate in order to validly exercise its enforcement powers under Fourteenth Amendment. Congress is vested with power to enforce Fourteenth Amendment, but not power to determine substance of Fourteenth Amendment's restrictions. Ultimate interpretation and determination of Fourteenth Amendment's substantive meaning remains province of judicial branch.

Harbert Int'l, Inc. v. James, 157 F.3d 1271 (11th Cir. 1998). Contractor sued Governor and Highway Director in official capacity to provide state mandated administrative procedures and to release funds that State of Alabama withheld on construction project. Eleventh Amendment bars suits in federal courts against state officials in official capacity. Three exceptions include: (1) waiver; (2) abrogation by Congress under Section 5 of the Fourteenth Amendment, United States Constitution; and (3) prospective injunction against violation of federal law. Harbert urges a fourth exception, when state courts do not afford relief. The Circuit declined to consider a fourth exception because it found that Alabama courts do afford relief. Alabama recognizes an exception to sovereign immunity to force state officials to perform their legal duties. When Alabama contracts for services and accepts the benefit, Alabama is obligated to perform under the contract and this liability is enforceable in state courts. Thus, Harbert is not barred by sovereign immunity and is barred by the Eleventh Amendment. The issue of a possible fourth exception is not reached.

Jove Engineering, Inc. v. Internal Revenue Service, 92 F.3d 1539 (11th Cir. 1996). Debtor brought action against IRS for violation of the automatic stay under §362. Even though the United States may not be sued absent a waiver of its sovereign immunity, the Circuit held this action may be maintained as Congress waived sovereign immunity with respect to §§ 105 and 362 actions in the 1994 Bankruptcy Code Amendments. This waiver was not without limitation. Section 106(a)(3) limits sanctions to those that are coercive but not punitive. A fixed non-compensatory fine is punitive.

Hardy v. United States (*In re* Hardy), 97 F.3d 1384 (11th Cir. 1996). IRS attempted to collect discharged debt. Debtor argued §§ 105 and 524 authorized monetary sanctions. Circuit held the doctrine of sovereign immunity prohibited suits against the United States unless the United States specifically consents to be sued. Any waiver of sovereign immunity had to be unequivocally expressed in order to be effective. With the 1994 Amendments, Congress unequivocally waived sovereign immunity for actions under both §§ 105 and 524. This waiver was not without limitation. Section 106(a)(3) limits sanctions to those that are coercive but not punitive. A fixed non-compensatory fine is punitive.

Tew v. Arizona State Retirement System, 873 F.2d 1400 (11th Cir. 1989). Section 542 turnover suit brought by trustee against state pension fund for monetary recovery was barred by the Eleventh Amendment. There is some question as to the validity of this case following the 1994 Amendments

to the Bankruptcy Code which seems to expressly abrogate sovereign immunity for § 542 actions. Of course, considering the Seminole Tribe decision above, there is some question as to the validity of the 1994 Amendment's ability to abrogate sovereign immunity.

§ 106(b) Waiver of Sovereign Immunity.

State of Georgia Dept. of Revenue v. Burke (*In re* Burke); State of Georgia v. Headrick (*In re* Headrick), 146 F.3d 1313 (11th Cir. 1998). In two consolidated cases, the Court of Appeals held the filed proofs of claims by the state waived the Eleventh Amendment immunity. In case 1, Georgia filed a proof of claim for state income taxes in a Chapter 13 case, which converted to Chapter 7, and a discharge was entered. Thereafter, Georgia attempted collection. In case 2, Georgia filed a proof of claim for state income taxes in a Chapter 13 case. While the case was pending, Georgia attempted collection. In defense of claims of discharge and automatic stay violations, Georgia alleged that she did not waive her Eleventh Amendment immunity by the method established in the Georgia Constitution. Court of Appeals held a state may consent to federal court jurisdiction through its affirmative conduct, even in the absence of explicit consent according to state statute or constitutional provision. Following Gardner v. New Jersey, 329 U.S. 565 (1947), the court found Georgia waived her Eleventh Amendment immunity for purposes of adjudication of the claims, limited to proofs of claims filed in the cases. The court narrowed the holding to permit only recovery of attorneys' fees and cost incurred by the state's violations. The Court of Appeals declined to consider the abrogation of Eleventh Amendment immunity in § 106, and declined to address whether the proof of claim waives Eleventh Amendment immunity for compulsory counterclaims. The dicta noted that § 106(b) correctly reflects the law on waiver of Eleventh Amendment immunity. The dicta also supports a waiver of sovereign immunity, in addition to a waiver of Eleventh Amendment immunity, by filing a proof of claim. In reading this case and § 106, you are cautioned to distinguish between sovereign immunity, a defense to suit in any court, and Eleventh Amendment immunity, a defense to suit in federal court.

§ 108(a) Extension of Time.

Beck v. Deloitte & Touche, 144 F.3d 732 (11th Cir. 1998). Chapter 7 Trustee sued for professional malpractice within two years of appointment and five years after occurrence. Section 108(a) allows the Trustee to bring suit within the applicable statute of limitations or within two years of the order for relief if the applicable statute of limitations did not expire before the filing of the bankruptcy petition. This action was filed two years and one day after the order for relief. Thus, Trustee had to fit under Florida's statute of limitations. The Florida statute of limitations for malpractice is two years from the time the cause of action is discovered or should have been discovered with the exercise of due diligence. Normally the knowledge of the directors is imputed to the corporation, but not when the directors act adversely to the corporation. The exception only applies when the act is entirely adverse, and it does not apply when the corporation benefits (i.e., the actions must neither be intended to benefit the corporation nor actually cause short or long term benefit to the corporation). Trustee satisfied his burden in showing the interest of the directors were adverse to the corporation. Therefore, there was no imputation of knowledge and the Trustee's action fell within the statute of limitations. The order of dismissal was reversed.

§ 108(c) Tolling.

Morgan v. United States (*In re* Morgan), 182 F.3d 775 (11th Cir. 1999). The three year priority claim under § 507(a)(8)(A)(i), for income tax, is not automatically tolled during the pendency of a prior bankruptcy proceeding. The plain language of § 108(c) does not cover these facts. The plain language of 108(c) states that it only applies to "nonbankruptcy law" and "nonbankruptcy proceedings" and therefore can not apply to the bankruptcy provision, § 507(a)(8)(A)(i).

§ 109(d) Chapter 11 Eligibility Requirements.

Toibb v. Radloff, 501 U.S. 157, 111 S. Ct. 2197 (1991). Eligibility for Chapter 11 does not require that a debtor be engaged in business. The Code contains no ongoing business requirement for reorganization under Chapter 11. As such, individual debtors not engaged in business may file for relief under Chapter 11.

Moog, *In re*, 774 F.2d 1073 (11th Cir. 1985). Although primarily aimed at businesses, Chapter 11 may be used by consumer debtors under certain circumstances, for example, when there is no regular income. There is nothing in § 109(d) or its legislative history that would suggest that a consumer debtor may not seek relief under Chapter 11.

§ 109(f) Chapter 12 Eligibility Requirements.

McNeal, *In re*, 848 F.2d 170 (11th Cir. 1988). Income earned from a chicken coop cleaning service and sale of manure was not "income from farming" as required for eligibility as a Chapter 12 debtor. The mere purchase and sale of farm by-products is not necessarily a "farming operation."

§ 109(e) Chapter 13 Eligibility Requirements.

United States v. Verdunn, 89 F.3d 799 (11th Cir. 1996). A debt is liquidated, even though disputed, when IRS asserts the amount owed. Fact that debtor contested tax deficiency claim asserted by IRS did not render it unliquidated for purposes of Chapter 13 eligibility limits. Concept of a liquidated debt relates to the amount of liability, not the existence of liability. If the amount of the debt is dependent upon a future exercise of discretion, not restricted by specific criteria, the claim is unliquidated.

Hammonds, *In re*, 729 F.2d 1391 (11th Cir. 1984). Circuit faced with the question of whether checks from the Aid to Families With Dependent Children (AFDC) constituted regular income for Chapter 13 purposes. An individual with regular income is defined in the Code as an individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under Chapter 13. Regular income may include welfare, social security, fixed pension incomes, or investment incomes. Since Congress specifically stated that an individual on welfare is deemed an

individual having regular income under Chapter 13, a parent who receives AFDC benefits is eligible to be a debtor in Chapter 13 under § 109(e).

§ 302 Consolidation.

Reider v. F.D.I.C. (*In re* Reider), 31 F.3d 1102 (11th Cir. 1994). When a husband and wife file a joint petition, the two estates are jointly administered. However, this should not be confused with substantive consolidation. For substantive consolidation, the bankruptcy court should consider two factors: 1) disregard of corporate formalities and commingling of assets (substantial identity), and 2) possible harm or injustice to the creditors. In the spousal context, a court must determine: (1) whether there is a substantial identity between the assets, liabilities, and handling of financial affairs between the debtor spouses; and (2) whether harm will result from permitting or denying consolidation. In assessing the extent of substantial identity, relevant factors will include the extent of jointly held property and the amount of joint-owed debts. Additionally, where administrative difficulties in disentangling the spouses' estates makes it prohibitively expensive or where disentanglement is otherwise impracticable, consolidation should ordinarily be permitted. However, to prevent consolidation, a creditor may demonstrate that it has relied on the separate credit and assets of one of the spouses and would be harmed by a consolidation of assets. Here, because the bank had a claim against only the husband and it did not rely on wife's assets, substantive consolidation was not warranted.

Eastgroup Properties v. Southern Motel Assoc., Ltd., 935 F.2d 245 (11th Cir. 1991). Chapter 7 trustee for two separate debtors moved to consolidate substantively two bankruptcy cases. Creditors opposed consolidation. Circuit held the purpose of substantive consolidation is "to insure the equitable treatment of all creditors." It involves the pooling of the assets and liabilities of two or more related entities. The liabilities of the entities involved are then satisfied from the common pool of assets created by the consolidation. Substantive consolidation should be used sparingly. The proponent of substantive consolidation must show that (1) there is substantial identity between the entities to be consolidated; and (2) consolidation is necessary to avoid some harm or to realize some benefit. Circuit provides a non-exclusive list of factors which may be shown to show identity of entities, including: (1) the presence or absence of consolidated financial statements; (2) the unity of interests and ownership between various corporate entities; (3) the existence of parent and intercorporate guarantees on loans; (4) the degree of difficulty in segregating and ascertaining individual assets and liabilities; (5) the existence of transfers of assets without formal observance of corporate formalities; (6) the commingling of assets and business functions; (7) the profitability of consolidation at a single physical location; (8) the parent owning the majority of the subsidiary's stock; (9) the entities having common officers or directors; (10) the subsidiary being grossly undercapitalized; (11) the subsidiary transacting business solely with the parent; and (12) both entities disregarding the legal requirements of the subsidiary as a separate organization. Once the proponent meets its burden of proof, the burden of proof then shifts to the party opposing substantive consolidation to prove (1) it has relied on the separate credit of one of the entities to be consolidated; and (2) it will be prejudiced by substantive consolidation. If the objecting party meets its burden, the court may still order consolidation only if it determines that the demonstrated benefits of consolidation 'heavily' outweigh the harm.

§ 303 Involuntary Cases.

Trusted Net Media Holdings, LLC v. Morrison Agency, Inc. (In re Trusted Net Media Holdings, LLC), 550 F.3d 1035 (11th Cir. 2008). In an en banc opinion, overruling its precedent in *In re All Media Properties, Inc.*, 646 F.2d 193 (5th Cir. 1981) to the extent that *All Media* indicated that the

§ 303(b) requirements for commencing an involuntary case are jurisdictional, the Eleventh Circuit held that § 303(b)'s requirements are not subject matter jurisdictional and can, therefore, be waived. Subject matter jurisdiction involves the court's power to hear a case and, therefore, can never be waived. Courts have an independent obligation to determine whether subject matter jurisdiction exists and if same is lacking the court must dismiss the case. Whether the plaintiff has established the elements of the asserted cause of action is a separate issue from whether the court has jurisdiction to hear the cause of action. The failure of one or more elements of a cause of action does not automatically produce a failure of a court's jurisdiction to hear the cause of action. The Supreme Court has instructed courts to look to whether Congress has included jurisdictional language in a statute in question and, if Congress does not clearly state "that a threshold limitation on a statute's scope shall count as jurisdictional," then courts should treat the statute as nonjurisdictional in character. Section 303(b) contains no explicit reference to its requirements being jurisdictional in nature and never uses the word "jurisdiction." Instead, § 303(b) merely states that an involuntary case "is commenced against a person by the filing with the bankruptcy court of a petition under chapter 7 or 11" that meets certain requirements.

Trusted Net Media Holdings LLC v. Morrison Agency, Inc. (In re Trusted Net Media Holdings, LLC, 525 F.3d 1095 (11th Cir. 2008), *rev'd en banc*, 550 F.3d 1035 (11th Cir. 2008). Following prior precedent, the Eleventh Circuit found that the Bankruptcy Code's requirements for commencing an involuntary case are subject matter jurisdictional in nature and cannot be waived. In a subsequent opinion, the court of appeals granted a rehearing en banc and vacated this opinion finding that the Bankruptcy Code's requirements for commencing an involuntary case are not subject matter jurisdictional and can therefore be waived, overruling *All Media Properties, Inc.*, 646 F.2d 193 (5th Cir. 1981).

J.B. Lovell Corp., *In re*, 876 F.2d 96 (11th Cir. 1989). Creditors filed an involuntary petition against Debtor for relief under Chapter 7. Because Debtor failed to properly raise any affirmative defenses or counter-claims bankruptcy court granted the bankruptcy petition. Debtor filed a notice of appeal of the bankruptcy court's order to the district court and, on the same day, filed a motion to convert the bankruptcy action from a Chapter 7 involuntary proceeding to a Chapter 11 voluntary proceeding. District court dismissed the appeal as moot. Debtor appealed. Circuit Court affirmed the district court holding the conversion to Chapter 11 rendered debtor's appeal of involuntary petition moot.

§ 304 Cases Ancillary to Foreign Proceedings.

Goerg, *In re*, 930 F.2d 1563 (11th Cir. 1991). Circuit was faced with the question whether § 304 opens United States bankruptcy courts to proceedings ancillary to foreign insolvency proceedings where the entity that is the subject of the foreign proceeding qualifies for insolvency administration under foreign law, but does not fall within the Bankruptcy Code's definition of "debtor."Both the bankruptcy court and the district court answered the question in the negative, holding that a West German bankruptcy trustee was precluded from commencing a § 304 ancillary case because the debtor in the foreign case--an insolvent decedent's estate--did not qualify as a "debtor" under the Bankruptcy Code. Circuit disagreed and reversed. The Code's definition of "person," and therefore its definition of "debtor," excludes insolvent decedents' estates. Nevertheless, a § 304

proceeding can be commenced even if the entity in question would not qualify as a debtor under the Code.

§ 305(c) Appeals of Abstention Orders.

Goerg, *In re*, 930 F.2d 1563 (11th Cir. 1991). Pursuant to § 305(c), an order dismissing a case or suspending all proceedings in a case, or a decision not to dismiss can be appealed to the district court or bankruptcy appellate panel, but not to the Court of Appeals. Even before this amendment, such an appeal would have to be required, notwithstanding the prior statute. Otherwise, the order of dismissal or suspension would be an unreviewable order by non-article III judge, which is unconstitutional. The standard of review is a clearly erroneous standard with respect to findings of fact and a *de novo* review standard with respect to conclusions of law.

§ 324 Removal of Trustee or Examiner.

Walden v. Walker (In re Walker), 515 F.3d 1204 (11th Cir. 2008). A triall court has jurisdiction to reduce its oral findings to writing even after a notice of appeal has been filed. While the filing of a notice of appeal generally divests a court of its control over those aspects of the case involved in the appeal, an exception exists when a trial court reduces its oral findings to writing and cites relevant case law.

§ 327(a) Employment of Professional Persons.

Electro-Wire Products, Inc. v. Sirote & Permutt, P.C. (*In re* Prince), 40 F.3d 356 (11th Cir. 1994). Reversing an attorney award of $199,292, the court of appeals denied all compensation and expenses. The purpose of § 327(a) is to ensure impartiality in bankruptcy representation. The phrase "interest materially adverse to the estate" is not defined by the Bankruptcy Code, however, other courts have defined the phrase as holding either an 'economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant or a predisposition under the circumstances that render a bias against the estate.

§ 328(a) Limitation On Compensation of Professionals.

United States v. Ruff, 99 F.3d 1559 (11th Cir. 1996). Trustee employed broker to facilitate sale of estate assets. Broker was employed under § 328, with specific terms set out in the employment order. Broker was to share 10% commission with other brokers previously hired. Property sold and Broker was to receive $20,000 commission. Prior to these events, the IRS assessed a federal tax liability against Broker, pursuant to 26 U.S.C. § 6672. IRS served on Trustee a Notice of Levy for Broker's outstanding tax liabilities, which exceeded $230,000. Trustee did not turn the $20,000 commission over to the IRS as required by the Notice of Levy. Trustee argued she was not "in possession" of any property of the Broker when she received the Notice of Levy because the Broker's fee application had not yet been approved by the bankruptcy court. Circuit held since Broker was entitled to commission, which was fixed and determinable due to the § 328 order, Trustee was "in possession" of Broker's property, despite no final approval by bankruptcy court. The § 328 order curtailed the bankruptcy court's discretion with respect to the previously

approved terms of payment to the Broker. Because the Trustee failed to turnover the property, under the Treasury regulations, she was personally liable for the amount not turned over, $20,000.

§ 328(c) Limitation On Compensation of Professionals Found Not to Be Disinterested.

Electro-Wire Products, Inc. v. Sirote & Permutt, P.C. (*In re* Prince), 40 F.3d 356 (11th Cir. 1994). Reversing an attorney award of $199,292, the court of appeals denied all compensation and expenses. The purpose of § 327(a) is to ensure impartiality in bankruptcy representation. Section 328(c) permits, but does not require, denial of compensation to a professional found not to be disinterested. In exercising the discretion, the court should lean strongly toward denial of fees. The court should not speculate whether a conflict of interest influenced or caused an action to the prejudice of the estate. The client is entitled to conflict-free, impartial and independent counsel and evaluation of the potential claims of and against this estate. In this case, debtor's counsel represented the spouse and debtor's corporation and provided prepetition estate planning.

§ 330(a) Compensation of Officers.

Miller Buckfire & Co. v. Citation Corp. (In re Citation Corp.), 493 F.3d 1313 (11th Cir. 2007). Sections 328 and 330 provide two separate mechanisms for the estate to employ a professional. Under § 328, the trustee, with the bankruptcy court's approval, is allowed to employ a professional on any reasonable terms and conditions, including on a retainer, on an hourly basis, or on a fixed or percentage fee basis, or on a contingent fee basis. Under § 330(a), the bankruptcy court may award reasonable compensation for actual necessary services rendered by the professional based on the nature, the extent, and the value of such services, and considering the time spent on such services, and the cost of comparable services. The Eleventh Circuit affirmed the bankruptcy court's use of the Loadstar analysis, though not required, under § 330 to reduce the $3.5 million fee requested by an investment banker hired by the debtor to provide financial services, reversing the district court which found that the terms of the investment banker's contract prevailed.

Coastal Fuels Marketing, Inc. v. Florida Exp. Shipping Co., Inc., 207 F.3d 1247 (11th Cir. 2000). Fee applicant bears the burden of establishing entitlement and of documenting the appropriate hours and hourly rates. Court may consider its own knowledge and experience concerning reasonableness and propriety of fees and may form an independent judgment either with or without the aid of witnesses. Court should articulate and give principled reasons for its decisions and show any calculations. If the court determines to disallow hours, it must explain which hours are disallowed and show why an award of those hours would be improper.

Inglesby, *et al.* v. Moore, Trustee (*In re* America Steel Product), 197 F.3d 1354 (11th Cir. 1999). Attorneys representing Chapter 7 Debtor were denied application for payment of fees from bankruptcy estate. Prior to the 1994 Amendments, Chapter 7 attorneys could be paid by the estate. The amendments to 11 U.S.C. § 330(a) omitted attorneys of Debtors in Chapters 7 and 11. The amended § 330(a) precludes fees to an attorney for the debtor (as opposed to the attorney for debtors in possession) from a Chapter 7 or Chapter 11 estate. The court is not permitted to consider that the omission was the result of a legislative mistake, a drafting error. The reference to an attorney of a Chapter 11 estate is dictum and should not apply to an attorney employed under

§ 327(a) to represent a debtor in possession.

Lamie v. U. S. Trustee, 540 U. S. 526, 124 S. Ct. 1023 (2004). Chapter 11 case converted to one under Chapter 7. Debtor's attorney applied for fees under § 330(a)(1) for services rendered after the conversion. United States Trustee objected on the ground the attorney was not employed by the trustee and approved by the court, pursuant to § 327. Agreeing with the Eleventh Circuit, the Supreme Court held that the strict language of § 330(a) precludes fees to an attorney for the debtor. Debtor's attorneys may be paid pre-petition, but the trustee must control and marshal the assets of the estate post-petition. Before the 1994 amendments, the statute authorized payments to debtor's attorneys, but not thereafter. The fact that the statute has awkward and ungrammatical language does not make it so ambiguous as to permit the court to interpret it in conflict with the clear language.

Stroock & Stroock & Lavan v. Hillsborough Holdings Corp. (*In re* Hillsborough Holdings Corp.), 127 F.3d 1398 (11th Cir. 1997). Counsel for the debtor and counsel for the official committee are entitled to be reimbursed for actual, necessary expenses incurred in providing services under § 330(a)(1)(B). The Bankruptcy Court denied expenses attributable to overhead because it considered them a part of the hourly billing rate. Excluded categories included postage, secretarial charges, word processing, local travel expenses, meals, express mail, messengers, copying, supplies, and computer research charges. Counsel argued that hourly rates assumed reimbursement of these expenses, which are billed on a user fee. The expenses were excluded by categories early in the case, so the Court of Appeals treated it as a legal ruling, which is reviewed de novo. If a factual issue, then broad discretion is applied. The discretion in most fee issues is very broad, if not unlimited, and is rarely abused. Categorical denial, without evidence, of expenses reversed and remanded. Congress intends for professional compensation and expenses to be treated the same as in other branches of legal services. Competent counsel are to be encouraged to handle bankruptcy matters. User billing is a widespread billing practice. This case may encourage trial courts to require evidence on all § 330 applications.

McMillan v. Joseph DeCosimo and Co. (*In re* Das A. Borden & Co.), 131 F.3d 1459 (11th Cir. 1997). Administrative expenses are to be kept at a minimum so as to preserve as much of the estate as possible for creditors. Accounting services for an individual debtor and eighteen related partnerships are not administrative expenses in the case of a corporate debtor, even though those services may benefit the corporation. The services for related entities is only an unsecured claim. Administrative expenses must be necessary to the upkeep and maintenance of the bankruptcy estate.

Loranger v. Stierheim, 10 F.3d 776 (11th Cir. 1994). A decree awarding attorney fees must provide sufficient findings of fact for the appellate court to review the factors considered in determining the reasonable hourly rate, the number of hours reasonable expended, and if an adjustment to the lodestar is appropriate. The application for fees should itemize the tasks for all time spent, and clearly delineate compensable hours. If the application is voluminous, the court may give a clear explanation without an hour-by-hour analysis.

Brooks v. Georgia St. Bd. of Elections, 997 F.2d 857 (11th Cir. 1993). In awarding attorney fees, §1988 fees here, reasonable hourly rates are based upon the prevailing market rate in the relevant legal community for similar services by lawyers of comparable skills, experience, and reputation. If no lawyers in the community of the trial possess comparable skills, experience and reputation, then the relevant legal community expands until it includes such lawyers.

Holywell Corp. v. Smith (*In re* Holywell Corp.), 967 F.2d 568 (11th Cir. 1992). If an objection to a fee application is filed, an evidentiary hearing in order to receive evidence related to the disputed matter is only required when there is a dispute of a material historical fact. There is no need to hold an evidentiary hearing on matters on which the courts possess expertise, such as the reasonableness of the fee, the reasonableness of the hours and the significance of the outcome.

Port Royal Land & Timber Co., *In re*, 924 F.2d 208 (11th Cir. 1991). Fees should not be reduced for hours that are spent on unsuccessful efforts. Instead, the award of fees is based upon those services that are reasonable and necessary to the faithful representation of the bankruptcy estate.

Grant v. George Shumann Tire & Battery Co., 908 F.2d 874 (11th Cir. 1990). In awarding attorneys fees under § 330, the court should not consider any policy considerations as in a prevailing party provision. The issue is whether the services rendered were reasonable and necessary to the administration of the estate. Oftentimes, attorneys fees will have to be expended for the estate even where the efforts are not successful. The issue in this case is whether fees should be awarded for prosecuting an appeal on the issue of awarding attorneys fees. The court of appeals denied fees in this case because they would benefit the attorney and not the bankruptcy estate.

Red Carpet Corp. of Panama City Beach, *In re*, 902 F.2d 883 (11th Cir. 1990). District court and bankruptcy courts have broad discretion in determining the amount of attorneys' fees to award as compensation for services performed in connection with bankruptcy proceedings. An award of attorneys fees in a bankruptcy proceeding will be reversed only if the court abused its discretion. An abuse of discretion occurs if the judge fails to apply the proper legal standard or to follow proper procedures in making the determination, or bases an award upon clearly erroneous findings of fact.

Norman v. Housing Authority of City of Montgomery, 836 F.2d 1292 (11th Cir. 1988). The factors used in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) (applied to bankruptcy cases in First Colonial Corp. of America, *Matter of*, 544 F.2d 1291 (5th Cir. 1977) have been rejected by the Supreme Court as too subjective a guide in determining fees, and has been displaced by the lodestar formula. The factors are helpful in establishing a reasonable hourly rate. The initial step in determining value of lawyer's services is multiplying hours reasonably expended by a reasonable hourly rate to determine "lodestar" figure. Hourly rate is prevailing market rate in relevant legal community for similar services by lawyers of similar skill. Burden is on applicant to prove requested rate is in line with market rates by satisfactory evidence, which requires more than the affidavit of the attorney performing the services. The court is an expert on fees and may form an opinion on reasonable and proper fees with or without witnesses. Adjustments to lodestar:

if results were excellent, full amount should be awarded. "If the result was partial or limited success, then the lodestar must be reduced to an amount that is not excessive." Hours spent on unsuccessful claims may be identified and disallowed by the court or the award may be reduced by some proportion. Lodestar may be enhanced if case was taken on contingency, or for the time value of the fee if a delay was involved in obtaining the fee.

§ 347(a) Unclaimed Property.

The Georgian Villa, Inc. v. United States (*In re* Georgian Villa, Inc.), 55 F.3d 1561 (11th Cir. 1995). Chapter 11 debtor is entitled to surplus funds after administration of the estate. A bankruptcy court cannot deny a Chapter 11 debtor the surplus funds from the estate on equitable grounds. Bankruptcy courts are essentially courts of equity, but such equitable powers can only be exercised within the confines of the Bankruptcy Code. The plain language of the Code compels distribution of the surplus to the debtor. The case was administered under the Bankruptcy Act, then reopened to claim the surplus.

§ 348(a) Effect of Conversion.

State Airlines, Inc., *In re*, 873 F.2d 264 (11th Cir. 1989). Conversion of a case from Chapter 11 to Chapter 7 does not reimpose the automatic stay against a party granted relief therefrom prior to conversion.

§ 349 Effect of Dismissal.

Morris, *In re*, 950 F.2d 1531 (11th Cir. 1992). After main bankruptcy case, bankruptcy court entered judgment in related adversary. District Court reversed holding bankruptcy court did not have subject matter jurisdiction over adversary proceeding after dismissal of main bankruptcy case. Circuit reversed the district court. Although dismissal of the bankruptcy case usually results in dismissal of all remaining adversary proceedings, § 349 gives the bankruptcy court the power to alter the normal effects of the dismissal of a bankruptcy case if cause is shown. Section 349 acknowledges that some cases have progressed so far that judicial interference is needed to unravel or preserve the rights of parties.

§ 361(3) Adequate Protection.

Bonapfel v. Nalley Motor Trucks (*In re* Carpet Center Leasing Co.), 4 F.3d 940 (11th Cir. 1994). Section 361(3) prohibits only the granting of an administrative expense claim as adequate protection as an initial matter. The goal of § 361(3) is to protect creditors from unrealistic expectations, not debtors, and its prohibition applies only to the initial form of adequate protection allowed. However, administrative expense adequate protection is specifically allowed as a remedy for the later failure of the adequate protection granted under § 507(b).

§ 362(a) Automatic Stay.

Jacks v. Wells Fargo Bank (In re Jacks), 642 F.3d 1323 (11th Cir. 2011). Mortgage lender's internal documentation on debtors' account of post-petition attorney's fees did not constitute an

"act" under § 363(a)(3) in violation of the stay where mortgage lender never billed the debtors nor told them that they would be expected to pay the fees. Note: effective December 1, 2011, Bankruptcy Rule 3002.1 requires a creditor filing a proof of claim in a Chapter 13 case that has a claim secured by the debtor's principal residence to file and serve on the debtor, debtor's counsel, and trustee a notice itemizing all fees, expenses or other charges incurred post-petition.

Russell v. Caffey (In re Caffey), 384 Fed. Appx. 882 (11th Cir. 2010). Debtor's ex-wife willfully violated the automatic stay by failing to vacate state court contempt orders to recover unpaid child support and by extracting payments in the amount of $80,000 from the debtor in exchange for his release from jail. The contempt sanction was in the nature of civil contempt, not criminal contempt, and was, therefore, subject to the stay under § 362(b)(1). The ex-wife argued that she should not be penalized because of her inaction. The Eleventh Circuit noted that § 362 prohibits "the commencement or continuation of judicial process to recover a debt." The court cited cases where creditors have an affirmative duty to move to vacate contempt and arrest orders that were not themselves issued in violation of the automatic stay. The Eleventh Circuit held further that regardless of whether or not the ex-wife had an affirmative duty to vacate the outstanding contempt orders, she actively violated the stay after the arrest warrant was executed by opposing the debtor's release from jail after being informed of the debtor's bankruptcy and negotiating $80,000 in payments from the debtor as a condition of his release.

Williford v. Williford (In re Williford), 294 Fed. Appx. 518 (11th Cir. 2008). The bankruptcy court did not abuse its discretion in annulling the automatic stay and, thereby, validating a postpetition divorce decree. Although the divorce decree violated the stay and was, therefore, void absent annulment, the bankruptcy court reasonably exercised its discretion to grant annulment for cause pursuant to § 362(d)(1).

Daewoo Motor Am., Inc. v. General Motors Corp. (In re Daewoo Motor Am., Inc.), 459 F.3d 1249 (11th Cir. 2006). The district court dismissed the debtor's complaint against a Korean debtor on the grounds of international comity. The court did not abuse its discretion when it granted comity to an order of a Korean bankruptcy court approving the sale of the Korean automobile manufacturer's assets and liabilities. To determine whether comity was appropriate, the court of appeals evaluated three factors: (1) whether the foreign court was competent and used proceedings consistent with civilized jurisprudence, (2) whether the judgment was rendered by fraud, and (3) whether the foreign judgment was prejudicial because it violated American public policy notions of what is decent and just. The interest of Korea in regulating business activity on its shores outweighed any prejudice to the American debtor's loss of its exclusive right to sell the manufacturer's vehicles. The court also determined that reciprocity was not an absolute precondition to comity.

United States v. White, 466 F.3d 1241(11th 2006). The stay terminated as to tax assessment upon entry of a Chapter 11 order confirming plan, despite the plan's delayed effectiveness. The tax assessment, which was in the nature of a bookkeeping entry noting debtor's alleged delinquency rather than of a levy against property, did not violate the automatic stay as having been made subsequent to the entry of an order confirming the debtor's plan. Language in the debtor's

confirmed plan that purported to delay the effective date of the plan to a time subsequent to confirmation was insufficient to delay the grant of the debtor's discharge immediately upon entry of the confirmation order. The Eleventh Circuit noted the limited precedential effect of its ruling in this case as the statutory provision relevant to this case was amended in 1994 so that debtors no longer enjoy an automatic stay against tax assessments. BAPCPA further amended § 1141 so that for individual debtor's confirmation does not discharge any debt until the court grants a discharge on completion of all payments under the plan.

Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 116 S. Ct. 286 (1995). A bank does not violate the automatic stay by placing an administrative freeze on its customer's account. There is no setoff, under §362(a)(7), until: (1) a decision to setoff, (2) an action to implement, and (3) a recording of the setoff. A temporary freeze while seeking relief from the automatic stay is not a setoff. Moreover, §§ 362(a)(3) and (6) are not violated because a bank account is a promise to pay the customer and not funds held by the bank. A failure to honor the customer's orders on the account is merely a failure to perform a promise. The administrative hold was implemented over eight months after the petition was filed.

Ankenbrandt v. Richards, 504 U.S. 689, 112 S. Ct. 2206 (1992). The Constitution does not exclude domestic relations cases from federal jurisdiction. Statutory interpretation of diversity jurisdiction has crafted an exception for the issuance of a decree determining the domestic relationship as to granting or modifying a divorce, alimony or child custody. The exception does not include enforcement of such a decree. Abstention does not apply when no proceedings are pending in state tribunals. Recognizing that abstention should rarely be invoked, the Court stated it may apply when a case presents difficult state law questions with important public policy issues beyond the case at bar.

Board of Governors of the Federal Reserve System v. MCorp Financial, Inc., 502 U.S. 32, 112 S. Ct. 459 (1991). When there is a conflict between the automatic stay provisions of the bankruptcy code and administrative proceedings of the Federal Reserve Board for regulating banks, the banking statute prevails. The automatic stay provisions of § 362(a)(1),(3) and (6) do not apply to ongoing, non-final administrative proceedings of a regulatory nature. However, when the Board of Governors makes a final order, the Bankruptcy Court, pursuant to an adversary proceeding filed in bankruptcy court, has the authority to enter an injunction to stop the enforcement of that order.

Telfair v. First Union Mortgage Corp., 216 F.3d 1333 (11th Cir. 2000), *cert. denied* 121 S. Ct. 765 (2001). Post confirmation creditor applied debtor's payments to recover attorney's fees rather than to principal debt. Debtor argued such actions violated the automatic stay under § 362. Circuit had to reconcile § 1306 (dealing with Chapter 13 property of the estate), § 1327 (dealing with the vesting of property post confirmation) and § 362. The Circuit adopted the estate transformation approach, which regards only that property necessary for the execution of the plan as remaining property of the estate after confirmation. Here, after confirmation, only the amount required for the plan payments remained property of the estate. The debtor's loan payments, made outside of the plan, were therefore no longer property of the estate and thus, the creditor's application of a

portion of those payments to attorney's fees did not violate § 362(a).

Muse v. Accord Human Resources, Inc., 2005 U.S. App. LEXIS 7240 (April 18, 2005) (*not for publication*). Plaintiff in a Fair Labor Standards Act ("FLSA") case had filed Chapter 13 bankruptcy on November 7, 1997. Plaintiff's plan was confirmed on April 7, 1998 and he received a Chapter 13 discharge on August 8, 2003.

From January 3, 2000 to September 6, 2002, plaintiff was employed by Defendants. On June 6, 2003, plaintiff filed the FLSA claim seeking to recover unpaid overtime allegedly not paid to him during the entire time he was employed by defendants. Defendants raised the defense of judicial estoppel. The district court held that because plaintiff's claim arose during the pendency of his Chapter 13 case and he did not disclose the claim, then he was judicially estopped from asserting the claim.

The Eleventh Circuit reversed because plaintiff's claim did not arise until after confirmation of his Chapter 13 plan. The court based its holding on the interpretation of Section 1306(a) and 1327(b) in Telfair v. First Mortgage Corp., 216 F.3d 1333 (11th Cir. 2000). In Telfair, the court held that assets acquired post-confirmation are not property of the bankruptcy estate unless they are necessary to maintain the bankruptcy plan. In this case, the court held that because there was no assertion that the FLSA claim was necessary to meet the terms of the bankruptcy plan, he had no duty to disclose the claim, and the claim was accordingly not property of the estate.

Meadows v. Commissioner of Internal Revenue, 2005 WL 768131 (11th Cir., April 6, 2005). This case came to the Eleventh Circuit on appeal of the Tax Court's granting the IRS's motion for summary judgment on the issue of whether or not the Tax Court abused its discretion of declining to decide bankruptcy issues raised by debtor Meadows. Bankruptcy debtor Meadows filed tax returns for 1988 to 1993 in late 1993. The IRS had assessed the tax, interest and penalties and secured a lien on the Meadows' and his non-debtor wife's residence. Mrs. Meadows obtained a $10,000 home equity loan to pay the IRS to release the lien, and upon receipt of the agreement, the IRS took the money and applied it to Debtor Meadows' 1988 tax liability. Since Meadows had received discharge on December 21, 1995, he alleged that the $10,000 had been applied to the wrong tax period since the 1998 tax year had been discharged while the 1992 and 1993 years for which he still owed over $31,000 had not been discharged. Meadows argued that application to the wrong debt was a violation of the automatic stay. Meadows appealed to the Tax Court where both parties filed for summary judgment.

Meadows contended that the $10,000 was his equitable interest in the property, so applying those funds to the 1988 liability violated the bankruptcy stay. The IRS countered that the Tax Court did not have jurisdiction to decide this bankruptcy issue, that the stay wasn't violated because the payment was made by a non-debtor so the debtor could have no say-so in how it was applied, and that any remedy for violation of the stay would return the money to Mrs. Meadows not to the debtor. The Tax Court granted the IRS's motion for summary judgment, and Meadows appealed to the Eleventh Circuit.

The Eleventh Circuit held that while the Tax Court does not have jurisdiction under 26 U.S.C. § 6213 to determine dischargeability of an unpaid tax liability in a bankruptcy proceeding, it does have jurisdiction under § 6330 to decide whether a bankruptcy court had discharged a taxpayer's unpaid liabilities for certain years, because that issue is directly connected to whether or not the

Tax Commissioner could proceed with a lien. Because the issue of violation of the stay involves a complex bankruptcy question, the Tax Court did not abuse its discretion in declining jurisdiction and deferring to the Bankruptcy Court, thus the Tax Court judgment was affirmed.

Roberts v. Commissioner of Internal Revenue, 175 F.3d 889 (11th Cir. 1999). Taxpayers' petition in the Tax Court seeking redetermination of deficiencies was the commencement of an independent judicial proceeding, rather than a mere continuation of IRS administrative proceedings. Given that the taxpayers initiated it, the proceeding was not one 'against the debtor,' subject to the automatic stay of the Bankruptcy Code. Moreover, the Tax Court proceeding was not one 'to recover a claim against the debtor,' subject to the stay, since the Court's jurisdiction was limited to review of a deficiency and did not extend to recovering a deficiency.

United States v. Ruff (*In re* Rush-Hampton Industries), 98 F.3d 614 (11th Cir. 1996). Federal government's right to setoff against its obligation for tax refund to debtor is automatically stayed, upon filing of bankruptcy petition by debtor. IRS should have obtained a lifting of the automatic stay before setoff. Penalty not warranted by harmless violation.

Carver v. Carver, 954 F.2d 1573 (11th Cir. 1992). The state court held a debtor in contempt for default on support obligations after the petition for relief was filed. The debtor's ex-wife and her attorney were aware of the bankruptcy case, and the debtor obtained an award for damages against them for violation of the automatic stay. The court of appeals reversed, holding that although the automatic stay applies, the court should have abstained from entering an award of damages. Section 362(a) is usually not an exception in Chapter 13 because almost all property is property of the estate. Even though the defendants violated the automatic stay, the bankruptcy court should not have awarded damages and should have abstained from hearing the case because of the interest of comity with the state. Domestic law is a special category for determination by state courts and the bankruptcy court should avoid being involved. Stay violations should only be considered if the court is not required to delve too deeply into domestic law. Note that Ankenbrandt v. Richards effectively overrules or at least limits the application of Carver.

B. F. Goodrich Employees Credit Union v. Patterson (*In re* Patterson), 967 F.2d 505 (11th Cir. 1992). A credit union violates the automatic stay by placing an administrative freeze on a member debtor's account, by exercising self-help when applying the account to the debt as a set-off, and by suspending credit union services to the debtor. Even though the checking and savings accounts were pledged as security, creditor cannot protect its right of set-off with an administrative freeze. A valid right of set-off requires a mutuality of obligation, determined by a court. Self-help is not permitted. The circuit court discussed payment of the accounts into the registry, but failed to consider many practical and procedural problems. The holding would seem to be reversed by Citizens Bank of Maryland v. Strumpf.

State Airlines, Inc., *In re*, 873 F.2d 264 (11th Cir. 1989). Conversion of a case from Chapter 11 to Chapter 7 does not reimpose the automatic stay against a party granted relief therefrom prior to conversion.

Lashley, *In re*, 825 F.2d 362 (11th Cir. 1987). Bankruptcy court may not retroactively impose a stay. Where the court lifted the stay, the debtor requested no stay of the order, the foreclosure took place, and the debtor then requested stay pending appeal, the bankruptcy court could not make stay retroactive to date of original order.

Ellison v. Northwest Engineering Co., 707 F.2d 1310 (11th Cir. 1983). Debtor's filing of bankruptcy after oral argument on appeal of lawsuit but before circuit court issued opinion stayed issuance of the opinion.

Borg-Warner Acceptance Corp. v. Hall, 685 F.2d 1306 (11th Cir. 1982). Actions taken in violation of stay are void and without effect. A creditor may be subject to contempt of court and a fine, and the debtor may be entitled to attorney fees.

§ 362(b) Automatic Stay Limitations.

Griggs v. City of Gadsden Rev. Dept. (Griggs), 327 Fed. Appx.186 (11th Cir. 2009). A debtor must present sufficient evidence that the defendants used the criminal process in bad faith to collect a debt which would have otherwise been discharged. Here the debtor had to show that the defendants criminally charged her with operating a business without a license to frustrate the bankruptcy court's jurisdiction, but nothing suggested that the defendants could have recovered any discharged debt as part of the debtor's criminal prosecution, thus, the § 362(b)(1) stay exception applied.

Old West Annuity and Life Ins. Co. v. The Apollo Group (The Apollo Group), 605 F.3d 856 (11th Cir. 2010). Section 544(a) gives the trustee the power to avoid only pre-petition transfers. A bankruptcy court may grant creditors relief from the automatic stay after notice and hearing and a stay relief order is a final order that is immediately appealable. Although a bankruptcy court's order lifting the automatic stay is not equivalent to an abandonment of the estate's property, when a bankruptcy court grants a creditor relief from the stay the creditor is allowed to realize its interest in the collateral. After the court lifted the stay, creditor perfected its lien postpetition so as not to be avoidable by trustee.

Wood v. Commissioner of Internal Revenue, 138 Fed.Appx. 168 (11th Cir. 2005)(*not selected for publication).* Notices of federal income tax deficiency did not violate the automatic stay. The filing of a bankruptcy petition triggers the automatic stay as to the "commencement or continuation of a proceeding before the United States Tax Court concerning the debtor." 11 U.S.C. § 362(a)(8). The stay remains in effect until the earliest of the closing of the case, dismissal of the case, or grant or denial of a discharge. The IRS issued the deficiency notice more than three years after the bankruptcy case was closed and the stay had ended. Further, audits and notices of deficiency are expressly exempted from the stay pursuant to § 362(b)(9).

Walker v. Gwynn (In re Walker), 157 Fed.Appx. 171 (11th Cir. 2005)(*not selected for publication)*. Civil counsel for a creditor does not violate the automatic stay by assisting the state in enforcing

a criminal judgment against a debtor in a restitution hearing. The enforcement of a criminal judgment against a debtor in a restitution hearing does not violate the automatic stay and a creditor does not violate the automatic stay by assisting the state in enforcing a criminal judgment even though the creditor's primary motivation is to collect the debt.

Brock v. Rusco Industries, Inc., 842 F.2d 270 (11th Cir. 1988). Purpose of automatic stay is to stop collection efforts and help relieve the debtor of financial pressures. The purpose of § 362(b)(4), providing an exception to the stay, is to allow government to enforce its laws with uniformity without regard to debtor's position in bankruptcy court. The Secretary of Labor's action under FLSA is excepted from stay.

Barnette v. Evans, 673 F.2d 1250 (11th Cir. 1982). Bankruptcy court erred in enjoining the debtor's criminal prosecution for giving a worthless check under Ala. Code § 13A-8-3 (1975). "The purpose of bankruptcy is to protect those in financial, not moral, difficulty."

§ 362(d) Relief from the Automatic Stay.

Williford v. Williford (In re Williford), 294 Fed. Appx. 518 (11th Cir. 2008). The bankruptcy court did not abuse its discretion in annulling the automatic stay and, thereby, validating a postpetition divorce decree. Although the divorce decree violated the stay and was, therefore, void absent annulment, the bankruptcy court reasonably exercised its discretion to grant annulment for cause pursuant to § 362(d)(1).

United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 108 S. Ct. 626 (1988). A secured creditor sought adequate protection for the loss of its right to foreclose. Supreme Court held "interest in property" protected by § 362(d)(1) does not include a secured party's right to immediate foreclosure. Further, since this was an undersecured creditor, it was not entitled to interest on its collateral during the stay to assure adequate protection under § 362(d)(1).

Bel-Bel Int'l Corp. v. Community Bank of Homestead, 162 F.3d 1101 (11th Cir. 1998). Panamanian Corp. held a security interest in the proceeds of a tomato crop. Debtor and other lenders restructured debts with payments to come from the tomato crop. Held that Panamanian lender has a claim against other lenders for conversion. Bankruptcy court's order granting creditor relief from stay allowed creditor to pursue its claims against Chapter 11 debtor on a promissory note and a fraud claim Order allowed creditor's suit to proceed without exception. Thus, as the suit included both claims, both counts could proceed.

Orix Credit Alliance, Inc. v. Delta Resources, Inc. (*In re* Delta Resources, Inc.), 54 F.3d 722 (11th Cir. 1995). Adequate protection payments under §362(d)(1) compensate decline in the value of collateral only, whether the claim is oversecured or undersecured. To the extent a claim is oversecured on the date of filing the petition, postpetition interest is added to the principal balance when allowing the claim at the end of the case by §506(b). However, adequate protection does not

include periodic postpetition interest payments to insure against diminution in the value of an equity cushion.

Dixie Broadcasting, Inc., *In re*, 871 F.2d 1023 (11th Cir. 1989). A petition filed in bad faith justifies relief from the automatic stay. Bankruptcy court's decision to grant or deny relief from the automatic stay is a final decision reviewable on appeal under the abuse of discretion standard.

Underwood, *In re*, 869 F.2d 1501 (11th Cir. 1989). Bankruptcy court's findings of fact were not clearly erroneous, and it did not abuse its discretion in denying motion for relief from the automatic stay to pursue litigation, where litigation would impose a substantial burden on the debtor.

Albany Partners, Ltd., *In re*, 749 F.2d 670 (11th Cir. 1984). Property is not "necessary to an effective reorganization" under § 363(d)(2)(B) unless an effective reorganization is possible; the mere fact that the property is indispensable to the debtor's survival is insufficient. Acts taken in violation of the automatic stay are generally deemed void and without effect. Court may "annul" the stay under limited circumstances, awarding retroactive relief.

Peoples Bank & Trust Co. v. Coleman, 736 F.2d 643 (11th Cir. 1984). Creditor held a mortgage with a future advance clause. Creditor subsequently modified agreement when creditor advanced new funds for the purchase of new automobiles. Upon default on vehicles, creditor moved for relief from the automatic stay against the real property securing the mortgage. Circuit reversed the lower courts holding the parties modified the mortgage agreement, deleting the real property as security for the loan. As such, any default on the vehicle note, was not grounds for lifting the automatic stay as to the real property.

§ 362(e) Automatic Termination of the Stay.

Borg-Warner Acceptance Corp. v. Hall, 685 F.2d 1306 (11th Cir. 1982). Order on relief from stay motion had to be construed as an order after a final hearing. If it had been a preliminary hearing, the order must have required that the stay remain in place and set a final hearing.

§ 362(g) Burdens of Proof on Relief from Stay Motions.

Dallas v. S.A.G., Inc., 836 F.2d 1307 (11th Cir. 1988). On relief from stay motion, bankruptcy court assigned burden of proving requirements of Alabama Code § 10-2A-160 to creditor. That section prohibits a corporation from pledging or disposing of "all or substantially all" of the corporation's assets without an authorization from its board of directors. Motion for relief was denied because creditor failed to prove that not "all or substantially all" of the corporation's assets were included within his security interest, and because he failed to prove that the board of directors had authorized the security agreement. Circuit reversed holding burden of proof is on the party opposing the relief, rather than on the party seeking relief from the automatic stay. Under § 362(g), the moving party need only prove that the debtor lacks equity in the property. The party opposing the relief has the burden of proof on all other issues. If the trustee wished to assert that the

requirements of section 10-2A-160 were not met, he has the burden of proving its assertion.

Allstar Building Products, Inc., *In re*, 834 F.2d 898 (11th Cir. 1987), *rev'g* *In re* Allstar Building Products, Inc., 809 F.2d 1534 (11th Cir. 1987). Bankruptcy court improperly altered burdens of proof provided under § 362(g) by requiring moving creditor to prove it had a valid security interest beyond the allegations in the pleadings, since burden properly would be on trustee or debtor to prove lack of security interest as a defense.

§ 362(h) Damages for Violations of the Stay.

Jove Engineering, Inc. v. Internal Revenue Service, 92 F.3d 1539 (11th Cir. 1996). Corporate or partnership debtor cannot recover damages for violation of the automatic stay pursuant to § 362(h). That section applied only to individuals damaged by stay violations. However, § 105(a) should be used as an alternative. Contempt requires knowledge of pending bankruptcy and an intentional act. IRS repeated collection efforts violated automatic stay. One department failed to stop another department in different city from attempting collection of the debt.

Commodore Holdings, Inc. v. Exxon Mobil Corp. (*In re* Anastasia Cruises, Inc.), 331 F.3d 1257 (11th Cir. 2003). A debt collector sought to collect from an asset of the estate and was held in contempt for violating the automatic stay. Debtor then moved to hold other parties with an interest in the debt in contempt on the grounds that they were imputed with the acts of the debt collector. The creditor had assigned the debt to a debt collector for $10,000, and retained a $40,000 contingent interest, in the event that the collector recovered more than $100,000. The trial court found the assignor was not affiliated with the debt collector, nor did the assignor take any action to advise, assist or request the debt collector to collect the debt in violation of the stay. An assignment for consideration and retention of a contingent interest is not an unlawful collection practice. The assignor is not imputed with the acts of the debt collector and is not in contempt.

Borg-Warner Acceptance Corp. v. Hall, 685 F.2d 1306 (11th Cir. 1982). Actions taken in violation of stay are void and without effect. A creditor may be subject to contempt of court and a fine, and the debtor may be entitled to attorney fees.

§ 363(b) Use, Sale, or Lease of Property of the Estate Outside the Ordinary Course of Business.

MacNeal v. Equinamics, Corp., 308 Fed. Appx. 311 (11th Cir. 2009). Pursuant to § 363(b), a trustee has authority to sell property of the estate and after a sale is approved by the bankruptcy court and consummated by the parties, the sale may not be invalidated unless it is stayed pending appeal pursuant to § 363(m). Because the debtor did not obtain a stay of the sale of his claims, the district court could not give the debtor meaningful relief from the judgment. The failure to obtain stay rendered the debtor's appeal moot.

Koch Foods of Ala., LLC v. General Electric Capital Corp., 303 Fed. Appx. 841 (11th Cir. 2008). Pursuant to a lease agreement, equipment remained personal property of the lessor even after another party purchased the debtor's poultry processing plant. Under Alabama law, the chattel

character of a fixture may be retained by an agreement between the seller and purchaser even against third persons purchasing or taking a mortgage upon the land upon which the fixture stands, *bona fide* and without notice of such agreement.

Orix Credit Alliance, Inc. v. Mills (*In re* Beach Television Partners), 38 F.3d 535 (11th Cir. 1994). Chapter 7 sold two broadcast licenses to private parties. Creditor asserted security interest in licenses and requested turnover of proceeds. Trustee countered creditor could not hold a security interest in broadcast licenses. Circuit Court reversed. Courts have long held that security interest in broadcast licenses, regulated by the Federal Communications Commission, are invalid, because the licensee had no ownership interest in the license, as required by U.C.C. § 9-203(1). The Circuit rejected the traditional position, holding the rights between licensees and FCC can be distinguished from rights between the licensee and a lender. A security interest in the proceeds of a sale of a broadcast license does not interfere with the FCC's right to regulate the license. The case does not address the mechanics, but arguably the secured lender could only sell the collateral to a purchaser approved by the FCC, because its permission is required for any transfer or assignment of the license.

§ 363(c) Use, Sale, or Lease of Cash Collateral.

George Ruggiere Chrysler-Plymouth, Inc., *In re*, 727 F.2d 1017 (11th Cir. 1984). Debtor filed motion for use of cash collateral which creditor opposed. Circuit weighed the debtor's interest in using cash collateral and the creditor's interest in conserving cash collateral. To resolve this tension between debtor and creditor, § 363(c)(2)(B) allows the court to authorize use of cash collateral only if the use accords with other provisions of § 363. The principal restraint on use of cash proceeds is found in § 363(e), which specifies that the court shall condition the use of secured property "as is necessary to provide adequate protection of such interest." Thus, when a creditor opposes a proposed use of cash collateral, the guiding inquiry is whether its security interests are "adequately protected" absent the additional protection that the cash collateral would provide. There must be an individual determination of the value of the secured creditor's interest and whether a proposed use of cash collateral threatens that value. Value of secured interest for purpose of determining adequate protection is lesser of the amount of the secured claim or the value of collateral, and is determined as of the date of filing. Where collateral is valued, wholesale value is used because that is the "amount which the creditor would receive by its customary or commercially reasonable means of disposition." Bankruptcy court was not clearly erroneous in allowing the debtor to retain gross profits and send wholesale value to the creditor.

§ 363(e) Adequate Protection.

United States v. Whiting Pools, Inc., 462 U.S. 198, 103 S. Ct. 2309 (1983). When property of the debtor is required to be turned over pursuant to § 542, the creditor losing possession does not lose its lien. Nor is its status as a secured creditor destroyed. The creditor becomes entitled to adequate protection for its interests under § 363(e).

Capital Factors, Inc. v. Empire for Him, Inc. (*In re* Empire for Him, Inc.), 1 F.3d 1156 (11th Cir. 1993). Prepetition accounts receivable collected and held under a factoring agreement are property

of the estate required to be turned over pursuant to § 542. However, the turnover order must provide adequate protection to the secured party. The Bankruptcy Code provides secured creditors the right to adequate protection to replace the protection afforded by possession.

George Ruggiere Chrysler-Plymouth, Inc., *In re*, 727 F.2d 1017 (11th Cir. 1984). Debtor filed motion for use of cash collateral which creditor opposed. Circuit weighed the debtor's interest in using cash collateral versus the creditor's interest in conserving cash collateral. To resolve this tension between debtor and creditor, § 363(c)(2)(B) allows the court to authorize use of cash collateral only if the use accords with other provisions of § 363. The principal restraint on use of cash proceeds is found in § 363(e), which specifies that the court shall condition the use of secured property "as is necessary to provide adequate protection of such interest." Thus, when a creditor opposes a proposed use of cash collateral, the guiding inquiry is whether its security interests are "adequately protected" absent the additional protection that the cash collateral would provide. There must be an individual determination of the value of the secured creditor's interest and whether a proposed use of cash collateral threatens that value. Value of secured interest for purpose of determining adequate protection is lesser of the amount of the secured claim or the value of collateral, and is determined as of the date of filing. Where collateral is valued, wholesale value is used because that is the "amount which the creditor would receive by its customary or commercially reasonable means of disposition." Bankruptcy court was not clearly erroneous in allowing the debtor to retain gross profits and send wholesale value to the creditor.

§ 363(h) Sale of Co-owners Interest.

Spain, *In re*, 831 F.2d 236 (11th Cir. 1987). Where property is deeded after November 1972, a tenancy in common with right of survivorship must be construed as a joint tenancy with destructible survivorship rights. As a joint tenancy, the trustee can force the sale of the non-debtor's interest in real property, pursuant to § 363(h).

Livingston, *In re*, 804 F.2d 1219 (11th Cir. 1986). Under Alabama law, joint tenancy created between July 1965 and November 1972 is a Bernhard tenancy in common for life with a cross-contingent remainder in survivorship. This type of property interest is not included in the provisions of § 363(h), which applies only to tenancies in common, joint tenancies, and tenancies by the entirety.

§ 363(m) Sales Pending Appeal.

Miami Center Ltd. Partnership v. Bank of New York, 838 F.2d 1547 (11th Cir. 1988). Section 363(m) operates to moot an appeal unless a stay pending appeal has been granted. Section 363(m) does not apply where the debtor's assets have been sold pursuant to a plan of liquidation.

The Charter Co., *In re*, 829 F.2d 1054 (11th Cir. 1987). Failure to obtain a stay of sale pending appeal renders moot the appeal of an order allowing a sale, even where the buyer is the appellant.

§ 364 Obtaining Credit.

Matter of Saybrook Mfg. Co., 963 F.2d 1490 (11th Cir. 1992). Sections 364(c) and 364(d) authorize Chapter 11 debtors to obtain secured credit and incur secured debt as part of their reorganization. By their express terms, sections 364(c) & (d) apply only to future--i.e., post-petition--extensions of credit. They do not authorize the granting of liens to secure pre-petition loans. Thus, cross-collateralization is authorized as a method of post- petition financing under section 364.

§ 365 Executory Contracts and Unexpired Leases.

Chira v. Saal (In re Chira), 567 F.3d 1307 (11th Cir. 2009). Settlement agreement under which trustee agreed to assume executory purchase contract for hotel did not trigger former wife's rights as a non-debtor co-owner. The Eleventh Circuit established two requirements for approval of a settlement agreement that includes assumption of a pre-bankruptcy contract: (1) the contract at issue must be executory in nature and meet the other basic requirements in § 365; and (2) the settlement agreement must meet the four part test for approval under Bankruptcy Rule 9019 as established in *Wallis v. Justice Oaks, II, Ltd. (In re Justice Oaks II, Ltd.)*, 898 F.2d 1544 (11th Cir. 1990).

§ 365(a) Assumption or Rejection of Executory Contracts and Unexpired Leases.

Thompkins v. Lil'Joe Records, Inc., 476 F.3d 1294 (11th Cir. 2007). A music recording company's

confirmed Chapter 11 plan provided for the rejection of all executory contracts including a contract

transferring ownership of a rap artist's song copyrights to the debtor in exchange for future royalties. Rejection under § 365(a) did not cause ownership of the copyrights to revert back to the artist. The copyrights passed into the bankruptcy estate and from there were legally assigned to another recording company that purchased them from the debtor. Section 365 addresses only future, unperformed obligations of the parties. It does not impact the executed portions of the contract. The rejection freed the debtor from its obligation to pay royalties under the agreement and gave the artist a prepetition claim for damages resulting from the breach. Section 365(g) provides that rejection of an executory contract that has not been assumed constitutes a pre-petition breach. The non-debtor party to the rejected contract becomes a general unsecured creditor who was entitled to seek contract damages against the debtor as a prepetition breach of contract claim. By failing to file a proof of claim for the rejection damages, the rap artist slept on his rights and waived any damages to which he might have been entitled.

Sipes v. Atlantic Gulf Communities Corp. (*In re* General Development Corp.), 84 F.3d 1364 (11th Cir. 1996). The general rule is that state law governs questions of property rights in bankruptcy. The general rule excepts those areas where a specific federal interest governs the relationship between the parties. A real property sales contract, when the debtor is the seller, may fit the exception. Purchaser paid the entire purchase price pre-petition and demanded specific performance. Debtor-in-possession's confirmed plan rejected the contract and provided for the claim. The Countryman definition of executory contract to require unperformed mutual obligations on both sides is rejected. The functional approach adopted. The question of whether a contract is executory is determined by the benefits that assumption or rejection would produce

for the estate. Even though there may be material obligations outstanding on the part of only one of the parties to the contract, it may be executory if its assumption or rejection benefits the estate. In this case, rejection permitted debtor-in-possession to avoid obligations it was financially unable to meet and to reorganize.

City of Jamestown, Tenn. v. James Cable Partners, L.P. (*In re* James Cable Partners, L.P.), 27 F.3d 534 (11th Cir. 1994). A debtor-in-possession may assume an executory contract from itself as debtor.

Gardinier, Inc., *In re*, 831 F.2d 974 (11th Cir. 1987). Since prepetition agreement to sell land was actually two separate contracts, an executory contract for the sale and an executed contract for a broker's fee, the debtor could assume the former contract and reject the separate brokerage agreement.

Ranch House of Orange-Brevard, Inc., *In re*, 773 F.2d 1166 (11th Cir. 1985). Where reorganized debtor removed state court action involving assignment of lease to bankruptcy court and bankruptcy court ruled that lease had been rejected in the plan of confirmation, court of appeals would give great deference to court construing its own order. Circuit affirmed bankruptcy court's determination that Chapter 11 debtor expressly rejected lease, where confirmation order embraced debtor's initial plan of reorganization, and initial plan rejected executory contracts.

Brada Miller Freight System, Inc., Matter of, 702 F.2d 890 (11th Cir. 1983). Section 365 also applies to collective bargaining agreements. As an ordinary commercial contract may be rejected by a trustee upon a showing that the rejection would benefit the estate, a greater showing is required, however, to reject a collective bargaining agreement. Note: This case was decided prior to both N.L.R.B. v. Bildisco and Bildisco, 465 U.S. 513 (1984) and the 1984 enactment of § 1113.

§ 365(b) Curing Default Before Assumption or Rejection.

Airlift Int'l, Inc., *In re*, 761 F.2d 1503 (11th Cir. 1985). Upon assuming an executory contract or unexpired lease under § 365 the estate must (i) cure all defaults, (ii) compensate the other party for any pecuniary losses arising from such default, and (iii) provide adequate assurance of future performance under the agreement.

§ 365(c) Restrictions on Assumption/ Assignment of Executory Contracts and Unexpired Leases.

City of Jamestown, Tenn. v. James Cable Partners, L.P. (*In re* James Cable Partners, L.P.), 27 F.3d 534 (11th Cir. 1994). Executory contract could be assumed, notwithstanding prohibition against assignment, if two conditions are met. First, "applicable law" must excuse the other party from accepting performance from an entity other than the debtor. Second, the other party must not have consented to the assumption of the agreement. "Applicable law" does not refer to general prohibitions barring assignment. "Applicable law" refers to non-bankruptcy law. No law proffered by other party that would excuse it from accepting performance from a third party.

Thomas B. Hamilton Co., *In re*, 969 F.2d 1013 (11th Cir. 1992). An agreement for a bank to purchase a merchant's credit card transactions with recourse is not a financial accommodation. Debtor and credit card merchant reached agreement for the purchase of credit card sales drafts from debtor with recourse against debtor for rejected sales. This contract did not extend "financial accommodations" as that term is used in § 365(c)(2). Section 365(c)(2) does not apply to all contracts that involve the extension of credit. It merely applies to "contracts to make loans and other traditional kinds of debt financing arrangements." Here, agreement merely established contractual business relationship between the parties. Any financing that was part of relationship was only incidental to relationship.

§ 365(d) Timing of Assumption or Rejection.

Airlift Int'l, Inc., *In re*, 761 F.2d 1503 (11th Cir. 1985). In the typical Chapter 11 case the trustee must assume or reject an executory contract or unexpired lease before confirmation of a plan, although the court, pursuant to a request of any party to such contract or lease, may set a specified time period in which the trustee must assume or reject.

§ 365(e) Termination or Modification Due to Filing of Bankruptcy.

Yates Development, Inc. v. Old Kings Interchange, Inc. (*In re* Yates Development, Inc.), 256 F.3d 1285 (11th Cir. 2001). Debtor had option to purchase real property. Contract provided the base price would be increased $5,000 per day if the option was extended. Prior to expiration of option, debtor filed it bankruptcy petition. Debtor argued § 365(e) prevented the inflated base price to be charged. The Circuit held § 365(e)(1) forbids the enforcement of ipso facto clauses. Section 365(e)(1) invalidates provisions in executory contracts and unexpired leases modifying or terminating the agreements conditioned upon (A) the insolvency or financial condition of the debtor at any time before the closing of the case; (B) the commencement of a bankruptcy case; or (C) the appointment of or taking possession by a trustee. Here, the provision in the contract for the increased price was not based upon one of the situations proscribed in § 365(e), and was, therefore, enforceable.

§ 365(g) Effect of Rejection.

Gardinier, Inc., *In re*, 831 F.2d 974 (11th Cir. 1987). Trustee's rejection of the separate brokerage agreement, relegated creditor to the status of a general unsecured creditor.

§ 501(a) Filing Proofs of Claims.

The Charter Co., *In re*, 876 F.2d 866 (11th Cir. 1989). Section 501(a) sets forth who may file proofs of claims. There is no explicit provision authorizing the filing of class proofs of claim. Further, the statutory list of who may file, and the definitions of the terms composing the list, do not include a class representative. However, this list is not exclusive. The circuit held that a proof of claim filed on behalf of a class of claimants is valid. This reading of § 501 to permit class proofs of claim is consistent with the goals of the bankruptcy statutory scheme.

§ 502(a) Allowance of Claims or Interests.

Universal American Mortgage Co. v. Bateman (*In re* Bateman), 331 F.3d 821 (11th Cir. 2003). This is a most important Chapter 13 case of first impression in this Circuit, reviewing the vague language of bankruptcy procedure and the interrelations of claims allowance and plan confirmation, §§ 502(a), 1322, 1325 and 1327, and Rule 3007. The Circuit denied a collateral attack on an improperly confirmed plan, but held an unchallenged residential mortgage lien and claim survived the plan provisions and discharge. Because of its importance, a lengthy review of this case is given.

The plan provided for a residential mortgage arrearage of $21,600, payable in fixed payments during the plan payments. The creditor timely filed a proof of a secured claim of $49,178.80 for the arrearage. No objection to the proof of claim was filed. Without objection, the plan was confirmed after the bar date for filing claims, sometimes called a late confirmation hearing. No appeal was filed. Over a year after confirmation, the debtor filed an objection to the proof of claim and the creditor responded with a motion to dismiss on the ground that the plan did not conform to the provisions of the Code, §§ 1322(b) and 1325(a). The bankruptcy court sustained the objection and denied the motion to dismiss, holding the creditor was bound by the confirmed plan provisions under §1327.

Before specifically addressing the issues, the Circuit gave a most helpful review of the confirmation and claims process. The debtor files a petition and proposed plan, which contains the treatment to be afforded each creditor. Before a plan is confirmed, the parties in interest have an opportunity to file claims and litigate any dispute over the claim. All parties have a responsibility to assure the confirmed plan results in a synthesis of the interests of all parties, consistent with the Code and Rules. The debtor has a special duty to ensure that the plan provides an accurate and thorough treatment of all claims. The bankruptcy court has an independent duty to ensure that the proposed plan comports with the requirements of the Code. Once the plan is confirmed and the plan provisions are satisfied, the debtor receives a discharge.

The first issue is the objection to the claim and whether the creditor is bound by the claim amount provided for in the confirmed plan. Section 1322 states the mandatory contents of a plan. The holder of a secured claim is protected to the extent of the value of the collateral, § 506(a); however, § 1322(b)(2) prohibits any modification of a claim secured only by a homestead, even if the claim is undersecured. Nobelman v. Am. Savs. Bank, 508 U.S. 324 (1993). Often the mortgage is in default which can be cured, § 1322(b)(5), without an improper modification. Sections 1322(b)(2) and (5) permit the mortgage secured claim to be split into the current payments and the arrearage, but this does not compromise the amount of the arrearage. The debtor must provide treatment for the mortgage in the plan. If the creditor wants to receive payments under the confirmed plan, it must timely file a proof of claim. However, the creditor is not required to file a proof of claim as the unchallenged lien survives the discharge. Folendore, *In re*, 862 F.2d 1537 (11th Cir. 1989). The timely filing of a proof of claim constitutes prima facie evidence of the validity and amount of the claim, which is rebutted by an objection, § 502(a). Although § 502(a) does not provide for a time limit to file an objection, it must be filed prior to plan confirmation. Justice Oaks II, Ltd., *In re*, 898 F.2d 1544, 1553 (11th Cir. 1990). This time limitation is a primary key to the holding of this case. Thus, the confirmation of the plan without an objection to the timely filed proof of claim makes the claim deemed allowed and is prima facie evidence of the validity and amount of the mortgage arrearage, § 502(a). The objection to the claim should have been overruled. The bankruptcy court holding that the creditor should have protected its rights by objecting to the plan and confirmation

and is thereafter bound by the terms of the confirmed plan is wrong and is reversed. The burden was on the debtor to have objected to the claim before confirmation to resolve the conflict between the proof of claim and the plan provision. The circuit refused to permit a plan provision to constitute a constructive objection to the claim, and refused to permit the failure to object to confirmation to act as acceptance to the plan treatment, which § 1325(a)(5)(A) permits an otherwise impermissible provision.

On the second issue of the denial of the motion to dismiss, the creditor argues that a confirmed plan with improper claim treatments is not entitled to res judicata under § 1327. The res judicata refers to claim preclusion, which is harsher than common law issue preclusion. It has the same finality and effect as any federal court final judgment on the merits. The terms of the confirmed plan on the treatment of a claim, however improper, fit within claim preclusion because it should have been presented prior to confirmation. If an objection to confirmation had been filed or the confirmation appealed, it would have prevailed. Absent such action, the confirmed plan is binding. The motion to dismiss was properly denied as a collateral attack.

Nevertheless, the Circuit follows the reasoning in Simmons v. Savell, 765 F.2d 547, 559 (5th Cir. 1985) that a secured creditor's lien survives a contrary plan confirmation. If the lien survives, so must any corresponding arrearage claim. Section 502(a) is the applicable provision for claims allowance and, consequently, should control over the more general policy considerations embodied in § 1327(a). Hobdy, *In re*, 130 B.R. 318, 321 (9th Cir. BAP 1991). The arrearage claim provided in the unchallenged timely filed proof of claim is unaffected by the terms of the confirmed plan. The creditor retains its rights under the mortgage, subject to the automatic stay, until the allowed claim is satisfied in full.

United States v. Galletti, 541 U. S. 114, 124 S. Ct. 1548 (2004). This case determines limitations periods for the collection of delinquent taxes from partners under 26 U.S.C. §§ 6501(a) and 6502(a). The partnership failed to pay federal employments taxes. The IRS timely assessed the taxes against the partnership, which extended the limitations period for collection by ten years. The partners filed

for Chapter 13 relief. Upon failure to pay by the partnership, the IRS filed a proof of claim. The partners argued that the limitations period had expired because the extension did not apply to them. The Supreme Court unanimously held that the "taxpayer" was the partnership, and the extension of the limitations period against it was sufficient to extend the period for collection from the partners.

§ 502(b) Amount of Claims.

Baggett Brothers Farm, Inc. v. Altha Farmers Coop. Inc. (In re Baggett Brothers Farm, Inc.), 315 Fed. Appx. 840 (11th Cir. 2009). The bankruptcy court did not abuse its discretion in finding that a creditor's claim was not barred by laches even though the creditor did not attempt to collect on its note for five years and was unable to produce accounting records for the debtor's payment history. Laches is more than delay. "It is time plus prejudicial harm, and the harm is not merely that one loses what he otherwise would have kept, but that delay has subjected him to a disadvantage in asserting and establishing his claimed right or defense."

Travelers Cas. & Sur. Co. of America v. Pacific Gas & Elec. Co., – U.S. –, 127 S.Ct.1199, (2007). A creditor filed a proof of claim seeking to recover attorney's fees incurred challenging the debtor's plan of reorganization and the debtor objected to the proof of claim. The bankruptcy court sustained the debtor's objection to the proof of claim and the district court affirmed relying on the Ninth Circuit *Fobian* case which held that contract-based claims of creditors for attorney's fees for litigating issues peculiar to bankruptcy law must be disallowed. The Supreme Court held that the *Fobian* rule finds no support in the Bankruptcy Code under § 502 or elsewhere. The Court refused, however, to resolve whether such attorney fee claims must be disallowed based on other theories, stating "[w]e conclude only that the Court of Appeals erred in disallowing that claim based on the fact that the fees at issue were incurred in litigating issues of bankruptcy law." The Court would not entertain other substantive arguments for disallowing the claim, such as the absence of benefit to the estate resulting from the services of the creditor's attorney, because the arguments were not raised below.

Raleigh v. Illinois Dept. of Revenue, 530 U.S. 15, 120 S. Ct. 1951 (2000). Creditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation, subject to any qualifying or contrary provisions of the Bankruptcy Code. The "basic federal rule" in bankruptcy is that state law governs the substance of claims. Even though bankruptcy courts have some equitable powers to adjust the rights between creditors, bankruptcy courts are not authorized in the name of equity to make a wholesale substitution of the underlying law controlling the validity of creditors' claims.

Country Best v. Christopher Ranch, LLC, 361 F. 3d 629 (11th Cir. 2004). Claims owed under the Perishable Agricultural Commodities Act for "sums owing in connection with" a perishable commodities transaction encompass the price of the commodities plus additional related expenses like prejudgment interest and attorney's fees, if they are available under applicable contract principles.

United States v. Sanford (*In re* Sanford), 979 F.2d 1511 (11th Cir. 1992). Allowance of claims by § 502(b) must be according to the applicable substantive legal standards. Under § 502(b)(1), a claim against the bankruptcy estate will not be allowed in a bankruptcy proceeding if the same claim would not be enforceable against the debtor outside of bankruptcy. Reducing, or partially disallowing, a claim because of equities is not permitted.

Prospect Hill Resources, Inc., *In re*, 837 F.2d 453 (11th Cir. 1988). Section 502(b)(7) limits claims arising out of the rejection of an executory employment contract. It also limits claims for future compensation, which conceivably would have been earned had the parties to the agreement performed under the terminated contract. On its face, § 502(b)(7) does not apply to vested retirement benefits. The statute, by its terms, refers to claims by employees, not by retired workers.

§ 502(e) Claims for Reimbursement or Contribution.

The Charter Co., *In re*, 862 F.2d 1500 (11th Cir. 1989). Claims for contribution or reimbursement were made against Chapter 11 debtors for cleanup of hazardous waste. The Bankruptcy court

correctly disallowed claims for indemnification or contribution pursuant to § 502(e)(1)(B) since claims were unliquidated at the time of allowance or disallowance. Section 502(e)(1)(B) reflects the Congressional policy underlying the Bankruptcy Code as a whole, and Chapter 11 in particular, that the bankruptcy estate should not be burdened by estimated claims, contingent in nature. The debtor should be expeditiously rehabilitated, thereby providing the debtor with a fresh start while simultaneously according fair treatment to creditors by paying ascertainable claims as quickly as possible.

§ 502(g) Claims Arising From Rejection.

Airlift Int'l, Inc., *In re*, 761 F.2d 1503 (11th Cir. 1985). Where an executory contract is not assumed prior to confirmation of Chapter 11 plan, the breach of the executory contract or an expired lease is deemed to have occurred prepetition, giving rise to a prepetition claim under section 502(g), but not an administrative expense under section 503(b).

§ 503(b) Administrative Expenses.

Celotex Corp., *In re*, 227 F.3d 1336 (11th Cir. 2000). Attorney for asbestos related property damage claimants in Chapter 11 case applied under § 503(b) for attorney fees on ground that he made substantial contribution. The bankruptcy court denied application, but found that attorney would be entitled to compensation at blended lodestar rate of $225 per hour if decision were reversed, and was affirmed. Trial court held that creditor's interests were adverse to the debtor and its actions were to benefit its interests and not benefit the estate. The Eleventh Circuit held that: (1) creditors' motive in taking actions that benefitted estate should not have been factor in determining whether creditors' attorney was entitled to fee award for making substantial contribution; (2) attorney was entitled to fee award for his extraordinary service in negotiating successful reorganization plan; and (3) remand was necessary for bankruptcy judge to explain how he determined appropriate compensation rate. Without defining substantial contribution, Court held it is demonstrated by conclusion that plan would not have been confirmed without attorney's efforts.

United States v. Hillsborough Holdings Corp. (*In re* Hillsborough Holdings Corp.), 116 F.3d 1391 (11th Cir. 1997). The debtors filed their postpetition income tax returns only for the income they earned postpetition. The IRS argued that the tax for the whole year was an administrative expense because the tax was assessed postpetition. The Circuit affirmed the bankruptcy court and the district court and denied the administrative expense. An administrative expense, as defined in section 503(b), includes "any tax incurred by the estate, except a tax of a kind specified in section 507(a)(7)...." Only if a tax (1) IS incurred by the estate and (2) IS NOT of a kind specified in section 507(a)(7) will it qualify for administrative priority. Otherwise, the tax will generally be paid as a seventh priority claim.

Varsity Carpet Services, Inc. v. Richardson (*In re* Colortex Industries, Inc.), 19 F.3d 1371 (11th Cir. 1994). In a first impression review, the court held that interest on trade debts incurred with postpetition credit from a supplier, thus an administrative expense, is allowed by § 503(b)(1)(A). Even though an administrative claim for interest is not specifically provided for in § 503(b)(1), it can still be classified as such due to broad interpretation of that section's use of the term

"including." However, upon conversion to Chapter 7, interest drops to fifth priority under § 726(a)(5).

Bonapfel v. Nalley Motor Trucks (*In re* Carpet Center Leasing Co.), 991 F.2d 682 (11th Cir. 1993). When a debtor-in-possession uses a creditor's equipment to generate funds for the operation of its business during the pendency of the bankruptcy, the creditor's expense of providing that equipment is an actual and necessary cost of preserving the bankruptcy estate under § 503(b).

Allied Mechanical Services, Inc., *In re*, 885 F.2d 837 (11th Cir. 1989). Interest accrued on tax liabilities incurred during operation under Chapter 11 is entitled to administrative priority under § 503.

Subscription Television, *In re*, 789 F.2d 1530 (11th Cir.1986). Debtor held a post-petition sixty day executory contract which obligated the creditor to provide the debtor with unscrambled television broadcast signals. Debtor only used the broadcast signals only seventeen days. The provider of the broadcast signals claimed an administrative expense priority for the entire sixty day period on the theory that it had been deprived of its own use of the television signals because the contract required it to keep the signals available to the debtor. Circuit held that only the portion of services actually utilized by the a Trustee in the operation of a debtor's business is a necessary cost and expense of preserving the estate that should be accorded the priority of an administrative expense. Services which provide only a potential benefit are too speculative to be allowed as an "actual, necessary cost and expense of preserving the estate."

Airlift Int'l, Inc., *In re*, 761 F.2d 1503 (11th Cir. 1985). The breach of an executory postpetition agreement under § 1110 gives rise to an administrative claim under § 503(b). On the other hand, where an executory contract is not assumed prior to confirmation of Chapter 11 plan, the breach of the executory contract or an expired lease is deemed to have occurred prepetition, giving rise to a prepetition claim under section 502(g), but not an administrative expense under section 503(b).

Alchar Hardware Co., *In re*, 759 F.2d 867 (11th Cir. 1985). Only obligations of the debtor's estate which arise postpetition are entitled to administrative expense status.

§ 505(a) Determination of Tax Liability.

Greenfield v. I.R.S., 297 Fed. Appx. 858 (11th Cir. 2008). The IRS filed proofs of claims for the tax years 1983, 1984 and 1991. The debtor's 1982 tax deficiency was not, however, at issue in the bankruptcy proceeding so as to result in a final judgment as to the 1982 tax deficiency for res judicata purposes where neither the IRS nor the debtor filed a proof of claim on behalf of the IRS for the 1982 tax year and neither party moved for the court to determine the tax deficiency.

United States v. Ryan (*In re* Ryan), 64 F.3d 1516 (11th Cir. 1995). Debtor sued IRS to determine dischargeability of certain taxes and amount of nondischargeable taxes. Under § 505, a bankruptcy

court is given the power to "determine the amount or legality of any tax ...." However, subsection (a)(2) contains a time limitations on the court's ability to determine a debtor's tax liabilities and refunds. The Internal Revenue Code has a similar restriction on the ability of a court to determine a taxpayer's right to a refund. Under the Revenue Code an administrative claim must be filed with the IRS within certain time limitations set out in the Revenue Code.

United States v. Galletti, 541 U. S. 114, 124 S. Ct. 1548 (2004). This case determines limitations periods for the collection of delinquent taxes from partners under 26 U.S.C. §§ 6501(a) and 6502(a). The partnership failed to pay federal employments taxes. The IRS timely assessed the taxes against the partnership, which extended the limitations period for collection by ten years. The partners filed

for Chapter 13 relief. Upon failure to pay by the partnership, the IRS filed a proof of claim. The partners argued that the limitations period had expired because the extension did not apply to them. The Supreme Court unanimously held that the "taxpayer" was the partnership, and the extension of the limitations period against it was sufficient to extend the period for collection from the partners.

§ 506(a) Allowance of Claims or Interests.

United States v. Oscher (In re J.H. Investment Servs., Inc.), 452 Fed. Appx. 858 (11th Cir. 2011). An unsecured creditor must file a proof of claim to be considered an unsecured creditor for its deficiency. Section 506(a)(1) does not automatically assert a deficiency claim. A creditor must take an affirmative step to pursue an unsecured claim. No creditor, even an undersecured creditor, is required to pursue a claim in bankruptcy or file a proof of claim. *See* § 501 (stating "[a] creditor ... *may* file a proof of claim"). The Code merely prevents nonfiling creditors from receiving distributions from the debtor's estate. *See* § 524(a). The Federal Rules of Bankruptcy Procedure further underscore this point. *See* Fed. R. Bankr.P. 3002(a) (stating that an unsecured creditor "must file a proof of claim ... for the claim ... to be allowed."); Fed. R. Bankr.P. 3003(c)(2) (stating that "any creditor who fails to [file a proof of claim] shall not be treated as a creditor with respect to such claim for purposes of voting and distribution.") An undersecured creditor is not required to pursue a deficiency claim and the trustee and other parties can conclude that the creditor has decided not to pursue its deficiency claim if the deficiency is not properly noted on the proof of claim. Requiring an undersecured creditor to signal its intent to pursue a deficiency claim serves an important notice function. Under § 502, a proof of claim is allowed "unless a party in interest ... objects." 11 U.S.C. § 502(a).

§ 506(a) Determination of Secured Status.

Associates Commercial Corp. v. Rash, 520 U.S. 953, 117 S. Ct. 1879 (1997). A Chapter 13 plan provided for the debtors to retain a Kenworth tractor truck for use in a freight-hauling business and to pay the present value over the life of the plan under § 1325(a)(5)(B). The lender valued the collateral at retail and the debtors valued it at wholesale. The Supreme Court held that the collateral should be valued by its replacement value, defined as the price a willing buyer in the

debtor's situation would pay a willing seller to purchase property of like condition. The valuation is governed by § 506(a) which applies to all chapters. The first clause of the section determines the interest to be valued is the creditor's nature and position of lien in the estate's nature and extent of ownership in the collateral. The second sentence directs how to value. The paramount factor is the proposed disposition or use. If the collateral is retained, foreclosure value or wholesale value is not appropriate. The replacement value definition assumes a willing buyer and seller, so a forced auction or distressed sale cannot be considered. The value is based on property of like condition. Footnote six excludes the price of new property and the value of warranties, inventory storage, and reconditioning. These factors are not retained by the debtor, so they are not included in the value. This limitation also probably excludes overhead, profit, commissions, showroom and advertising costs. Thus, replacement value may be the same as wholesale value, but the analysis is different.

White, *In re*, 908 F.2d 691 (11th Cir. 1990). Pursuant to § 506(a), bankruptcy court *sua sponte* ruled on a creditor's claim in the absence of an objection to the claim by a party in interest. Circuit held the bankruptcy court should not have ruled on claim in the absence of a claim objection. Such action violated Fed. R. Bankr. P. 3007.

§ 506(b) Interest on Oversecured Claims.

First United Security Bank v. Garner (In re Garner), 663 F.3d 1218 (11th Cir. 2011). Pursuant to § 506(b) an oversecured creditor is entitled to interest at the contract rate from the petition date until confirmation. Post-confirmation, an oversecured creditor is only entitled to interest at the plan rate.

United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 109 S. Ct. 1026 (1989). Debtor argued creditor was not entitled to interest on non-consensual oversecured lien as opposed to consensual oversecured lien. Supreme Court held § 506(b) entitles a creditor to receive postpetition interest on a non-consensual oversecured lien. It makes no difference if the lien is consensual or not. Additionally, the holder of an oversecured claim created pursuant to an agreement is entitled to receive, in addition to postpetition interest, if the agreement so provides, reasonable fees, costs and charges.

Welzel v. Advocate Realty (*In re* Welzel), 275 F.3d 1308 (11th Cir. 2001). A promissory note provided that upon default, the lender could recover collection costs, including attorney fees of 15% of the principal. After default, debtor filed for bankruptcy relief. Lender filed secured claim which included attorney fees. En banc Circuit held that a oversecured creditor's contractually set fees were subject to the federal standard of reasonableness set forth in the Code, by virtue of preemption. Relying on statutory construction, the Circuit held this standard applies even if such fees vested prepetition and were enforceable under state law. Section 506(b) refers to "reasonable fees," without differentiation based on the time the fees vested. Circuit also held the fees are subject to bifurcation. Fees deemed reasonable are included in a secured claim. If a portion of the fees are deemed unreasonable, however, the fees should be bifurcated between the reasonable portion, treated as a secured claim, and the unreasonable portion, treated as an unsecured claim. The Eleventh Circuit joined four other circuits, which have considered the issue.

Telfair v. First Union Mortgage Corp., 216 F.3d 1333 (11th Cir. 2000), *cert. denied* 121 S. Ct. 765 (2001). During the pendency of the Chapter 13 plan, the debtors defaulted on several regular loan payments. In order to recoup the costs incurred in attempting to cure these defaults, creditor filed request for attorney's fees. After the plan was discharged, creditor applied post-petition mortgage payments to the outstanding attorney's fees. Debtor argued this action violated § 506(b), governing costs and fees for oversecured claims, and § 362(a), the automatic stay provision. Circuit held that under § 506(b), holders of oversecured claims are entitled to any interest, fees, or costs provided for in the underlying debt instrument. Interest for an oversecured creditor's claim accrues under § 506(b) from the petition date until confirmation or effective date of the plan. Section 506(b) has no effect upon post confirmation interest. Further, nothing in the language of § 506(b) suggests that interest, as opposed to fees, costs and charges, should be treated differently.

Bel-Bel Int'l Corp. v. Community Bank of Homestead, 162 F.3d 1101 (11th Cir. 1998). Secured creditor was entitled to postpetition interest on its claim against Chapter 11 debtors on promissory note. Debtors were liable for accrued postpetition interest.

Community Bank of Homestead v. Torcise, 162 F.3d 1084 (11th Cir. 1998). Parties disagreed on the amount of interest to be paid on claim. Amount of interest had previously been decided in state court foreclosure action. The Circuit held that the state court foreclosure proceedings collaterally estopped the debtor from contesting, in bankruptcy court, the interest calculation awarded on the mortgagee's claim. Collateral estoppel prevents relitigation of an issue resolved in a prior judicial proceeding, provided that (1) the identical issue has been fully litigated, (2) by the same parties, and (3) a final decision has been rendered by a court of competent jurisdiction. Each of these elements were present in this case. The second element was met even though the state court action involved the individual and bankruptcy court action involved the debtor. "Identical" parties for collateral estoppel purposes, includes parties in "privity" with the parties in the prior litigation. Here, the individual and his bankruptcy estate are in privity. Since the earlier state action determined the amount of the debt, the issue could not be relitigated in the bankruptcy court.

Orix Credit Alliance, Inc. v. Delta Resources, Inc. (*In re* Delta Resources, Inc.), 54 F.3d 722 (11th Cir. 1995). Adequate protection payments under §362(d)(1) compensate decline in the value of collateral only, whether the claim is oversecured or undersecured. To the extent a claim is oversecured on the date of filing the petition, postpetition interest is added to the principal balance when allowing the claim at the end of the case by §506(b). However, adequate protection does not include periodic postpetition interest payments to insure against diminution in the value of an equity cushion.

Sublett, *In re*, 895 F.2d 1381 (11th Cir. 1990). Reasonable interest charges are authorized as part of an oversecured claim under § 506(b) if interest charges on unpaid loan installments were provided for in loan instruments. Contract interest rates apply provided they are reasonable and permissible under state law. Where loan instrument provided for interest on attorney's fees by reason of litigation, interest was not recoverable where there was no litigation. Where a loan instrument provided for interest on attorneys fee by reason of litigation, the fees can be allowed. However, there must be litigation for the interest provision to apply.

Fawcett, *In re*, 758 F.2d 588 (11th Cir. 1985). Where Chapter 13 plan called for payment in full to secured creditors and Internal Revenue Service's proof of claim states that "postpetition interest may be payable", Internal Revenue Service was entitled to have interest paid.

§ 506(c) Costs and Expenses of Preserving or Disposing of Property.

Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 1205 S. Ct. 1942 (2000). Administrative claimant sought to prime secured claimholder under § 506(c). Underwriter for workmen's compensation insurance held an administrative claim for Chapter 11 postpetition premiums. Union Planters Bank held a security interest in all estate assets, so ordinarily the secured claim has priority over administrative expenses. After conversion to Chapter 7, the underwriter claimed the rights of a trustee under § 506(c) to charge encumbered collateral with the reasonable and necessary costs of preserving and disposing of the property. There were no unencumbered assets to pay allowed administrative expenses. Section 506(c) constitutes an important exception to the rule that secured claims are superior to administrative claims. Supreme Court held the section only mentions that trustees may recover under the section. Therefore, only trustees (and debtors-in-possession) may use the provisions of § 506(c). No derivative suit by another party is permitted. The holding in this case raises some questions as to the propriety of derivative actions by parties other than the trustee under other sections of the Bankruptcy Code such as §§ 544, 545, 547(b), 548(a), and 549(a).

§ 506(d) Lien Avoidance Through Claims Allowance.

McNeal v. GMAC Mortgage LLC (In re McNeal), 477 Fed. Appx. 562 (11th Cir. 2012). Debtor was entitled to "strip off" wholly unsecured second priority mortgage lien pursuant to § 506(a) and (d). Section 506(d) provides "[t]o the extent that a lien secures a claim against a debtor that is not an allowed secured claim, such lien is void." Several courts have determined that *Dewsnup v. Timm*, which concluded that a Chapter 7 debtor could not "strip down" a partially secured lien under § 506(d), also precludes a Chapter 7 debtor from "stripping off" a wholly unsecured junior lien.

Dewsnup v. Timm, 502 U.S. 410, 112 S. Ct. 773 (1991). Debtor, in a case under Chapter 7, filed an adversary proceeding, contending that the debt of approximately $120,000 that she owed to creditor exceeded the fair market value of the land securing the debt and that, therefore, the bankruptcy court should reduce the creditor's lien on the land to the land's fair market value pursuant to § 506(d). Supreme Court held that "allowed secured claim" in § 506(d) did not have the same meaning as "allowed secured claim" in § 506(a). As such, the debtor could not strip down the lien. Instead, the lien passed through the bankruptcy unaffected. Recognizing that this holding, while reasonable in a Chapter 7 liquidation case, will cause substantial confusion and change in existing law in reorganization cases, the Supreme Court specifically limited the holding to only Chapter 7 cases. Courts will have difficulty in limiting the application of the case since §506 applies to every Chapter in the Bankruptcy Code.

Wrenn v. American Cast Iron Pipe Co., 40 F.3d 1162 (11th Cir. 1994). Debtor argued that § 506(d) avoids liens to the extent they secure claims that are not allowed, reciting Dewsnup v. Timm, 502

U.S. 410, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992). Even though the debtor was correct in his interpretation of Dewsnup, he still failed as these claims were allowed. The phrase "allowed secured claim" in § 506(d) means a secured claim that has been allowed according to the claims allowance provisions in § 502. Under § 502(a), "[a] claim ... is deemed allowed, unless a party in interest ... objects." If not allowed, the claim is subject to § 506(d) avoidance of the lien. Here, the debtor did not object to the allowance of the creditor's claim, and thus the claim was allowed. Section 506(d) does not avoid liens securing allowed claims. Thus, the debtor was not entitled to avoid creditor's lien under § 506(d).

Folendore, *Matter of*, 862 F.2d 1537 (11th Cir. 1989). Debtors filed complaint to determine extent of lien. Lien would be unsecured under § 506(a). The parties agreed that the creditor did not have an allowed secured claim. Thus, under the plain language of § 506(d), the debtors could void the lien by making a request to disallow the claim secured by the lien. Under § 506(d), the claim need not actually be disallowed; the motion for disallowance is sufficient for § 506(d) to come into play.

§ 507(a) Priorities.

Console v. I.R.S., 291 Fed. Appx. 234 (11th Cir. 2008). Debtor's prepetition request for a collection due process hearing stayed the IRS's collection process from the time the request was filed until appeals from the hearing were resolved. "An otherwise applicable time period" under § 507(a)(8) is "suspended" for periods in which "a governmental unit is prohibited under applicable non-bankruptcy law from collecting a tax as a result of a request by a debtor for a hearing and an appeal of any collection action taken or proposed against the debtor, plus ninety days . . ."

Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co. (In re Howard Delivery), – U.S.– , 126 S. Ct. 2105 (2006). Claims for unpaid workers' compensation premiums are not entitled to priority status under the Bankruptcy Code. The Code accords priorities among unsecured claims for unpaid "wages, salaries, or commissions, including vacation, severance, and sick leave pay" pursuant to § 507(a)(4)(A), and for unpaid contributions to "an employee benefit plan . . . arising from services rendered" pursuant to § 507(a)(5). Section 507(a)(5) was enacted to capture fringe benefits that complete a pay package for services rendered that are not covered by § 507(a)(4). Such fringe benefits typically include pension plans, group health, life and disability insurance. The bankruptcy court denied creditor's priority status reasoning that the unpaid premiums did not qualify as "bargained-for, wage-substitute-type benefits" provided in lieu of increased wages. The question before the Supreme Court was whether § 507(a)(5) also encompasses claims for unpaid premiums on a policy purchased by an employer to cover its workers' compensation liability. The Court resolved the issue, stating that "[a]lthough the question is close, we conclude that premiums paid for workers' compensation insurance are more appropriately bracketed with premiums paid for other liability insurance, *e.g.*, motor vehicle, fire, or theft insurance, than with contributions made to secure employee retirement, health, and disability benefits."

United States v. Reorganized CF & I Fabricators of Utah, Inc., 518 U.S. 213, 116 S. Ct. 2106 (1996). To fall under § 507(a), the debt in question must be a tax, and not a penalty. The label placed on a tax is not determinative of priority under § 507(a)(8). To determine between a tax and a penalty, a "tax" is a pecuniary burden laid upon individuals or property for the purpose of supporting the

government. On the other hand, a "penalty" is exaction imposed by statute as punishment for unlawful act. Here, debt in question was a penalty, not a tax, to be dealt with as an ordinary, unsecured claim.

Morgan v. United States (*In re* Morgan), 182 F.3d 775 (11th Cir. 1999). The three year priority claim period under § 507(a)(8)(A)(i), for income tax, is not automatically tolled during the pendency of a prior bankruptcy proceeding.

United States v. Haas (*In re* Haas), 162 F.3d 1087 (11th Cir. 1998). Debtor proposed plan to treat priority tax debt as a secured claim, rather than as a priority unsecured claim. The effect was to reduce the recovery by the IRS by $68,000. A plan may not ignore the priority status of the tax claim.

United States v. Hillsborough Holdings Corp. (*In re* Hillsborough Holdings Corp.), 116 F.3d 1391 (11th Cir. 1997). The debtors filed their postpetition income tax returns only for the income they earned postpetition. The IRS argued that the tax for the whole year was an administrative expense because the tax was assessed postpetition. The Circuit affirmed the bankruptcy court and the district court and denied the administrative expense. An administrative priority is only available to income tax on postpetition income. 11 U.S.C. § 507(a)(8)(A)(iii). The DIP allocated income by a per diem division without a factual determination of when the income was earned and the tax incurred. The Circuit permitted the DIP to make a short year tax election which 26 U.S.C. § 1398(d) only affords to individual debtors.

Matter of Saybrook Mfg. Co., 963 F.2d 1490 (11th Cir. 1992). Section 507 of the Bankruptcy Code fixes the priority order of claims and expenses against the bankruptcy estate. Creditors within a given class are to be treated equally, and bankruptcy courts may not create their own rules of superpriority within a single class.

§ 507(b) Superpriority.

Bonapfel v. Nalley Motor Trucks (*In re* Carpet Center Leasing Co.), 991 F.2d 682 (11th Cir. 1993).

Section 507 of the Bankruptcy Code affords first priority to administrative expenses to encourage the provisions of goods and services to the estate, and to compensate those who expend new resources attempting to rehabilitate the estate. Where there has been a diminution in the value of the creditor's secured collateral by reason of a section 362 stay, § 507(b) converts the creditor's claim into an allowable administrative expense claim, which is a superpriority administrative expense claim to the extent that the adequate protection was insufficient.

§ 509 Claims of Co-Debtors.

Fibreboard Corp v. Celotex Corp. (In re Celotex Corp.), 472 F.3d 1318 (11th Cir. 2006). A co-defendant that pays the full amount of a joint and several liability judgment against it and the debtor cannot seek subrogation under § 509. Section 509(a) grants the right of subrogation to

parties who are either liable with the debtor on a claim, or act as a surety on a claim and pay that claim, but subsection (b)(2) disallows subrogation if the creditor requesting subrogation received consideration for paying the claim. Every court that has expressly applied § 509(b)(2) has held that it excludes those who are primarily liable for the debt from subrogation because they received consideration for paying the debt. Section 509(b)(2) "embodies the general principle that subrogation is not available to a party who satisfies a debt for which that party was primarily obligated."

§ 510(a) Subordination by Agreement.

Chemical Bank v. First Trust of New York (*In re* Southeast Banking Corp.), 179 F.3d 1307 (11th Cir. 1999). The State of New York Court of Appeals answered the certified question that New York did follow the Rule of Explicitness. Therefore, the language in these particular agreements was insufficiently precise, explicit, and unambiguous on issues of postpetition interest, fees, and costs to satisfy Rule of Explicitness under New York law. For subordination agreement to be enforceable by § 510(a), pursuant to applicable nonbankruptcy law (New York state law), the contract would have to expressly provide for post-petition interest. Absent such explicit language, subordination agreement was not enforceable.

Chemical Bank v. First Trust of New York (*In re* Southeast Banking Corp.), 156 F.3d 1114 (11th Cir. 1998). Only oversecured claims may receive postpetition interest from the estate. Section 506(b). To circumvent this result, senior lenders required junior lenders to subordinate. The lending agreements provided that senior lenders received the distributions owed to junior lenders until the senior debt with all interest and fees and expenses was paid. Even though goal of bankruptcy is equal distribution to creditors of equal rank, where creditors expressly agree to subordinate their claims, they no longer share qual rank with other creditors. Bankruptcy courts previously used equitable considerations, such as the Rule of Explicitness, to balance the equities of a case. The majority of the panel held § 510(a) is clear and abrogates the Rule of Explicitness. Section 510(a)'s direction to enforce subordination agreements according to applicable nonbankruptcy law required bankruptcy court to enforce agreement without consideration of bankruptcy court equitable powers. Circuit certified case to New York court to determine validity of subordination agreement.

§ 510(c) Equitable Subordination.

United States v. Reorganized CF & I Fabricators of Utah, Inc., 518 U.S. 213, 116 S. Ct. 2106 (1996). Supreme Court again rejected categorical subordination. Categorical subordination was tantamount to a legislative act and therefore was outside the scope of the bankruptcy court's power.

United States v. Noland, 517 U.S. 535, 116 S. Ct. 1524 (1996). Tax penalties from nonpayment of social security and unemployment taxes cannot be categorically equitably subordinated under § 510(c). Without holding that misconduct is required, the Court held that equitable subordination is limited to a holding based on the facts of the case. Courts are not permitted to reorganize the priorities of Section 726 by using a fairness analysis favoring pecuniary losses over nonpecuniary

ones.

Holywell Corp., *In re*, 913 F.2d 873 (11th Cir. 1990). A plan may not subordinate the claim of a creditor solely for the reason that the creditor is also an equitable security holder. The proponent of the plan setting forth the equitable subordination of the claim of the equitable security holder has the burden of proof that claimant has engaged in inequitable conduct, that conduct has injured creditors or given unfair advantage to claimant, and that subordination of claim is not inconsistent with Bankruptcy Code. If that burden is met, burden shifts to claimant to prove fairness of the transactions with debtor. If claimant fails to meet its burden, claim will be subordinated.

N & D Properties, Inc., *In re*, 799 F.2d 726 (11th Cir. 1986). In determining the elements necessary to equitably subordinate a claim, the burden and sufficiency of proof required is not uniform in all cases. Where the claimant is an insider or a fiduciary, the trustee bears the burden of presenting material evidence of unfair conduct. If the claimant is not an insider or fiduciary, however, the trustee must prove more egregious conduct such as fraud, spoilation or overreaching, and prove it with particularity. If subordination is warranted, it may only operate to redress the amount of actual harm done. Here, since portion of shareholder's claim disadvantaged only consumer creditors, and not trade creditors, it was subordinated only to claims of consumer creditors.

§ 521 Debtor's Duties.

Jones v. U.S. (In re Jones), 467 Fed. Appx. 815 (11th Cir. 2012). Employee was judicially estopped from asserting claim, given her intentional failure to disclose it in concurrent bankruptcy. The Eleventh Circuit applies a two part test for judicial estoppel: (1) has the party previously adopted an inconsistent position under oath in a judicial proceeding, and (2) did the party intend to make a mockery of the judicial system. Here it was undisputed that the debtor adopted inconsistent positions. The debtor argued, however, that she did not have the requisite motive because she believed in good faith that her toxic tort claim had no value due to the highly speculative nature of such claims. The court of appeals rejected this argument explaining that most litigation is speculative, but if the debtor did not believe she had some chance at recovering $10 million, she would not have actively prosecuted the claim. The debtor had a clear motive to conceal this claim, i.e. obtaining a no-asset discharge, and the omission was not inadvertent given that the debtor knew of the claim when she first filed her Chapter 13 proceeding and repeatedly failed to disclose same until the government learned of the omission from other sources.

Pavlov v. Ingles Markets, Inc. (In re Pavlov), 236 Fed.Appx. 549 (11th Cir. 2007). Plaintiffs were judicially estopped from pursuing claims that they failed to disclose as an asset in their Chapter 13 bankruptcy notwithstanding any interest of the bankruptcy trustee in the causes of action as property of the debtors' bankruptcy estate where the trustee made no appearance in the action.

Ajaka v. BrooksAmerica Mortg. Corp. (In re Ajaka), 453 F.3d 1339 (11th Cir. 2006). Debtor's failure to disclose TILA claim as a contingent asset in his bankruptcy petition did not necessarily barr debtor's state court action against mortgagee on ground of judicial estoppel. A genuine issue of material fact existed as to whether the debtor had motivation and intent to manipulate the judicial system caused by debtor's delay in disclosing the cause of action. The element of intent under judicial estoppel is satisfied by "cold manipulation and not unthinking or confused blunder;" "intentional contradictions not simple error or inadvertence;" and it must be a "calculated assertion of divergent positions." Although the law recognizes that there is no requirement that the party invoking judicial estoppel show prejudice it is difficult to impute an intent to make a mockery of the judicial system where the complaining party was aware of the inconsistency in time to raise an objection in the original proceeding. Here the creditors had actual knowledge of the debtor's contingent TILA claim within the time period during which they could have sought revocation of the order confirming the debtor's plan under § 1330(a).

Jones v. Clayton County (In re Jones), 184 Fed.Appx. 840 (11th Cir. 2006). Whether or not a debtor discloses its existence, a pre-petition cause of action is property of the Chapter 7 bankruptcy estate. A trustee, as the estate representative, is the proper party in interest, and is the only party with standing to prosecute causes of action belonging to the estate. Because there was no evidence that the trustee, who was the real party in interest in this discrimination suit, ever abandoned the claim, the debtor lacked standing to bring the claim.

Parker v. Wendy's Int'l, Inc., 365 F.3d 1268 (11th Cir. 2004). The facts of this case are the same as Barger and Pemco. The discrimination suit was filed and then the petition in Chapter 7 was filed without disclosing the lawsuit. A discharge was entered and the case was closed. However, judicial estoppel did not apply because of a significant, different fact – the debtor had won the race to the courthouse door. The debtor had moved to reopen the bankruptcy case to allow amendments to the schedules and the trustee had moved to intervene in the discrimination case before the employer moved to dismiss based on judicial estoppel. The trustee argued that he was a party to the discrimination suit and he had not taken any inconsistent positions in court or acted to perverse the judicial process. The creditors of the estate were innocent parties who should not be penalized.

The Circuit first published an opinion following Barger, then vacated that opinion and held that the trustee was correct in that he should be considered separate from the debtor. He is the only appellant prosecuting this case. A pre-petition cause of action becomes property of the estate when the petition is filed, and only the trustee has standing to pursue it. Perhaps the debtor could retain standing if prospective injunctive relief is requested, but that is not present here. The trustee retains exclusive standing unless the asset is abandoned by § 544, and it is not abandoned when it is not administered, as when it is not scheduled as an asset. As the real party-in-interest, the trustee took no inconsistent positions under oath and judicial estoppel is not applicable to him. The trustee takes the asset, subject to any defenses arising from pre-petition action by the debtor, but post-petition acts when the debtor was not the real party-in-interest create no defense. In dictum, the Circuit questions whether Pemco should have been decided on lack of standing rather than judicial estoppel. The Circuit, *en banc*, will have to address that question.

Muse v. Accord Human Resources, Inc., 2005 U.S. App. LEXIS 7240 (April 18, 2005) (*not for publication*). Plaintiff in a Fair Labor Standards Act ("FLSA") case had filed Chapter 13 bankruptcy on November 7, 1997. Plaintiff's plan was confirmed on April 7, 1998 and he received a Chapter 13 discharge on August 8, 2003.

From January 3, 2000 to September 6, 2002, plaintiff was employed by Defendants. On June 6, 2003, plaintiff filed the FLSA claim seeking to recover unpaid overtime allegedly not paid to him during the entire time he was employed by defendants. Defendants raised the defense of judicial estoppel. The district court held that because plaintiff's claim arose during the pendency of his Chapter 13 case and he did not disclose the claim, then he was judicially estopped from asserting the claim.

The Eleventh Circuit reversed because plaintiff's claim did not arise until after confirmation of his Chapter 13 plan. The court based its holding on the interpretation of Section 1306(a) and 1327(b) in Telfair v. First Mortgage Corp., 216 F.3d 1333 (11th Cir. 2000). In Telfair, the court held that assets acquired post-confirmation are not property of the bankruptcy estate unless they are necessary to maintain the bankruptcy plan. In this case, the court held that because there was no assertion that the FLSA claim was necessary to meet the terms of the bankruptcy plan, he had no duty to disclose the claim, and the claim was accordingly not property of the estate.

De Leon v. Comcar Indus., Inc., 321 F.3d 1289 (11th Cir. 2003). Chapter 13 debtor filed for bankruptcy after filing a complaint against his employer with EEOC for discrimination and retaliation. Six months after filing his petition in bankruptcy, debtor brought a discrimination suit against his employer, but he never scheduled or amended his schedules to reflect the cause of action. Employer moved for summary judgment on the ground that debtor was estopped from pursuing such claims due to his failure to disclose them in his bankruptcy petition or subsequent filings. The district court granted summary judgment for employer, and debtor appealed. Rejecting debtor's attempt to distinguish Burnes as narrowly-tailored only to cases under Chapter 7, the Eleventh Circuit held that the rule of judicial estoppel, as established in Burnes, applies regardless of the type of filing. Thus, noting that "the need for complete and honest disclosure exists in all types of bankruptcies," the Circuit affirmed summary judgment in favor of employer.

Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282 (11th Cir. 2002). Debtor was one of several employees to bring suit, six months after debtor's bankruptcy petition was filed, alleging discrimination against employer. Debtor-employee never amended his Chapter 13 statements or schedules to reflect the pending cause of action and likewise did not amend statements or schedules after his case was converted to Chapter 7. Three years after filing the discrimination suit, debtor received a complete discharge of his debts, totaling over $38,000. Shortly thereafter, employer moved for summary judgment on grounds that estoppel barred debtor from pursuing action when he failed to disclose it in his Chapter 7 schedules and statements. Citing § 521(1)'s requirement of filing schedules and § 541(a)(7)'s inclusion of after-acquired interests, the Court affirmed the grant of summary judgment and stated that a debtor's duty to fully and honestly disclose was continuing in nature, requiring a debtor to amend his schedules if circumstances change. Debtor's intentional failure to disclose the pending action judicially estopped him from pursuing his employer for money damages, though he could seek injunctive relief as that would have had no value to the bankruptcy estate; further, debtor would not be allowed to reopen his bankruptcy case to amend his schedules to include the cause of action.

Barger v. City of Cartersville, Ga., 348 F.3d 1289 (11th Cir. 2003). Following the trend from DeLeon and Pemco, the Circuit held that judicial estoppel barred the claim for damages, but not the claim for reinstatement. The debtor filed suit for discrimination seeking reinstatement. Subsequently, she filed a Chapter 7 petition without disclosing the lawsuit. She then amended the discrimination claim to seek damages. Never having amended the schedules to disclose the discrimination claim, the debtor received a discharge. The action was not abandoned by § 554 upon closing the estate because it was not administered. The employer was granted summary judgment based on judicial estoppel and lack of standing. The Circuit applied a procedural analysis of the Rules of Civil Procedure, without considering the implications of the bankruptcy provisions. Rule 17(a) was applied to require the real party-in-interest. The trustee was determined to be the real party-in-interest and to have exclusive standing, notwithstanding the debtor being the proper party prior to filing Chapter 7. The court properly found the action to be property of the estate after the petition date. Then the court applied Rule 25(c) to restrict the trustee's rights to those of the debtor. However, the court did not consider that the trustee's rights were governed by the debtor's rights after the petition was filed, at a time when the debtor was the real party for some claims and the trustee had become the real party for other claims. The debtor's post-petition acts eliminated the claims that belonged to the trustee. Section 362 restricts actions against property of the estate, and those acts are void. Certainly, the acts of the debtor invoked the application of judicial estoppel as to rights and claims of the debtor, but the question is how it applied to the estate. Hopefully, the Circuit will review

Taylor v. AGE Federal Credit Union (*In re* Taylor), 3 F.3d 1512 (11th Cir. 1993). Chapter 7 consumer debtor may only retain collateral and reaffirm the debt under § 524(c), retain collateral and redeem it under § 722, or surrender the collateral under § 521(2). The debtor does not have the option to retain the collateral by staying current on contractual obligations without reaffirming the debt.

§ 522 Exemptions.

Schweizer v. Chambers (Schweizer), 399 Fed. Appx. 482 (11th Cir. 2010). After a state court has determined what property is subject to the debtor's homestead exemption, a bankruptcy court cannot reexamine the issue under § 522(f).

Schwab v. Reilly (In re Reilly), 130 S. Ct. 2652 (2010). When the Bankruptcy Code defines the property a debtor is authorized to exempt as an interest, the value of which may not exceed a certain dollar amount, in a particular type of asset, and the debtor's schedule of exempt property accurately describes the asset and declares the "value of [the] claimed exemption" in that asset to be an amount within the limits that the Code prescribes, an interested party is entitled to rely upon that value as evidence of the claim's validity and need not object to the exemption in order to preserve the estate's ability to recover value in the asset beyond the dollar value the debtor expressly declared exempt. This decision overrules Eleventh Circuit precedent, *In re Green*, 31 F.3d 1098 (11th Cir. 1994), finding that a debtor who exempts the entire reported value of an asset is claiming the asset's full market value as exempt, whatever the market value turns out to be.

Hecker v. Kokomo Spring Co. (In re Hecker), 264 Fed. Appx. 786 (11th Cir. 2008). Diallowance of claimed exemption for retirement trust fund was warranted where the debtor disbursed a significant amount of the retirement trust funds after the bankruptcy court entered a preliminary injunction prohibiting the debtor from withdrawing, transferring, encumbering or disposing of the trust assets. The "key to unlocking a court's inherent powers is a finding of bad faith" which is demonstrated "by delaying or disrupting the litigation or hampering enforcement of a court order." The bankruptcy court did not impose the sanction of striking the debtor's exemption until the court determined that lesser sanctions would not suffice.

§ 522(b) Exemptions.

Baker v. Tardif (In re Baker), 590 F.3d 1261 (11th Cir. 2009). A Chapter 7 debtor can exempt a Keogh plan that complies with § 401(a) of the Internal Revenue Code under Florida law even if the plan does not comply with ERISA.

Chauncey v. Dzikowski (In re Chauncey), 454 F.3d 1292 (11th Cir. 2006). Delay in filing petition until funds could be deposited with mortgagee did not warrant imposition of lien upon homestead. Under Florida law, a debtor's actions in delaying her bankruptcy filing until after her personal injury action settlement proceeds could be applied to reduce the outstanding principal balance that existed on her mortgage, so as to protect the funds from unsecured creditors, did not warrant the imposition of an equitable lien upon her homestead in favor of the Chapter 7 trustee. The debtor obtained the funds not through fraud, but by instituting a personal injury action. Although the debtor's delay in filing was bad faith, it did not rise to the level of fraud, nor did it constitute egregious behavior. (Under BAPCPA, §522(p)(1), a debtor cannot exempt any amount of interest acquired during the 1,215 day period that exceeds $125,000.)

Hamm v. James (In re James), 2005 WL 913616 (11th Cir. Ala. April 21, 2005). This case came on appeal to the Eleventh Circuit from the district court's order affirming the bankruptcy court's overruling of the Chapter 7 Trustee's objections to exemptions. Trustee Daniel Hamm objected to three different debtors' claims for federal earned income tax credit ("EITC") exemptions in each of their bankruptcy cases. The claims were exempt under Alabama Code § 38-4-8 (1975), which allows an exemption for "all amounts paid or payable as public assistance to needy persons." The Trustee argued that an EITC payment is not "public assistance" under Alabama Code § 34-4-8 and cannot be categorized as exempt personal property, and that a debtor who receives an EITC payment in a lump sum cannot claim the payment as exempt. The Trustee based his first argument on Alabama Code § 38-4-1, which describes persons to whom public assistance is payable. The Trustee asserted that the state law exemption only applies to state public assistance programs, not to federal public assistance EITC payments. This court disagreed because the Trustee's argument is contrary to the plain language of the statute, and the purpose of Alabama Code § 38-4-1 is not to define "public assistance" in general, but only for that particular chapter.

The Trustee also argued that the Sorenson v. Sec'y of the Treasury of the United States, 475 U.S. 851, 106 S.Ct. 1600, 89 L.Ed.2d 855 (1986), which required the Secretary of Treasury to intercept tax-refund payments from taxpayers to pay past-due child support payments, would apply here because EITC refunds are similar to other "overpayments." The Eleventh Circuit disagreed that the Supreme Court decision was applicable because "[w]hether an EITC payment

is a credit, a refund, or an overpayment does not affect the fact that it is 'public assistance' for purposes of Alabama Code § 38-4-8 and is therefore exempt." As a result, the court affirmed the district court's order, which had affirmed the bankruptcy court's overruling of the Trustee's objections to Debtors' exemptions.

Owen v. Owen, 500 U.S. 305, 111 S. Ct. 1833 (1991). Section 522 determines what property a debtor may exempt. Under § 522(b), he must select between a list of federal exemptions (set forth in § 522(d)) and the exemptions provided by his State, unless the State has "opted out" of the federal list. If the State opts out, then its debtors are limited to the exemptions provided by state law. States are free to restrict or limit the scope of their exemptions. Under § 522(c), property that is properly exempted under § 522 is immunized against liability for prebankruptcy debts. However, no property can be exempted, unless it first falls within the bankruptcy estate. Section 522(b) provides that the debtor may exempt certain property "from property of the estate." Thus, if an interest is not possessed by the estate, it cannot be exempted.

Havoco of America, Ltd. v. Hill, 255 F.3d 1321 (11th Cir. 2001). Circuit ruled based upon response to question certified to Florida Supreme Court. Eleventh Circuit questioned whether Florida Constitution allowed a homestead exemption where the debtor acquired the homestead using non-exempt funds with the specific intent to hinder, delay, or defraud creditors. Florida Supreme Court answered in the affirmative. Homestead may still be exempted. Exception to rule applies, but only where funds obtained through fraud or egregious conduct were used to invest in, purchase, or improve homestead.

Levy v. Kozyak (*In re* Financial Federated Title and Trust, Inc.), 347 F.3d 880 (11th Cir. 2003).

When a home is purchased with fraudulently obtained funds, the Florida Constitution does not protect homestead property under these circumstances. The Circuit adopted the bankruptcy court's order imposing an equitable lien and a constructive trust.

Goldenberg, *In re*, 218 F.3d 1264 (11th Cir. 2000). Patient who had obtained judgment of more than $4 million against surgeon objected to two of exemptions claimed by surgeon in effort to remove roughly all of assets he owned from reach of creditors. The bankruptcy court overruled patient's objections. The Court of Appeals, held that surgeon who filed for Chapter 7 relief at start of jury deliberations in medical malpractice case could not be denied Florida state law exemption in the funds on deposit in IRAs, on theory that allowing debtor to use this exemption was imposition upon creditors. IRAs were not acquired by debtor with proceeds of any fraud perpetrated upon patient, and were not the result of a transfer of non-exempt assets into exempt assets on eve of bankruptcy.

Havoco of America, Ltd. v. Hill (*In re* Hill), 197 F.3d 1135 (11th Cir. 1999). Judgment creditor objected to exemptions in Chapter 7 case of homestead and household furnishings. Florida permits homestead exemption as well as furnishings held in tenancy-by-the-entireties with his wife. Post judgment the Florida real estate was purchased and non-exempt assets were used to purchase furnishings. The Eleventh Circuit affirmed that a challenge to a tenancy-by-the-entireties exemption impacts the rights of the wife. Only procedural method to adjudicate rights implicating

a non-debtor is by an Adversary Proceeding. Due Process prevents a contested hearing addressing these issues. Florida's Fraudulent Conveyance Statute is similar to § 548 and Fed. R. Bankr. P. 7001 requires an Adversary Proceeding. Federal and state courts have conflicted on whether a Florida homestead exemption can be challenged if the homestead is purchased with non-exempt assets with the actual intent to hinder, delay, or defraud creditors. Issue is certified to the Supreme Court of Florida.

Musolino v. Sinnreich (In re Sinnreich), 391 F.3d 1295 (11th Cir. 2004). Debtor Sinnreich filed for Chapter 13 bankruptcy and claimed real estate property and household goods and furnishings as exempt from creditors under 11 U.S.C. § 522(b) because he held an interest in such property with his wife as a tenant by the entirety under Florida law. Section 522 provides that "any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law."

One of Sinnreich's creditors, Musolino, objected on grounds that there is the case of *United States v. Craft* where the IRS as a creditor was able to divide property rights of a tenancy by the entirety in order to bring the husband's interest in the property into the bankruptcy estate. 535 U.S. 274, 122 S.Ct. 1414, 152 L.Ed.2d 437 (2002). The Eleventh Circuit reviewed precedent from the Supreme Court of Florida's holding in *Beal Bank SSB v. Almand & Assoc.* which did not allow creditors to divide a husband and wife's estate when they held property in a tenancy by the entirety. 780 So. 2d 45, 53 (Fla. 2001). The IRS's ability in *Craft* to pursue only one bankruptcy spouse's portion of property was distinctive to that case alone because it was the federal government that had special power to collect taxes. That right did not extend to other bankruptcy creditors. Therefore, the district court's grant of partial summary judgment to Sinnreich, which affirmed the bankruptcy court's decision to permit the debtor's full exemption, was affirmed.

Key Bank of Maine v. Jost (*In re* Jost), 136 F.3d 1455 (11th Cir. 1998). The Circuit remanded to the bankruptcy court for additional findings and conclusions on objection to claimed exemptions. Florida law is unsettled regarding whether a homestead exemption can be successfully challenged when the homestead is purchased with non-exempt assets with the actual intent to hinder, delay, or defraud creditors. A statute may permit the challenge, but the Constitution may protect the homestead. If the bankruptcy court were to find actual intent to hinder, delay, or defraud, question would have to be certified to Florida Supreme Court.

Guardian Life Insurance. Co. v. Solomon (*In re* Solomon), 95 F.3d 1076 (11th Cir. 1996). Objection to exemption sustained. Florida exempts annuity contracts. Debtor structured a settlement with periodic payments for ten years and a final balloon payment. The settlement was financed by an annuity purchased by the defendant. Annuity contracts are to be defined broadly, but parties must intend to create an annuity. Debts or accounts receivable which resemble annuities do not qualify.

Englander v. Mills (*In re* Englander), 95 F.3d 1028 (11th Cir. 1996). Objection to homestead exemption sustained. Florida law limits a homestead within a municipality to a residence on one-half acre. Zoning and building regulations prevented subdivision of lot. Where the real property is not divisible, the trustee may sell the homestead and the court apportion the proceeds to protect

the homestead exemption.

Schlein, *In re*, 8 F.3d 745 (11th Cir. 1993). Florida exemptions protecting wages do not cover earnings of an independent contractor. Florida exemptions for employee benefit plans (IRAs) are not preempted by ERISA. The Florida statute is similar to the one in Alabama.

McCollam, *In re*, 986 F.2d 436 (11th Cir. 1993). Debtor may claim Florida exemption by structuring a litigation settlement into an annuity contract.

First National Bank of Mobile v. Norris, 701 F.2d 902 (11th Cir. 1983). In Alabama, only state law exemptions and not § 522(d) federal exemptions are available to a bankrupt. Allowable exemptions in Alabama are determined by law applicable at the time the debts were created.

Wilson, *Matter of*, 694 F.2d 236 (11th Cir. 1982). Attorneys fees brought back into the estate under §§ 329 and 541(a)(3) may be exempted by the debtor, as is the case of any property not specifically restricted.

§ 522(c) Effect of Exempt Status.

Gamble v. Brown (*In re* Brown), 168 F.3d 442 (11th Cir. 1999). Chapter 13 debtors claimed property as exempt without objection and sold it with the bankruptcy court's approval. Bankruptcy Court, reasoning that the proceeds were not freed from the claims of pre-petition creditors until the case was concluded subsequently ordered the debtors to turn the net proceeds from the sale over to the Trustee, for safekeeping until dismissal. The Eleventh Circuit reversed and held that when there is no objection to an exemption claim, the property is no longer part of the estate and was available for the debtors' use. Here, neither the trustee nor any creditor objected to the debtors' exemption of the property from the bankruptcy estate. Thus, the property became exempt, no longer part of the bankruptcy estate, and available for the debtors' use.

§ 522(d) Federal Exemptions.

Rousey v. Jackoway (In re Rousey), 125 S.Ct. 1561 (2005). The Supreme Court decided the issue of whether debtors are entitled to exempt their interests in their respective IRA accounts from the bankruptcy estate. Several years after rolling their 401(k) retirement plans into IRA accounts, debtors jointly filed for Chapter 7 relief and claimed the IRA accounts as exempt pursuant to 11 U.S.C. § 522(d)(10)(E), which allows an exemption for the "right to receive . . . a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependant of the debtor . . . ." 11 U.S.C. § 522(d)(10)(E). The Trustee objected to the claimed exemption and was successful in the bankruptcy court, the Bankruptcy Appellate Panel, and the Court of Appeals for the Eight Circuit. The lower courts held, *inter alia*, that because debtors had unlimited access to the funds held in the IRA accounts, subject only to a 10 percent penalty, the funds were not a right to receive payments "on account of illness, disability, death, age, or length of service," and the IRA accounts were not "similar plan[s] or contract[s]"

to "stock bonus, pension, profitsharing, [or] annuity" plans. 11 U.S.C. § 522(d)(10)(E). In a unanimous decision, the Supreme Court reversed.

On the issue of whether the right to receive payment was "on account of illness, disability, death, age, or length of service," in light of access to the funds subject only to a ten percent penalty for early withdrawal, the Court stated: "Because the 10 percent penalty applies proportionally to any amounts withdrawn, it prevents access to the 10 percent that the Rouseys would forfeit should they withdraw early, and this it effectively prevents access to the entire balance in their IRAs."

As to the issue of whether the IRA accounts were similar plans or contracts to "stock bonus, pension, profitsharing, [or] annuity" plans, the Court held that the IRA plans were similar to the listed plans in Section 522(d)(10)(E) because they all share the common feature of providing "income that substitutes for wages earned as salary or hourly compensation."

§ 522(f) Lien Avoidance.

Cadle Co. v. Taras (In re Taras), 131 Fed.Appx. 167 (11th Cir. 2005)(*not selected for publication)*. Bankruptcy court correctly included debtor's half of junior tax lien when it computed the extent to which debtor's home exemption was impaired by a senior judicial lien under the statutory formula set out in § 522(f)(2)(A). Subsection 522(f)(2)(A)(ii) states the computation of the impairment shall include "all other liens on the property." The term "all other liens on the property" includes junior liens. With the tax lien included in the calculation, the sum of the liens and the amount of the exemption substantially exceeded the debtor's interest in the property and the judicial lien could be avoided in its entirety.

Owen v. Owen, 500 U.S. 305, 111 S. Ct. 1833 (1991). Debtor moved to avoid judgment lien of creditor as impairing homestead exemption. Creditor argued this lien did not impair an exemption since the Florida homestead exemption is not assertable against pre-existing judicial liens. The Supreme Court held the debtor may avoid a lien under § 522 (f) to the extent that it impairs an exemption to which the debtor would have been entitled if the lien did not exist. To determine the application of § 522(f), the question is not whether the lien impairs an exemption to which the debtor is in fact entitled, but whether it impairs an exemption to which he would have been entitled but for the lien itself.

Farrey v. Sanderfoot, 500 U.S. 291, 111 S. Ct. 1825 (1991). Where an interest in property is created by a divorce court at the same time that it imposes a lien on the interest in favor of the ex-wife, the debtor may not avoid the judicial lien under § 522(f)(1). Unless the debtor had the property interest to which the lien attached at some point before the lien attached to that interest, he or she cannot avoid the fixing of the lien under the terms of § 522(f)(1). There is a different result, and the debtor may avoid a lien which is created by divorce court, on property which is already owned by the debtor.

Washington, *In re*, 242 F.3d 1320 (11th Cir. 2001). A judicial lien can be avoided per § 522(f)(1)(A). A judicial lien results from some judicial action. Liens that arise by operation of law, without judicial action, are not judicial liens. Florida law gives an attorney a lien for unpaid services effective when the services begin. An attorney's charging lien and its priority arise by common law

and attaches to property at the time the legal services commence, without any judicial process. Such a lien cannot be avoided until a judgment is entered.

Lehman, *In re*, 205 F.3d 1255 (11th Cir. 2000). A judicial lien can only be avoided to the extent it impairs an exemption. A literal reading of § 522(f)(2)(A) indicates that the entire lien may be avoided by calculations using only the Debtor's equity. However, the correct interpretation is to use the total value of the homestead owned by the Debtor and his dependants as joint tenants. The amount of the exemption is the maximum level that the Debtor may avoid a judicial lien.

Holloway v. John Hancock Mutual Life Ins. Co., 81 F.3d 1062 (11th Cir. 1996). Acknowledging that the 1994 amendments overruled Wrenn prospectively. Since this case precedes the amendments Wrenn still applied. Debtors had no equity in their residence as a result of two mortgages and a tax lien. The motion to avoid a judgment lien is denied because the homestead exemption claimed of $0.00 is not impaired by the lien, as required by Wrenn. Under the 1994 amendments, the lien would probably be fully avoided, but the exact figures are not given in order to compute the statutory formula.

Wrenn v. American Cast Iron Pipe Co., 40 F.3d 1162 (11th Cir. 1994). The bankruptcy court avoided creditor's lien to the extent of the $5,000 Alabama homestead exemption. Debtor argued § 522(f) allowed him to avoid all of creditor's lien. Circuit agreed with bankruptcy court and held the plain meaning of the language of § 522(f) limits its lien avoidance to the value of the exemptions provided in § 522(b). Furthermore, applying the plain meaning of the statute gives any postdischarge appreciation to the lienholder. Applied to this case, § 522(f) entitled the debtor to avoid creditor's lien only to the extent of the $5,000 Alabama homestead exemption. Note that this decision may have been overruled by the 1994 Amendments. Now, lien may be avoided to the extent they impair an exemption. Lien avoidance under § 522(f)(2)(A) is now a mathematical calculation. Congress has now specified that judicial liens may be avoided in their entirety if they do not attach to value in excess of the total of prior consensual liens and exemption claims.

Owen, *In re*, 961 F.2d 170 (11th Cir. 1992). Upon remand from the Supreme Court, Circuit was left with the question of whether there was a "fixing of a lien" on an interest of the debtor. Circuit held the debtor could not use § 522(f) to avoid this lien. Section 522(f) allows a debtor to avoid the "fixing of a lien." Here, there was never a "fixing of a lien" on an interest of the debtor, as the debtor had no property interest prior to the fixing of the lien. Unless the debtor had the property interest to which the lien attached at some point before the lien attached to that interest, he or she cannot avoid the fixing of the lien under the terms of § 522(f)(1). Where lien attaches simultaneous or prior to debtor's interest in property, § 522(f) is not available to the debtor.

Snap-on Tools, Inc. v. Freeman (*In re* Freeman), 956 F.2d 252 (11th Cir. 1992). Debtor attempted to avoid the lien in tools. Circuit held a debtor can avoid a lien if the lien: (1) impairs an exemption to which the debtor is entitled; (2) is a non-possessory, non-purchase money security interest; and (3) applies to tools of the debtor's trade. A security interest in collateral is "purchase money" to the extent that the item secures a debt for the money required to make the purchase. If an item of

collateral secures some other type of debt, e.g., antecedent debt, it is not purchase money. A purchase money security interest cannot exceed the price of what is purchased in the transaction wherein the security interest is created. Here, due to the consolidation of the debtor's debts with the lender, the purchase money security interest in the tools did not survive A lien becomes non-possessory, non-purchase money when a creditor refinances and consolidates debts and security agreements. After consolidation, the lien is subject to be avoided by a debtor as a non-possessory, non-purchase money security interest.

Owen, *In re*, 877 F.2d 44 (11th Cir. 1989). Debtor could not avoid judicial lien on Florida homestead property since lien came into existence before the property attained homestead status.

Hall, *In re*, 752 F.2d 582 (11th Cir. 1985). Generally, liens on exempt property remain valid unless avoided under a Code section. While states are free to limit property which may be exempt, such limitations may not abrogate purpose of § 522(f); thus, Georgia statute disallowing exemption of lien-encumbered property does not limit § 522(f). *Impliedly reversing* Maddox, *In re*, 713 F.2d 1526 (11th Cir. 1983), which held that Georgia law allowed the exemption of encumbered property. Chapter 13 debtors are entitled to use § 522(f) to avoid liens. *Note*: In Bland, *In re*, 793 F.2d 1172 (11th Cir. 1986), the court returned to its Maddox interpretation of Georgia law and held that the Hall court unnecessarily ruled that a state could not circumvent § 522(f).

§ 522(h) Debtor's Actions to Avoid Transfers.

Deel Rent-a-Car, Inc. v. Levine, 721 F.2d 750 (11th Cir. 1983). While the Bankruptcy Act's preference provisions were primarily designed to protect creditors, the Code also contains provisions which protect the debtor. The "diminution of the estate" prerequisite for preference avoidance under Act cases does not apply to § 522(h) actions. The debtor has standing to avoid the creditor's lien. Debtor could have exempted his condo "if the trustee had avoided the lien" and "if such property had not been transferred." Debtor could have exercised that exemption, therefore, he can stand in the trustee's shoes to avoid the lien himself. Circuit did not decide whether the "diminution of the estate" doctrine was annulled with respect to actions by the trustee.

§ 522(l) List of Exemptions.

Taylor v. Freeland & Kronz, 503 U.S. 638, 112 S. Ct. 1644 (1992). A trustee may not contest the validity of a claimed exemption under § 522(1) after the 30-day period of time under Fed. R. Bankr. P. 4003(b) has expired. This deadline for filing a contest of the exemption applies even though the debtor has no basis for claiming the exemption and it is not claimed in good faith.

Gamble v. Brown (*In re* Brown), 168 F.3d 442 (11th Cir. 1999). Chapter 13 debtors claimed property as exempt without objection and sold it with the bankruptcy court's approval. Bankruptcy Court, reasoning that the proceeds were not freed from the claims of pre-petition creditors until the case was concluded subsequently ordered the debtors to turn the net proceeds from the sale over to the Trustee, for safekeeping until dismissal. The Eleventh Circuit reversed and held that when there is no objection to an exemption claim, the property is no longer part of

the estate and was available for the debtors' use.

Holloway v. John Hancock Mutual Life Ins. Co., 81 F.3d 1062 (11th Cir. 1996). In order to exempt property under §§ 522(b) and (f), the debtor must file in the bankruptcy proceeding, a list of the property that the debtor claims as exempt.

Sloma, *In re*, 43 F.3d 637 (11th Cir. 1995). Chapter 7 debtor assigned his annuity payments to a bank. In his bankruptcy case, Debtor asserted a claim of exemption as to the payments due from the annuity. The bank did not file objections to Debtor's claim of exemption within 30 days. Debtor filed an adversary proceeding against the bank asserting that the payments due from the annuity were exempt property. Circuit held the bank did not need to object to the debtor's claim of exemptions. Because Debtor transferred his property interest to the bank, he could not claim as exempt property that he did not own.

Allen v. Green (*In re* Green), 31 F.3d 1098 (11th Cir. 1994). A claimed exemption of a cause of action for nominal value successfully exempts the entire value, if no timely objection is filed. Fed. R. Bankr. P. 4003. The trustee may not wait until the value of the contingent asset is established before contesting the exemption.

§ 523 Exceptions to Discharge.

United States v. Jacobs (In re Jacobs), 490 F.3d 913 (11th Cir. 2007). Section 523(a)(1)(C) contains a conduct requirement "that the debtor attempted in any manner to evade or defeat a tax" and a mental state requirement "that the attempt was done willfully." The government satisfies the conduct requirement when it proves that the debtor engaged in affirmative acts to avoid payment or collection of the taxes and it proves the mental state requirement - willfulness - where the government shows that the debtor's attempt to avoid the tax liability was done voluntarily. The mental state requirement is satisfied when the government shows that the debtor had a duty, knew he had the duty, and voluntarily or intentionally violated that duty. When failure to pay is coupled with additional conduct (e.g. placing title to the house in the wife's name but continuing to pay the mortgage himself, the lavish lifestyle, the gifts to the children, paying personal expenses out of his business account, etc.) the conduct requirement is satisfied. The fact that the debtor timely filed his tax returns or in some instances did not retain the benefit of the failure to pay (gifts to his children, etc.) did not change the court's conclusion. Fraud is not required in every case, simply willfulness. The willfulness requirement is met upon a showing of knowledge and deliberateness. Even though inadvertent mistakes may be a defense, the knowing and deliberate standard is functionally equivalent to voluntary. That standard applies whether or not a taxpayer timely files tax returns.

Paris v. United States, 245 Fed. Appx. 929 (11th Cir. 2007). The president of a corporation acted with the willfulness required to support his liability as a responsible person for trust fund recovery penalties, based upon the corporation's failure to remit the payroll taxes withheld from employee wages. Chapter 7 debtor brought an adversary proceeding against the IRS to determine the dischargeability of trust fund recovery penalties assessed against him. The IRS assessed penalties

against the debtor under § 6672 of the IRC for payroll taxes that were withheld from wages of his corporation's employees but not paid over to the IRS. The bankruptcy court granted summary judgment in favor of the IRS and the district court affirmed. The record clearly showed that the debtor acted willfully once he became so aware, by paying other creditors such as payroll, rent supplies and utilities, instead of the IRS. Part of the debtor's defense was that by paying these expenses the debtor would be able to keep the business running and pay the taxes, but the fact that the debtor was allegedly paying other creditors in good faith to keep the business going was irrelevant. The willfulness requirement of § 6672 is satisfied "if the responsible person has knowledge of the payments to other creditors after he becomes aware of the failure to remit the withheld taxes." A person who becomes aware that taxes have gone unpaid in past quarters in which the person was responsible for paying same "is under a duty to use all 'unencumbered funds' available to the corporation to pay those back taxes."

Taylor v. Wood (In re Wood), 245 Fed. Appx. 916 (11th Cir. 2007). Bankruptcy court's finding that Chapter 7 debtor should have discovered and corrected his limited partner's mistaken impression concerning another partner's limited guaranty on a loan did not support nondischargeability of debt owed by debtor to limited partner, on grounds that debtor engaged in false pretenses under § 523(a)(2)(A). The concept of false pretenses is especially broad and includes intentional fraud or deceit practiced by whatever method and in whatever manner. False pretenses may also be implied from conduct or may consist of concealment or nondisclosure where there is a duty to speak and may consist of any acts, work, symbol, or token calculated and intended to deceive. False pretenses contemplates a misrepresentation that is intentional or made with reckless indifference to the truth. Here since the bankruptcy court did not find reckless disregard or nondisclosure where there is a duty to speak noting only that the debtor was in the best position to learn the truth about the other partner's limited liability the elements of false pretenses were lacking.

Educational Credit Mgmt. Corp. v. Mosley (In re Mosley), 494 F.3d 1320 (11th Cir. 2007). Corroborating medical evidence independent from a debtor's testimony is not required to establish, under the second prong of the *Brunner* "undue hardship" test that medical disabilities are additional circumstances likely to render the debtor unable to repay his student loans. Requiring corroborating evidence when a debtor cannot afford expert testimony or documentation imposes an unnecessary and undue burden on the debtor in establishing his burden of proof. The Eleventh Circuit also upheld the bankruptcy court's power to enter a supplement order after the creditor filed its notice of appeal. While the filing of a notice of appeal generally confers jurisdiction on the court of appeals and divests the lower court of its control over those aspects of the case involved in the appeal, a lower court retains jurisdiction to reduce its oral findings to writing even if a party has filed a notice of appeal in the interim in the aid of appellate review.

§ 523(a)(1) Discharge Exception for Certain Taxes.

United States of America v. Mitchell (In re Mitchell), 633 F.3d 1319 (11th Cir. 2011). The Eleventh Circuit has developed a two-prong test for determining whether a debtor has willfully evaded taxes pursuant to § 523(a)(1)(C) under which the government must prove by a preponderance of the

evidence that the "debtor engaged in (1) evasive conduct with (2) a mental state consistent with willfulness." While a mere non-payment of taxes is insufficient to satisfy the conduct requirement, nonpayment in conjunction with a failure to file tax returns constitutes evasive conduct. The conduct requirement was satisfied in this instance by the debtor's failure to timely file returns for 1998 through 2002 and failure to pay the taxes owed for those years. Fraudulent intent is not required to satisfy the mental state requirement. The government must simply prove that the debtor acted *knowingly and deliberately*.

Console v. I.R.S., 291 Fed. Appx. 234 (11th Cir. 2008). The IRS did not have to appear and object in bankruptcy court to have its § 523(a)(1)(C) claim excepted from discharge. Instead, pursuant to §523(c), the IRS may wait until the bankruptcy discharge is invoked as a defense to its collection efforts, and then prove a factual basis for the tax fraud exception in the collection proceedings.

Young v. United States, 535 U.S.43, 122 S.Ct. 1036 (2002). Debtors sought determination that certain tax debts were discharged as they fell outside § 507(a)(8)(A)(i)'s "three-year lookback period." Bankruptcy Court held that the "lookback period" was tolled during the pendency of a prior bankruptcy case. The District Court and the First Circuit agreed. The Supreme Court also agreed and held the "lookback period" under § 507(a)(8)(A)(i) is tolled during the pendency of a prior bankruptcy case. Debtors' previous bankruptcy case created an automatic stay under § 362(a), which prevented the IRS from taking steps to collect the unpaid taxes. On debtors' subsequent Chapter 7 case, the three-year "lookback period" excluded time during which their Chapter 13 case was pending. The "lookback period" is a limitations period because it created a time period in which the IRS could enforce its rights – collection. As a limitations period, the time is subject to equitable tolling.

Fretz, *In re*, 244 F.3d 1323 (11th Cir. 2001). A Chapter 7 debtor "willfully" attempted to evade or defeat his taxes, within the meaning of § 523(a)(1)(C), when, for more than one decade, he failed to file income tax returns, or to pay taxes while he was employed at least part time as an emergency room physician. A prolonged bout with alcoholism does not provide excuse, exception, or mitigation. Acts of omission, as well as of commission, are sufficient to satisfy the conduct requirement of § 523(a)(1)(C). Here, omitting to file tax returns, when coupled with the failure to pay taxes, satisfied the conduct requirement of § 523(a)(1)(C).

Griffith v. United States (*In re* Griffith), 206 F.3d 1389 (11th Cir. 2000)(*en banc*), *cert. denied,* 121 S. Ct. 73 (2000). The Court of Appeals en banc accepted the panel invitation to revisit *In re* Haas. The primary holding of Haas, that mere nonpayment of taxes, without more, does not constitute a willful attempt to evade or defeat taxes under § 523(a)(1)(C), is correct. However, § 523(a)(1)(C) does render nondischargeable tax debts where the debtor engaged in affirmative acts constituting a willful attempt to evade or defeat payment of taxes. The key requirement is affirmative acts on behalf of the debtor to avoid his tax obligations. The section expressly applies to a debtor who files a fraudulent tax return. Haas is distinguished to make a debt nondischargeable when a debtor attempts to hide, conceal, or convey assets to interfere with payment or collection of a properly assessed tax.

Gust v. United States (*In re* Gust), 197 F.3d 1112 (11th Cir. 1999). Former Chapter 7 debtor objected to secured proof of claim filed by the IRS in his current Chapter 13 case. Debtor argued that certain taxes were not excepted from discharge because the IRS's claim was a secured claim. As secured, the claim did not qualify as an exception to discharge because the introductory clause in § 507(a)(8) only references "allowed unsecured claims." Circuit disagreed and ruled in favor of the IRS. A tax is nondischargeable by § 523(a)(1)(A) without regard to whether the tax claim is secured or unsecured. The analysis focuses on the type of tax and not the secured status of the claim. Even though § 507 refers to 'unsecured claims', Congress did not intend to make unsecured claims for taxes nondischargeable and render taxes dischargeable where the government has imposed a lien on the taxpayers' property.

Haas v. Internal Revenue Service (*In re* Haas), 48 F.3d 1153 (11th Cir. 1995). IRS brought dischargeability action against debtors with respect to certain taxes. dischargeable. Debtor argued taxes were dischargeable under § 523(a)(1)(C) as there no willful failure to pay the taxes. IRS argued since debtor knew of tax liability and failed to pay, the failure to pay was "willful." Question was whether the failure to pay taxes, without more, constituted a "willful" failure to "evade or defeat" his taxes under § 523(a)(1)(C). Circuit held the mere failure to pay taxes, without more, is not a willful failure to evade or defeat taxes.

Burns, *In re*, 887 F.2d 1541 (11th Cir. 1989). Chapter 13 debtor initiated adversary proceeding to determine dischargeability of federal income tax liabilities. Postpetition interest on a nondischargeable tax debt is also nondischargeable.

Wood, *In re*, 866 F.2d 1367 (11th Cir. 1989). Section 523 excepts certain unsecured tax claims of "governmental units" that are granted a priority in distribution by section 507(a)(7)(A) and for which a return is last due, including extensions, within three years before the date on which the petition in bankruptcy is filed. If the tax return is filed late, without an extension, the tax is dischargeable the later of three years after the last due date, including extensions, or two years after the filing date. Here, debtor's tax debt met these qualifications and was thus, nondischargeable. Debtor argued that including extension would penalize debtor who requested extension. Debtor who did not request extension would receive discharge from tax liability earlier than the taxpayer who filed a return pursuant to valid extension. While debtor was correct in his analysis, there was no constitutional problem in creating two classes of debtors.

Waite, *Matter of*, 698 F.2d 1177 (11th Cir. 1983). Surety paid debtor's tax liability owed to state. By paying taxes, the Surety was subrogated to the rights of the taxing entity which could have prevented a discharge of the tax debt, if it had gone unpaid, under § 523(a)(1). The only question was whether the state, to which the tax was owed, could have prevented a discharge of the tax debt under the § 523(a)(1), since the Surety, as subrogee, would have no more rights against the debtor than would the state whose rights are surrogated. Here, there was no reason why the state under § 523(a)(1) could not have prevented a discharge of the tax debt, had it remained unpaid. Thus, the Surety could also prevent the discharge.

§ 523(a)(2)(A) Discharge Exception for Debts from False Representations or Actual Fraud.

Carlson v. Washington Mutual Bank (In re Carlson), 464 Fed. Appx. 845. (11th Cir. 2012). Res judicata did not bar lender's claims against borrowers where the parties were parties to a lawsuit in state court concerning the same loans, mortgages, and property. It was undisputed that the state-court proceeding did not dispose of any claim raised in the lender's complaint which sought a determination that debts were nondischargeable, cross-claims were not compulsory in state court, and any state court would have lacked jurisdiction over the nondischargeability claims.

Archer v. Warner, 538 U.S. 314, 123 S.Ct. 1462 (2003). Plaintiff Archers brought suit against Defendant Warners in state court for fraud related to the plaintiffs' purchase of defendants' manufacturing company. The parties then reached a settlement by which the plaintiffs would release all claims, except the settlement amount of $300,000, against defendants and dismiss their case with prejudice in exchange for the settlement amount described as "compensation for emotional distress/personal injury type damages." Defendants paid plaintiffs $200,000 and agreed to pay the remaining $100,000 in installments pursuant to a promissory note. When defendants failed to pay as promised, plaintiffs brought suit on the debt, and the defendants subsequently filed for Chapter 7 relief. Plaintiffs then sought order of the bankruptcy court declaring the remaining $100,000 as nondischargeable on the ground of fraud, and, though defendant husband consented to nondischargeability, defendant wife successfully challenged the plaintiffs' requested relief. The Fourth Circuit affirmed, by two-thirds majority, the district and bankruptcy courts decisions to hold the debt dischargeable, reasoning that the settlement agreement worked as a novation, replacing the original potential debt based on fraud with a new debt based on settlement and promise. On appeal to the Supreme Court, the Court agreed that the settlement agreement created a debt based on settlement and promise, but stated that their prior decision in *Brown v. Felsen*, 442 U.S. 127 (1979) logically defeated the Fourth Circuit's novation theory. In *Brown*, the Court determined that the bankruptcy court could look beyond the state court proceeding record and termination by way of stipulation and consent judgment which made no mention of fraud to decide whether the subject debt was for money obtained by fraud and thereby nondischargeable. Finding that the instant case differed from *Brown* only in that the parties reached settlement rather than judgment of the court by consent, the Court stated that such difference not sufficient distinction to warrant different results. Thus, the Court found that the "new" debt based on the settlement agreement nonetheless arose out of the underlying fraud, and as such should be held nondischargeable. Note, however, that the Court refused to address, as being outside the scope of certiorari, defendant's alternative argument that plaintiffs were collaterally estopped from litigating the fraud issue because their state court action was dismissed with prejudice. The Court specifically reserved the Fourth Circuit's right to determine if such argument was properly raised, preserved, and meritorious.

Cohen v. De La Cruz, 523 U.S. 213, 118 S. Ct. 1212 (1998). Nondischargeable debt includes all liability resulting from the fraud. A unanimous Court followed *In re* St. Laurent, 991 F.2d 672 (11th Cir. 1993). State law authorized treble damages, attorney's fees and costs. Debt is not limited to the value obtained by fraud. The phrase "to the extent obtained by" in § 523(a)(2)(A) does not impose any limitation on the extent to which "any debt" arising from fraud is excepted from discharge. Congress did not limit the section to the liability representing restitutionary – as opposed to compensatory or punitive – recovery from fraud. The Congressional policy is that the creditors'

interest in recovering full damages outweighs the debtor's interest in a complete fresh start.

Field v. Mans (*In re* Mans), 516 U.S. 59, 116 S. Ct. 437 (1995). Supreme Court faced with question of what level of reliance is necessary to except a debt from discharge under § 523(a)(2)(A). Even though § 523(a)(2)(B) requires "reasonable reliance," § 523(a)(2)(A) is silent as to the level of reliance required. Court held justifiable, not reasonable, reliance is the appropriate standard in § 523(a)(2)(A) actions. Congressional intent is found in the common law meaning. When the section was adopted in 1978, forty-six states had decisions on the required level of reliance to common law fraud. Thirty-six of the states applied justifiable reliance. Reliance is justifiable when a person is justified in relying on a representation of fact "although he might have ascertained the falsity of the representation had he made an investigation." Justification is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case, rather than of the application of a community standard of conduct to all cases.

Grogan v. Garner, 498 U.S. 279, 111 S. Ct. 654 (1991). The burden of proof in all actions under § 523 is the preponderance of evidence standard, and not the clear and convincing evidence standard. This is the burden of proof required regardless of which dischargeability section is being utilized. With this lower burden of proof, most state court fraud judgments will be excepted from discharge in an action under § 523 by the doctrine of collateral estoppel.

Brown v. Felsen, 442 U.S. 127, 99 S. Ct. 205 (1979). A Bankruptcy Act case in which a creditor sought to determine a claim for fraud and embezzlement nondischargeable. Res judicata did not prevent bankruptcy court from considering evidence beyond record in prior state court action. Without discussing Full Faith and Credit Act, Supreme Court found that Congress gave bankruptcy courts full inquiry into dischargeability issues, subject to collateral estoppel.

Hoffend v. Villa (*In re* Villa), 261 F.3d 1148 (11th Cir. 2001). Customer of brokerage firm sued owner/ debtor for fraud committed by firm employee. Debtor was liable for fraud of another by virtue of being a control person pursuant to § 20(a) of the Securities Exchange Act. The fraud was committed by two of the firm's broker employees. Under § 523(a)(2)(A), a debt may be excepted from discharge when the debtor personally commits actual, positive fraud, and also when such actual fraud is imputed to the debtor under agency principles. Circuit refused to expand imputed fraud beyond agency law. Thus, the debtor's § 20(a) liability for another's fraud did not impute culpability to the debtor so as to render this debt nondischargeable under § 523(a)(2)(A).

SEC v. Bilzerian (*In re* Bilzerian), 153 F.3d 1278 (11th Cir. 1998). A criminal conviction for securities fraud, combined with a civil disgorgement judgment, satisfies collateral estoppel for fraud under § 523(a)(2)(A). Collateral estoppel requires that: (1) the issue be identical in both the prior and current action; (2) the issue was actually litigated; (3) the determination of the issue was critical and necessary to the judgment in the prior action; and (4) the burden of persuasion in the subsequent action not be significantly heavier. The causation requirement of "materiality" in Rule 10b(5) SEC enforcement action satisfied the requirement for actual reliance necessary to apply collateral estoppel in a § 523(A)(2)(A) case. Further, the award of a money judgment in the prior

case satisfied the requirement of a loss as a result of the misrepresentation.

HSSM # 7 Limited Partnership v. Bilzerian (*In re* Bilzerian), 100 F.3d 886 (11th Cir. 1996). In a first impression case, a debtor need not directly receive funds to hold a debt non-dischargeable. The Circuit adopted the "receipt of benefits" theory. This theory requires that the debtor merely gain a benefit, either direct or indirect, from the money that was obtained by fraudulent means. Here, the debtor received a benefit when he procured funds for a limited partnership, in which he had a beneficial interest. Turning to the elements of § 523(a)(2)(A), for the creditor to prevail on its § 523(a)(2)(A) claim, the creditor must prove by a preponderance of the evidence the following elements: (1) the debtor made a false representation with intent to deceive the creditor; (2) the creditor justifiably relied on the representation; and (3) the creditor sustained a loss as a result of the representation. Because the issues presented in the state court action were almost identical to the issues in the bankruptcy case, collateral estoppel applied. The only difference was that the state court action required "reasonable" instead of justifiable reliance. However, since the reasonable reliance standard is more stringent than the justifiable reliance standard, the creditor satisfied the reliance element.

Fuller v. Johannessen (*In re* Johannessen), 76 F.3d 347 (11th Cir. 1996). After four amendments to the complaint, the bankruptcy court dismissed under Fed. R. Bankr. P. 7012(b)(6). District court affirmed and Circuit court reversed, and remanded for trial. A complaint only requires a short and plain statement of the facts needed for the elements of the cause of action. If such a statement is provided a claim is stated. Thereafter, the court considers the sufficiency of the proof. Here, creditor made allegations as to each element of a § 523(a)(2)(A) action: that the debtor made a false statement with the purpose and intention of deceiving the creditor; that the creditor relied on such false statement; that the creditor's reliance on the false statement was justifiably founded; and that the creditor sustained damage as a result of the false statement

City Bank & Trust Co. v. Vann (*In re* Vann), 67 F.3d 277 (11th Cir. 1995). In a case decided prior to the Field v. Mans case, the Circuit also addressed the level of reliance necessary to except a debt from discharge under § 523(a)(2)(A). In contrast to § 523(a)(2)(B), § 523(a)(2)(A) does not require the creditor to show reasonable reliance on the debtor's representations. In a case of first impression in the Eleventh Circuit, the Circuit held the standard of reliance is justifiable. Between the strict, objective, reasonable reliance and the lenient, actual reliance, a standard of justifiable reliance is subjective, requiring the creditor to act appropriately according to his individual circumstances, knowledge and capacity.

Bush v. Balfour Beatty Bahamas, Ltd. (*In re* Bush), 62 F.3d 1319 (11th Cir. 1995), *cert. denied,* 529 U.S. 1017 (2000). Creditor obtained default judgment against debtor in civil action due to debtor's refusal to cooperate in discovery. After debtor filed bankruptcy case, creditor moved to hold debt excepted from discharge under § 523(a)(2)(A). In dischargeability action, creditor moved for summary judgment, asserting that the default judgment in the prior action conclusively established the elements necessary for the bankruptcy court to hold the debt non-dischargeable under § 523(a)(2)(A) as a debt for money obtained by fraud. Debtor argued that no preclusive effect should be accorded the prior judgment because the issue of fraud had not been actually litigated. Circuit

ruled in favor of creditor. While the general federal rule is that a default judgment does not support the application of collateral estoppel, a default judgment entered as sanctions for discovery abuse may suffice. Where a party has substantially participated in an action in which he had a full and fair opportunity to defend on the merits, but chooses not to defend, and attempts to frustrate discovery, the default judgment may support collateral estoppel. The opinion emphasizes this decision may not apply to a situation where a default is entered without any substantial participation by the debtor.

St. Laurent v. Ambrose (*In re* St. Laurent) 991 F.2d 672 (11th Cir. 1993). Creditor brought dischargeability action against debtor seeking to except punitive damages award arising out of fraudulent conduct from discharge. On a question of first impression in this Circuit, punitive damage awards flowing from the same course of fraudulent conduct necessitating an award of compensatory damages are not dischargeable under § 523(a)(2)(A). Given its "broadest possible definition," the term "debt" under § 523(a)(2)(A) encompasses an award for punitive damages arising from the same conduct as necessitated the compensatory damages award. For purposes of § 523(a)(2)(A), a creditor must prove that (1) the debtor made a false representation with intent to deceive the creditor, (2) the creditor relied on the representation, (3) that his reliance was reasonably founded, and (4) that the creditor sustained loss as result of the misrepresentation. For collateral estoppel to apply: (1) the issue at stake must be identical to the one decided in the prior litigation; (2) the issue must have been actually litigated in the prior proceeding; (3) the prior determination of the issue must have been a critical and necessary part of the judgment in that earlier decision; and (4) the standard of proof in the prior action must have been at least as stringent as the standard of proof in the later case.

TransSouth Financial Corp. of Fla. v. Johnson, 931 F.2d 1505 (11th Cir. 1991). Creditor brought successful dischargeability action against debtors. Bankruptcy court refused to include attorney fees in the non-dischargeable judgment. Circuit reversed holding that when a creditor establishes that a debt was incurred by fraud and satisfies the requirements of § 523(a)(2), the creditor is entitled to a non-dischargeable judgment for the entire debt. If the debt is based upon a contract which provides for attorney's fees, then those fees become part of the nondischargeable debt.

Hunter, *In re*, 780 F.2d 1577 (11th Cir. 1986). Davison-Paxon Co. v. Caldwell, 115 F.2d 189 (5th Cir. 1940), is still binding precedent. Failure to disclose is not within § 523(a)(2)(A); there must be an actual overt false pretense or representation. Debtor's failure to disclose gambling activities and past embezzlement was not fraud. Creditor must prove exception by clear and convincing evidence. Obviously, this case was decided prior to the Supreme Court's Grogan v. Garner decision, wherein the Supreme Court held the preponderance of the evidence was the appropriate burden of proof.

Birmingham Trust National Bank v. Case, 755 F.2d 1474 (11th Cir. 1985). Reckless disregard for the truth or falsity of a statement constitutes a "false representation" under § 523(a)(2)(A). Where fraud involves collateral of supposedly secured creditor, the measure of the debt excepted from discharge is total debt, not just the value of collateral. Bankruptcy laws are designed to provide relief for the honest but unfortunate debtor. One of the purposes of the fraud exceptions to discharge is to punish the debtor for engaging in fraudulent conduct. Thus, the entire amount of

the debt would be nondischargeable.

First National Bank of Mobile v. Roddenberry, 701 F.2d 927 (11th Cir. 1983). Holding in Davison-Paxon Co. v. Caldwell, 115 F.2d 189 (5th Cir. 1940), that § 17(a)(2) does not except debts created through concealment of insolvency and present inability to pay, is binding in the case of one credit transactions. Where third party bank credit cards are involved, the bank assumes the risk of nonpayment until the bank revokes the debtor's right to possession and use of the card and this revocation is made known to the debtor. Only use of card after such revocation will constitute false pretenses or false representations. In footnote 3, the Court notes the addition in § 523(a)(2)(A) of the term "actual fraud" but reserves comment on its effect.

§ 523(a)(2)(B) Discharge Exception for Debts From Use of False Financial Statements.

Equitable Bank v. Miller, 39 F.3d 301 (11th Cir. 1994). Under § 523(a)(2)(B), a debt is non-dischargeable where it was obtained by a writing: (1) that is materially false; (2) respecting the debtor's or an insider's financial condition; (3) on which the creditor to whom the debt is liable for such money, property, services, or credit reasonably relied; and (4) that the debtor caused to be made or published with the intent to deceive. A bankruptcy court should look to the totality of the circumstances, including the recklessness of a debtor's behavior, to infer whether a debtor submitted a statement with intent to deceive. Here, creditor failed to establish that debtor published the financial statement with intent to deceive where the overestimate of net worth was based on a reasonable method of cost, and failure to list liabilities was explained by a netting of assets and liabilities. The errors were made in good faith even though the statements failed to follow sound accounting practices.

Collins, *In re*, 946 F.2d 815 (11th Cir. 1991). A creditor satisfies the provisions of § 523(a)(2)(B) by proof of reasonable reliance on the false statement. It is no defense to the debtor that the creditor would have suffered no loss if it had properly perfected its security interest. The reasonableness of a creditor's conduct after loaning funds to the debtor is irrelevant to the reasonableness of his reliance on the representation which induced the loan in the first place.

§ 523(a)(3) Discharge Exception for Debts Not Listed or Scheduled.

Spring Valley Farms, Inc., *In re*, 863 F.2d 832 (11th Cir. 1989). Circuit distinguished this case from the Alton case which dealt with individuals debtors. This case dealt with a corporate debtor. Section 523(a)(3) places a burden of inquiry upon a creditor with actual knowledge of bankruptcy case in time to file proof of claim only when the debtor is an "individual debtor." A corporate debtor is not an individual debtor for the purposes of § 523, thus, creditor had no burden of inquiry.

Alton, *In re*, 837 F.2d 457 (11th Cir. 1988). Creditor with actual notice of bankruptcy proceeding brought motion for extension of deadline to file dischargeability complaint after deadline had run. Creditor argued § 523(a)(3), to which the deadline did not apply, would permit his complaint for dischargeability. Section 523(a)(3)(B) specifically provides that when a debtor fails to list

fraudulently incurred debts or lists them too late to allow a creditor to file a proof of claim and a dischargeability complaint in timely manner, then those debts will not be discharged "unless such creditor had notice or actual knowledge of the case in time for such timely filing and request" The mere knowledge of a pending bankruptcy proceeding is sufficient to bar the dischargeability complaint of a creditor who took no action, whether or not that creditor received official notice from the court of various pertinent dates. Section § 523(a)(3) places a burden of inquiry upon a creditor with actual knowledge of the bankruptcy case in time to file a proof of claim. This discourages a creditor, who knows of a proceeding but who did not receive formal notification, from standing back, allowing the bankruptcy to proceed without any action on his claim, and then asserting that the debt owed him is not dischargeable. Here, since creditor had actual knowledge of bankruptcy proceeding in time to file a claim and a request for determination of dischargeability, § 523(a)(3)(B) was unavailable.

Baitcher, Matter of, 781 F.2d 1529 (11th Cir. 1986). In a no-asset case, failure to schedule a debt does not deny a discharge of that debt under § 523(a)(3) when reason for failure is honest mistake. However, when reason is fraud or intentional design, discharge may be denied.

§ 523(a)(4) Discharge Exception for Fiduciary Debts, Embezzlement or Larceny.

Bullock v. BankChampaign (Bullock), 670 F.3d 1160 (11th Cir. 2012), *rev'd*, 2013 WL 1942393 (U.S. 2013). The court of appeals affirmed the bankruptcy and district courts' determinations that an Illinois judgment debt owed to the bank was excepted from dischargeable pursuant to § 523(a)(4) and adopted the objectively reckless standard for purposes of determining defalcation under § 523(a)(4). Subsequently reversed by the Supreme Court which adopted a standard of gross recklessness.

Guerra v. Fernandez-Rocha, MD (In re Fernandez-Rocha), 451 F.3d 813 (11th Cir. 2006). Florida's Financial Responsibility Act did not create a fiduciary duty for purposes of exception to discharge under § 523(a)(4). The physician's failure to maintain an escrow fund, malpractice coverage, or a letter of credit under the Act did not result in a breach of a fiduciary duty or even a debt for purposes of § 523(a)(4). The statute did not require the funds to be held in a fiduciary capacity, and nothing in the statute required the physician to perform any accounting to patients of the funds held to satisfy the regulatory requirements.

Quaif v. Johnson, 4 F.3d 950 (11th Cir. 1993). Chapter 7 debtor was an agent for an insurance provider. Contract with provider required all premiums to be held in trust and eventually forwarded to insurer. Debtor failed to remit funds to insurer and filed for bankruptcy relief. Insurer brought § 523(a)(4) dischargeability action against debtor. Debtor argued there was no fiduciary relationship between himself and the insurer. Circuit held the state statutory duty to segregate the insurance premiums created a trust and imposed fiduciary duties upon the debtor. Further, the failure to remit premiums to the insurer constituted a defalcation within the meaning of § 523(a)(4).

Greenberg v. Schools, 711 F.2d 152 (11th Cir. 1983). Where debt arose out of a settlement of a fraud

and misappropriation of funds in a fiduciary capacity state court lawsuit, bankruptcy court should examine the underlying facts to determine if exception to discharge is appropriate. Debt is not automatically dischargeable simply because underlying conduct was reduced to a monetary settlement.

§ 523(a)(5) Discharge Exception for Debts from Alimony, Maintenance, or Support.

Benson v. Benson (In re Benson), 441 Fed. Appx. 650 (11th Cir. 2011). In a Chapter 13 bankruptcy, a debtor post-BAPCPA can still discharge property settlements, but cannot discharge a DSO. A DSO is defined at § 101(14A) as a debt owed to a former spouse that was incurred as a result of a property settlement agreement that is "*in the nature of* alimony, maintenance, or support . . . [of that former spouse] *without regard to whether such debt is expressly so designated*." (emphasis added). Here the court determined that mortgage payments were a nondischargeable domestic support obligation.

Cummings v. Cummings (In re Cummings), 277 Fed. Appx. 946 (11th Cir. 2008). Bankruptcy court was precluded by the law of the case doctrine from re-litigating issue of to what extent state divorce court intended its award against debtor to constitute nondischargeable support, where the state court issued a clarification order that the first two of three lump sum payments were intended as support and the parties were identical in both proceedings. Once the divorce court resolved the issue of its intent, the debtor was precluded from relitigating that claim before the court.

Cummings v. Cummings, 244 F.3d 1263 (11th Cir. 2001). Dischargeability action was brought to determine whether certain debts would be excepted from discharge under § 523(a)(5). Pursuant to § 523(a)(5), a given divorce obligation is not dischargeable if it is 'actually in the nature of' alimony, maintenance, or support." To determine if a debt is in the nature of alimony, maintenance, or support, the court cannot rely solely on the label used by the parties. The parties intent at the time of the creation of the debt is the primary test in determining whether the obligation is alimony or support. The bankruptcy court considered several factors in determining if the debt was alimony or support, including: (1) the obligation was not subject to death or remarriage; (2) it was payable in three lump sums rather than installments; (3) it was non-modifiable; (4) it was not enforceable through contempt proceedings; (5) the divorce court derived it by equally dividing the assets and liabilities of the couple; (6) the minor children were separately awarded support; and (7) the divorce court separately awarded rehabilitative alimony. Circuit held that although the factors considered by the bankruptcy court were relevant to the inquiry, the touchstone for dischargeability under § 523(a)(5) is the intent of the parties.

Strickland v. Shannon (*In re* Strickland), 90 F.3d 444 (11th Cir. 1996). In a post divorce modification hearing, state court awarded attorney fees to non-debtor spouse under Florida statute which bases fees upon relative need and ability to pay. Debtor filed for Chapter 7 relief, and filed dischargeability action seeking determination of the dischargeability of the attorney fees. Under | 523(a)(5) the court should make a simple inquiry whether the obligation can legitimately be characterized as support. Because the award of attorney fees was based upon state statute relating to need and/or lesser ability to pay, the award of attorney fees could "legitimately be characterized as support," and therefore nondischargeable under § 523(a)(5). Section 523(a)(5) does not require

an assessment of the current financial circumstances of the parties to determine if the award is actually needed.

Harrell, *In re*, 754 F.2d 902 (11th Cir. 1985). Debtor's former spouse brought dischargeability action against debtor under § 5239a)(5). A domestic obligation is not dischargeable if it is actually in the nature of alimony, maintenance, or support. What constitutes alimony, maintenance or support will be determined under the bankruptcy laws, not state law. Whether the debtor had a duty under state law to pay certain expenses absent the divorce agreement was not relevant. Rather than analyze the financial position of the parties and determine if support is needed, the bankruptcy court should merely determine whether the obligation in issue is actually in the nature of alimony or support. Once the bankruptcy court concluded that the alimony payments were "actually in the nature of alimony," the obligation was nondischargeable under § 523(a)(5).

§ 523(a)(6) Discharge Exception for Willful and Malicious Acts.

Maxfield v. Jennings (In re Jennings), 670 F.3d 1329 (11th Cir. 2012). Exception to discharge for willful and malicious injury by debtor to the property of another applied where the debtor acted willfully in preventing the judgment creditor from reaching unencumbered property to satisfy part of his personal injury judgment. The debtor knew that the purpose of the transfer was to keep the property out of the reach of creditors. She was acutely aware of the creditor's personal injury claim because she had been named as a co-defendant in the suit just three months before the transfer. Nor did the debtor have just cause to effect the transfer. She knew that the third party to whom the property was transferred had no claim to the property and she knew that her co-defendant had no legitimate reason to transfer the property. She effected the transfer without just cause and, therefore, did so with malice.

Thomas v. Loveless (In re Thomas), 288 Fed. Appx. 547 (11th Cir. 2008). Debtor was collaterally estopped from relitigating the issue of her liability for conspiracy and malicious prosecution. Under § 523(a)(6) a "willful and malicious injury by the debtor to another entity or to the property of another entity" is excluded from discharge. "[A] debtor is responsible for a 'willful' injury when he or she commits an intentional act the purpose of which is to cause injury or which is substantially certain to cause injury." When a debtor commits an act that is "wrongful and without just cause or excessive even in the absence of personal hatred, spite or ill-will" malice is implied. The prepetition judgment against the debtor for conspiracy and malicious prosecution was excluded from discharge because the acts inflicted "willful and malicious injury" to the judgment creditors.

Kawaauhau v. Geiger (*In re* Geiger), 523 U.S. 57, 118 S. Ct. 974 (1998). The word "willful" in § 523(a)(6) modifies the word "injury," indicating that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. If "willful" referred to "act" the definition would be too broad and would place within the excepted category a wide range of situations in which an act is intentional, but injury is unintended, i.e., neither desired nor in fact anticipated by the debtor. Instead, the debtor must deliberately act and intentionally injure. Reckless and negligent acts are insufficient to fall within the provisions of § 523(a)(6). Like an intentional tort, the defendant must intend the consequences of the act. This

section does not apply to professional malpractice, even when the professional intentionally chooses to provide substandard services in order to increase profits.

Wolfson v. Equine Capital Corp. (*In re* Wolfson), 56 F.3d 52 (11th Cir. 1995). Secured lender brought dischargeability action under § 523(a)(6) alleging debtor converted its collateral. Circuit held that willful and malicious injury under § 523(a)(6) includes willful and malicious conversion, which is the unauthorized exercise of ownership over goods belonging to another to the exclusion of the owner's rights. However, the mere act of conversion, without more, is insufficient to find the debt excepted from discharge. Circumstances, engendered by a course of dealing, may create an honest, but mistaken belief, in the debtor with respect to its rights in the collateral. In such cases, there may be conversion, but not a "willful and malicious" conversion. Here, the creditor waived its rights to nondischargeability of claim as it was aware of debtor's actions and failed to take reasonable steps to protect its security. Where lender is aware of conversion and fails to act to protect its security, it waives its rights to assert that the debt is nondischargeable.

Hope v. Walker (*In re* Walker), 48 F.3d 1161 (11th Cir. 1995). Employee of debtor filed complaint requesting that his state court judgment for disability benefits, medical costs, attorney fees and interest be declared nondischargeable as debt resulting from willful and malicious injury due to debtor's failure to obtain statutorily required workers' compensation insurance. In order to be "willful" under § 523(a)(6), the debtor must have intended more than merely the act that results in injury. It requires instead an intentional or deliberate injury. Thus, a debtor is responsible for a "willful" injury when he or she commits an intentional act the purpose of which is to cause injury or which is substantially certain to cause injury. Here, the failure to obtain the insurance was a willful act. However, it was not done with the intent to cause injury nor was it substantially certain to cause creditor injury.

Yanks, *In re*, 931 F.2d 42 (11th Cir. 1991). Judgment creditor brought complaint seeking exception to discharge of debt owed by Chapter 7 debtor. Creditor was successful in state court action against the debtor alleging defamation, either through malicious publication or, in the alternative, that malice was implied by law. Debtor argued state court judgment did not necessarily find debtor's actions were "willful and malicious." Argument was not persuasive because the judgment under either of the theories alleged was sufficient to find malice. Malice, for purposes of § 523(a)(6), could be established by a finding of implied or constructive malice. Debtor also argued the standard of proof in the state court proceeding, preponderance of the evidence, was insufficient to find the debt non-dischargeable under § 523(a)(6). Debtor was arguing for the clear and convincing evidence standard of proof. Circuit also rejected this argument. Applying Grogan v. Garner, the standard of proof is preponderance of the evidence. Since the standards of proof in the state court action and the dischargeability action under § 523(a)(6) were identical, creditor was entitled to invoke the doctrine of collateral estoppel.

Ikner, *In re*, 883 F.2d 986 (11th Cir. 1989). Malicious means wrongful and without just cause or excessive even in the absence of personal hatred or ill will. For purposes of § 523(a)(6), malice can be shown by proving implied or constructive malice. Wantonness under Alabama law includes acts done in reckless disregard of the rights of another. Under the § 523(a)(6), however, "willful and

malicious" cannot be established by a showing of recklessness. Thus, bankruptcy court was not bound by collateral estoppel since issues were not identical.

Chrysler Credit Corp. v. Rebhan, 842 F.2d 1257 (11th Cir. 1988). Willfulness and malice must be proven by clear and convincing evidence. {Note: this conclusion was abrogated in the Supreme Court decision Grogan v. Garner, which only required a preponderance of the evidence} Willful for purposes of § 523(a)(6) requires an intentional act; a reckless disregard of duty is insufficient to prove willfulness. However, malice for purposes of § 523(a)(6) can be established by a finding of implied or constructive malice. Bankruptcy court was not clearly erroneous in finding that debtor had willfully and maliciously converted proceeds of automobile floor plan financing by failing to forward proceeds to creditor.

Latch, *In re*, 820 F.2d 1163 (11th Cir. 1987). Willful means deliberate and intentional; malicious means wrongful and without just cause. Since debtors had been convicted prepetition of civil theft, which crime required sufficiently similar standard of intent as § 523(a)(6), the bankruptcy court was bound by collateral estoppel to adopt the state court finding and find debt nondischargeable.

Fielder, *In re*, 799 F.2d 656 (11th Cir. 1986). Where debt arose prior to effective date of § 523(a)(9), excepting drunk driving judgments from discharge, the voluntary drinking of alcohol was an intentional act within the willful and malicious injury exception of § 523(a)(6).

Wrenn, *In re*, 791 F.2d 1542 (11th Cir. 1986). Debtor filed wholly frivolous suit under Title VII against employer. Employer was awarded attorney fees. After bankruptcy petition was filed, employer sought to except award from discharge under § 523(a)(6) as a "willful and malicious" injury. Creditor argued debtor's action was the equivalent of a "willful and malicious abuse of the court processes" for the purposes of determining the dischargeability of his judgment debt under § 523(a)(6). Circuit held that an act in reckless disregard of the rights of others is insufficient to constitute "willful and malicious" conduct for purposes of § 523(a)(6). Here, because debtor's action was frivolous it was a reckless disregard of employer's rights and not a "willful and malicious" act warranting exception from discharge.

§ 523(a)(7) Discharge Exception for Fines, Penalties, or Forfeitures.

Colton v. Verola (In re Verola), 446 F.3d 1206 (11th Cir. 2006). All state-imposed criminal restitution obligations are nondischargeable pursuant to § 523(a)(7). The debtor was ordered to pay restitution as a condition of probation. The money was to be collected by the Department of Corrections and forwarded to the victims. The debtor argued that the restitution obligation did not meet the second requirement under § 523(a)(7) that the restitution be payable "to and for the benefit of a government unit." Relying upon the Supreme Court case of *Kelly v. Robinson*, 479 U.S. 36, 107 S.Ct. 353 (1986), the Court of Appeals concluded that § 523(a)(7) makes all state-imposed criminal restitution obligations non-dischargeable.

Kelly v. Robinson, 479 U.S. 36, 107 S. Ct. 353 (1986). Section 523(a)(7) preserves from discharge any condition a state criminal court imposes as part of a criminal sentence. This section creates a broad exception for all penal sanctions, whether they be denominated fines, penalties, or forfeitures. Restitution, even though it is forwarded to the victim, still falls within the § 523(a)(7) exception. The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, a decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the state and the situation of the defendant. Thus, restitution orders operate "for the benefit of" the state and not "for ... compensation" of the victim. As such, restitution orders come within the meaning of § 523(a)(7).

Burns, *In re*, 887 F.2d 1541 (11th Cir. 1989). Chapter 13 debtor initiated adversary proceeding to determine dischargeability of federal income tax liabilities. Under § 523(a)(7), a tax penalty is discharged if either the tax to which it relates is discharged or if the transaction or event giving rise to the penalty occurred more than three years prior to the filing of the bankruptcy petition.

§ 523(a)(8) Discharge Exception for Student Loan Debts.

Hemar Insurance Corp. of American v. Cox (*In re* Cox), 338 F.3d 1238 (11th Cir. 2003), *reh'g denied*, 82 Fed. Appx. 220, 2003 WL 22240497, *cert. denied,* 541 U.S. 991, 124 S.Ct. 2016 (2004). Student loans are nondischargeable unless repayment imposes an undue hardship on the debtor or her dependents. This Circuit adopts the majority view to follow the Second Circuit Brunner standard. The debtor must show: (1) an inability to maintain, based on current income and expenses, a minimal standard of living for the debtor and dependents; (2) the current state of affairs is likely to persist for a significant period portion of the repayment period; and (3) good faith efforts to repay the loan. The Circuit held that a finding of undue hardship using these factors is required before the court can consider or impose a partial discharge, based on an ability to pay a portion of the debt. Section 523(a)(8) is designed to make the exception to nondischargeability difficult to satisfy.

Burks v. State of LA & Bd. of Regents, (*In re* Burks), 244 F.3d 1245 (11th Cir. 2001). Debtor's obligation to repay state educational stipend was non-dischargeable under § 5239a)(8)'s "educational loan" exception. The repayment obligation was incurred due to the debtor's failure to fulfill the stipend agreement's requirement to teach at an "other-race" university following attainment of his graduate degree. The debtor argued that the purpose of the stipends was to achieve diversity among public university instructors, not for an "educational benefit" as required in the statute. Regardless of any 'diversity purpose,' the debtor received an "educational benefit."

Shore, *In re*, 707 F.2d 1337 (11th Cir. 1983). Debtor filed complaint seeking discharge of educational loan. Debtor argued college was not a governmental unit as required for debt to be excepted from discharge under § 523(a)(8). Circuit disagreed and held college, which was an institution in the Georgia University system, is a governmental unit within the meaning of §§ 101 and 523(a)(8). An educational loan "made by" a governmental unit within the meaning of § 523(a)(8) is one in which a governmental unit is the lender and the holder of the loan obligation. Where the governmental unit draws the funds it loans, is immaterial to the determination of governmental unit status. Therefore, students loans would be excepted from discharge.

§ 523(a)(15) Discharge Exception for Divorce Debts Not Covered under § 523(a)(5).

Cummings v. Cummings, 244 F.3d 1263 (11th Cir. 2001). Dischargeability action was brought to determine whether certain debts would be excepted from discharge under § 523(a)(5) or § 523(a)(15). Pursuant to § 523(a)(5), a given divorce obligation is not dischargeable if it is 'actually in the nature of' alimony, maintenance, or support." Debts not of the kind specified under § 523(a)(5) may be dischargeable unless the debtor can prove one of the exceptions set forth in § 523(a)(15)(A) or (B). To determine if a debt is in the nature of alimony, maintenance, or support, the court cannot rely solely on the label used by the parties. The parties intent at the time of the creation of the debt is the primary test in determining whether the obligation is alimony or support. The bankruptcy court considered several factors in determining if the debt was alimony or support, including: (1) the obligation was not subject to death or remarriage; (2) it was payable in three lump sums rather than installments; (3) it was non-modifiable; (4) it was not enforceable through contempt proceedings; (5) the divorce court derived it by equally dividing the assets and liabilities of the couple; (6) the minor children were separately awarded support; and (7) the divorce court separately awarded rehabilitative alimony. Circuit held that although the factors considered by the bankruptcy court were relevant to the inquiry, the touchstone for dischargeability under § 523(a)(5) is the intent of the parties. Debts not falling within § 523(a)(5) would be considered under § 523(a)(15).

§ 523(d) Attorney Fees and Costs to Debtors on Unsuccessful Dischargeability Determinations.

Cadle Co. v. Martinez (In re Martinez), 416 F.3d 1286 (11th Cir. 2005). A debtor that successfully defends a nondischargeability proceeding is entitled to recover attorney fees and costs where the fees are authorized under an enforceable contractual right, including a contract provision which, in authorizing recovery of such fees and costs by the creditor if it prevails, necessarily incorporates a reciprocal attorney fee provision in the contract for debtor's benefit under Florida's reciprocal attorney fees statute. A prevailing party may generally not collect an attorney's fee unless the fee is either authorized by federal statute or an enforceable contractual right. The debtor was not entitled to an award of attorney's fees under § 523(d), the sole federal statutory authority for an award of attorney's fees under § 523(a)(2), because § 523(d) is only applicable in cases involving consumer debts. The debt at issue was a commercial loan. To be entitled to attorney fees, the debtor had to have an enforceable contractual right to the fees. The contract between the parties only entitled the creditor to attorney's fees, but Florida's reciprocal attorney's fee statute provides that a contractual provision for attorney's fees cannot be one-sided.

Fox, *In re*, 725 F.2d 661 (11th Cir. 1984). Mobile home dealer brought dischargeability action against debtor in connection with sale of commercial inventory. Bankruptcy court ruled in debtor's favor and ordered dealer to pay debtor's attorney fees. Circuit held the § 523(d) provision for awarding attorneys fees to debtor in creditor's unsuccessful dischargeability complaint applies only to consumer debts and not to commercial debts. Section 105(a) does not give bankruptcy judge the power to expand on statutory allowances of fees where Congress has not provided such.

§ 524(a) Effect of Discharge.

Asbestos Settlement Trust v. City of New York (Celotex Corp.), 487 F.3d 1320 (11th Cir. 2007). The debtor's confirmed Chapter 11 plan created a trust pursuant to 1 U.S.C. § 524(g)(2)(B)(i)(I) for the

purpose of receiving and managing trust assets consisting of over $1.2 billion to assume the debtor's current and future liabilities from asbestos claims estimated at over $13 billion and "to address, liquidate, resolve and disallow or allow and pay Asbestos Claims." The trustees of the settlement trust refused to pay property damage claims that a creditor asserted against the trust after the plan administrator had allowed the creditor's claims. The trustees and the creditor sought orders from the bankruptcy court upholding their respective interpretations' of the trustees' and administrator's authority under the plan documents. The Eleventh Circuit determined that the Chapter 11 plan documents created an asbestos settlement trust, and conferred on the trustees the power to administer any personal injury asbestos claims asserted against Chapter 11 debtors, but reserved to the property damages claims administrator, the power to process, investigate, and allow or disallow any property damage asbestos claims. The plan documents did not confer on the trustees any power to independently review and overrule the administrator's decisions. Under the doctrine of *expressio unius est exclusio alterius* when certain matters are mentioned in a contract, other similar matters not mentioned are intended to be excluded. Here the plan documents provided for review of the administrator's decisions, but only by individuals other than the trustees. By contrast there were no provisions expressly empowering the trustees to conduct their own review of the administrator's decisions.

Johnson v. Home State Bank, 501 U.S. 78, 111 S. Ct. 2150 (1991). Debtor filed Chapter 13 petition after receiving discharge in Chapter 7. A discharge in Chapter 7 discharges a debtor's *in personam* liability. While the Chapter 7 discharge extinguishes "the personal liability of the debtor," the *in rem* liability survives the Chapter 7 discharge. Thus, a creditor's right to foreclose on a mortgage survives or passes through the bankruptcy. Even though the *in rem* liability was not extinguished in the Chapter 7, it can still be addressed in a subsequent Chapter 13 case.

Hardy v. United States (*In re* Hardy), 97 F.3d 1384 (11th Cir. 1996). IRS attempted to collect discharged debt. Debtor argued §§ 105 and 524 authorized monetary sanctions. While not expressly deciding if § 524 can afford monetary relief, IRS may be liable for contempt under § 105 if it willfully violated the permanent injunction of § 524. The Circuit adopted the two-pronged test to determine willfulness for stay violation as the same test to determine willfulness for violations of the discharge injunction of § 524. Under this test the court will find the defendant in contempt if it: (1) knew that the debt had been discharged and (2) intended the actions which violated the discharge injunction. If elements are proven, court can only impose sanctions for contempt that are coercive and not punitive.

Holloway v. John Hancock Mutual Life Ins. Co., 81 F.3d 1062 (11th Cir. 1996). Unless a lien is avoidable and the debtor has taken timely steps to avoid it, the lien survives the discharge in bankruptcy.

Wrenn v. American Cast Iron Pipe Co., 40 F.3d 1162 (11th Cir. 1994). Debtor argued a lien was unenforceable because the discharge of the judgment against him avoids the judicial lien based upon it. Circuit disagreed holding that a discharge in bankruptcy "voids any judgment ..., to the extent that such judgment is a determination of the personal liability of the debtor." Thus, the discharge did not affect liability in rem. Prepetition liens remain enforceable after discharge

against the debtor's property, unless the lien is avoided.

Jet Florida Systems, Inc., *In re*, 883 F.2d 970 (11th Cir. 1989). Creditor moved to vacate the § 524(a) injunction to proceed with his defamation claim in either state or federal court. Section 524(a) prohibits a plaintiff from proceeding against a debtor who has received a discharge, in order to recover from bankruptcy estate. Section 524(a) does not act to enjoin a creditor from taking action against another who also might be liable to the creditor. Here, § 524(a) discharge injunction did not preclude determination of debtor's liability to defamation claimant, in order for claimant to recover from debtor's insurer.

§ 524(c) Reaffirmation.

Taylor v. AGE Federal Credit Union (*In re* Taylor), 3 F.3d 1512 (11th Cir. 1993). Reaffirmation contemplates a voluntary agreement between a creditor and the debtor whereby a debt which is otherwise dischargeable with respect to the personal liability of the debtor, is renegotiated or reaffirmed by both parties.

§ 524(e) Third Party Discharge.

Shure v. Bradford National Bank, et al (*In re* Sure-Snap Corp.), 983 F.2d 1015 (11th Cir. 1993). Creditor sought to hold guarantor liable for attorney fees. Guarantor contended her liability was extinguished by discharge of Chapter 11 debtor. Circuit agrees with creditor holding cconfirmation of a debtor's Chapter 11 plan does not discharge the obligations of a third-party guarantor.

Jet Florida Systems, Inc., *In re*, 883 F.2d 970 (11th Cir. 1989). Creditor moved to vacate the § 524(a) injunction to proceed with his defamation claim in either state or federal court. Section 524(a) prohibits a plaintiff from proceeding against a debtor who has received a discharge, in order to recover from bankruptcy estate. Section 524(e) permits plaintiff to proceed against debtor in order to establish liability as a prerequisite for recovering from another who also may be liable, *e.g.*, an insurer. Here, § 524(a) discharge injunction did not preclude determination of debtor's liability to defamation claimant, in order for claimant to recover from debtor's insurer.

§ 524(g) Channeling Injunction.

Travelers Indem. Co. v. Bailey, 129 S. Ct. 2195 (2009). Bankruptcy court had continuing jurisdiction, more than ten years after entering Chapter 11 confirmation plan proposed by manufacturer of asbestos-based products, approving proposed settlements between the debtor and insurers that funded its plan, and enjoining causes of action against insurers, to interpret and enforce its own orders. Terms of the injunction were sufficiently broad to bar direct actions against the insurers.

§ 525 Protection Against Discriminatory Treatment.

Myers v. Toojay's Management Corp. (In re Myers), 640 F.3d 1278 (11th Cir. 2011). The Bankruptcy Code's antidiscrimination provision does not prohibit a private employer from

denying employment to an individual on the ground that he is or has been in bankruptcy. While § 525(a) of the Code explicitly forbids government employers from either denying or terminating employment because of bankruptcy, § 525(b) forbids private employers from terminating employment due to bankruptcy but says nothing about denying employment because of bankruptcy.

§ 525(a) Protection Against Discriminatory Treatment By a Governmental Unit.

Federal Communications Commission (FCC) v. NextWave Personal Communications, Inc., -- U.S. --, 123 S. Ct. 832 (2003). Communications company won bids on broadband licenses in the FCC's auctions to provide licensing to small businesses and other designated entities. The applicable provisions of the Communication Act of 1934, amended 1993, allowed these businesses to pay a down payment, sign a promissory note, grant the FCC security agreements, and make installment payments over the term of the licenses. When the Communications company suffered financial difficulty, the FCC approved company's petition for suspension or forbearance of installment payments. The FCC mandated that the company choose one of the several restructuring options that FCC provided to licensees by June 8, 1998, and begin making payments again by October of that same year. FCC denied company's request to extend the restructuring option deadline, and company filed for Chapter 11 on the date of the deadline. After unfavorable resolution of company's avoidance action, company proposed a plan of reorganization in which it would make a lump-sum payment to FCC to satisfy its debt on the licenses. However, FCC objected to the plan, arguing that the licenses were canceled when company missed the deadline to resume payments, and announced that a new auction would be held to sell the licenses. Company requested and received emergency relief from the bankruptcy court, but the Second Circuit reversed, finding that the bankruptcy court had exercised jurisdiction beyond its authority. When the FCC denied company's request that it reconsider the license cancellation, company appealed, pursuant to the Communications Act, to the D.C. Circuit Court of Appeals. The Court of Appeals held, inter alia, that the FCC violated § 525(a) when it arbitrarily canceled debtor-company's licenses. On certiorari, the Supreme Court rejected the FCC's arguments that § 525(a) was inapplicable for three reasons: (1) the licenses were not canceled "solely because" of missed payments, but rather due to a "valid regulatory motive"; (2) the license obligations were not dischargeable "debts" as defined in bankruptcy; and (3) application of § 525(a) to regulatory matters would conflict with the Communications Act. The Supreme Court found that application of § 525(a) hinged on whether nonpayment was the proximate cause, which was undisputed, not underlying motive and that Congress has expressly provided regulatory exceptions where it intended to do so. The Court systematically addressed the meaning of "debt" in the Bankruptcy Code, finding that "a debt is a debt, even when the obligation to pay it is also a regulatory condition." Ultimately, the Court held that the debt owed from the purchase of the licenses did not fall within the nine exceptions to dischargeability enumerated in § 523(a) and was, therefore, dischargeable. Finally, the Court found no conflict between § 525(a) and the Communications Act, as the latter did not expressly permit installment agreements or expressly require cancellation upon default; these policy decisions and "administrative preferences" created no conflict between the statutes in question. Thus, affirming the D.C. Circuit Court of Appeals in favor of the company, the Court held that FCC's cancellation of broadband licenses due to nonpayment violated § 525(a).

§ 525(b) Discrimination by Private Employer.

B. F. Goodrich Employees Fed. Credit Union v. Patterson (*In re* Patterson), 967 F.2d 505 (11th Cir. 1992). Credit Union violated § 525(b), which prohibits discrimination by a private employer, against an individual who has filed for bankruptcy under the Code, solely because of such bankruptcy. A credit union qualifies as a private employer. The definition of employer extends to credit unions affiliated with a particular employer or whose membership is a benefit of employment. Term 'employer' should be given a broad reading. Credit Union discriminated against the debtors by suspending their membership privileges. Decision to suspend privileges made upon being informed the debtors had filed for bankruptcy.

§526 Restrictions on Debt Relief Agencies.

U.S. v. Milavetz, Gallop & Milavetz, P.A.,130 S. Ct. 1324 (2010). While § 526(a)(4) provides that a debt relief agency shall not advise an assisted person to in cure more debt in contemplation of filing for bankruptcy, a debt relief agency violates § 526(a)(4) only when the impetus of the advice to incur more debt is the expectation of filing for bankruptcy and obtaining a discharge of the debt. Advice to refinance a mortgage or purchase a reliable car prior to filing because doing so will reduce the debtor's interest rates or improve ability to repay is not prohibited, "as the promise of enhanced financial prospects, rather than the anticipated filing, is the impelling cause."

§ 541(a) Property of the Estate.

Robinson v. Tyson Foods, Inc. (In re Robinson), 595 F.3d 1269 (11th Cir. 2010). A pending lawsuit qualifies as an asset. The failure to disclose has been defined as inadvertent only when the debtor either lacks knowledge or has no motive for concealment. The debtor argued no motive here because this was a 100% payback plan, but motive to conceal stems from the possibility of defrauding the courts and not from actual fraudulent result. Since the debtor filed her lawsuit before her case was fully paid out the possibility of defrauding the court existed.

Moecker v. Greenspoon (In re Lentek Intern., Inc.), 346 Fed. Appx. 430 (11th Cir. 2009). Liquidating trustee in a corporate Chapter 11 case filed an AP against a law firm asserting claims for malpractice for representing both the corporate officer and the debtor who had conflicting interests in a stock purchase and sale transaction. There was no evidence that anyone acting for the debtor consulted with the defendants seeking legal advice while the weight of the evidence was that the debtor held no belief that it had an attorney-client relationship with the defendants."It is the belief of the putative client and not the lawyer's actions that determines whether a lawyer-client relationship has developed." *Jackson v. Bellsouth Telecomms.*, 372 F.3d 1250, 1281 (11th Cir. 2004).

Bracewell v. Kelley (In re Bracewell), 454 F.3d 1234 (11th Cir. 2006). Crop disaster payment was not "property of the estate" in nature of legal or equitable property interest held by debtor upon the commencement of the case. Under § 541(a)(1), property of the estate includes property the debtor held as of the commencement of the case, not property he acquires thereafter. Although the crop payment was based upon the debtor's prepetition crop losses, it was authorized by federal legislation enacted postpetition. Upon the commencement of the case, the debtor did not possess any property interest in the payment or any right to the compensation until the legislation was enacted. The court concluded that the language of § 541(a)(1) was perfectly clear and warned

against looking to policy, legislative history, and Congressional intent to find meaning for clear language.

Menotte v. Raborn (In re Raborn), 470 F.3d 1319 (11th Cir. 2006). After grantors executed a deed to the debtor in his capacity as the trustee of a trust and debtor then filed for Chapter 7 relief, the bankruptcy trustee brought an adversary proceeding against the trust beneficiaries for determination that the res of the trust was property of the debtor's Chapter 7 estate. Whether the debtor held mere legal title to the property or was the fee simple owner of same was a question of state law that had to be certified to the Florida Supreme Court. The Eleventh Circuit asked the court to determine whether the prepetition deed to the Chapter 7 debtor, as trustee of an express trust which was identified in the deed by name and date, manifested an intent to convey anything other than a fee simple interest in the property to the debtor. The Alabama Supreme Court answered the question in *Raborn v. Menotte*, 2008 WL 90037 (Ala. 2008) finding that the deed conveyed mere legal title to the debtor. Because the debtor possessed only legal title to the property as trustee of the trust, the bankruptcy trustee could neither succeed to nor have any rights in fee simple title to the property.

Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards (In re ETS Payphones, Inc.), 437 F.3d 1145 (11th Cir. 2006). A bankruptcy trustee stands in the shoes of the debtor and has standing to bring any suit that the debtor could have instituted on the petition date, but a trustee does not acquire rights or interests any greater than those of the debtor. The doctrine of *in pari delicto*, an equitable doctrine that states "a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing," applied with equal force to the trustee of a corporation that operated a massive Ponzi scheme. The trustee had standing to pursue RICO claims against entities that allegedly assisted the debtor's principal in the scheme, but the trustee was barred by the doctrine of *in pari delicto* from recovering on the claims. Whether the defense of *in pari delicto* may be asserted to a cause of action created by federal statute depends on two factors: (1) the plaintiff's active participation in violation *vel non*; and (2) the policy goals of the federal statute. Given that debtor was far more than a mere passive participant in fraud and that application of the *in pari delicto* doctrine would further policies behind RICO of divesting RICO participants of ill-gotten gains by barring award of treble damages, trustee of corporation that devised ponzi scheme was barred by the doctrine from recovering on federal racketeering claims against entities which allegedly assisted in the scheme.

Baillie Lumber Co., LP v. Thompson (In re Icarus Holding, LLC), 413 F.3d 1293 (11th Cir. 2005). Alter ego claim against corporation's principal, to hold principal liable for corporate debt, was cause of action belonging to creditors as a whole rather than to any specific creditor, so as to be included in "property of the estate" under § 541(a) and so as to prevent an individual creditor from seeking to pursue the cause of action because of the automatic stay of the bankruptcy.

Baxley v. Pediatric Servs. of Am., 147 Fed.Appx. 59 (11th Cir. 2005)(*not selected for publication)*. The plaintiff in an employment discrimination action failed to disclose her claim against her former employer in a Chapter 7 petition that she filed approximately two months after the employer terminated her. The bankruptcy court entered an order discharging her debts and closed the case. The district court entered an order granting summary judgment in favor of the employer based

on judicial estoppel. The Court of Appeals determined that the plaintiff did not have standing to pursue the claims because the claims were property of her Chapter 7 estate and there was no evidence that same had been abandoned by the Chapter 7 trustee. The Court found that debtor's employment claims arose on the date of her termination. Debtor filed bankruptcy two months later. Citing *Parker v. Wendy's International, Inc.*, 365 F.3d 1268 (11th Cir. 2004), the court of appeals concluded that debtor's employment claims became property of the bankruptcy estate.

Drye v. United States, 528 U.S. 49, 120 S. Ct. 474 (1999). A federal tax lien attaches to any property or rights to property belonging to the debtor, including an inheritance. This is notwithstanding a disclaimer by the heir. The lien attaches to property or rights to property of a taxpayer. The language of the federal tax lien statute and the statute providing for the collection of taxes by levy is broad. Congress intended to reach every interest in property that a taxpayer might have. The heir had the right under state law to accept the inheritance or to disclaim it. This right is sufficient to permit the lien to attach. State law cannot negate the federal law. A similar analysis should apply in making § 541 determinations.

United States v. Whiting Pools, Inc., 462 U.S. 198, 103 S. Ct. 2309 (1983). Property of the debtor seized by a creditor prior to the filing of a bankruptcy petition is property of the estate and, therefore, § 542(a) applies to a prepetition seizure of the debtor's assets. Supreme Court acknowledged that if the tax levy or seizure transferred ownership of the property to the IRS, property may not be property of the estate. Under the tax laws, until a tax sale takes place, the debtor remains the owner of the property and the property remains property of the debtor's estate.

Menotte v. Brown (In re Brown), 303 F.3d 1261 (11th Cir. 2002). Chapter 7 debtor had established an irrevocable charitable remainder trust with an anti-assignment/anti-alienation "spendthrift" provision, from proceeds from her deceased mother's estate almost six years prior to debtor filing bankruptcy. Under the terms of the trust, the debtor was to receive annual income equal to seven percent (7%) of the trust's assets, payable in monthly installments, for her life. When debtor filed bankruptcy, she claimed her interest in the trust as exempt, and over objection by the bankruptcy trustee, the court allowed the exemption. On appeal, the Eleventh Circuit, applying Florida law, defined spendthrift trusts as those established "*for the maintenance of another*," which could not be satisfied where debtor was both settlor and beneficiary. Having decided that the spendthrift provision was invalid, the court then turned to the question of defining the "debtor's interest" for purposes of inclusion in property of the estate. Holding that invalidation of the spendthrift provision did not invalidate the trust itself, the court stated that "[w]here the only interest a settlor has retained for herself under a trust is the right to income for life, it is solely this interest which her creditors can reach." Thus, because the debtor placed assets in an irrevocable charitable remainder trust, reserving only the right to redesignate other charitable remainderman, only the debtor's income interest and not the corpus of the trust, would be included in property of her bankruptcy estate.

Baillie Lumber Co. v. Thompson (In re Icarus Holding, LLC), 391 F.3d 1315 (11th Cir. 2004). After Ballie Lumber Company lost summary judgment against debtor's principal on an alter ego claim, the Eleventh Circuit considered whether, under Georgia law, debtor corporation had exclusive

standing to bring alter ego action against its principal. A debtor in possession may prosecute an alter ego claim on behalf of the corporation, and it has the exclusive right to such claim only if: (1) the claim is a general claim that is common to all creditors, and (2) state law allows the corporation to bring a claim against its principal. The court determined that if the debtor corporation has the right to bring the action, the right is property of the bankruptcy estate, under Section 541, but was unclear as to whether Georgia law allows a corporation to bring such a claim against its own principal.

The Eleventh Circuit certified two state law questions to the Supreme Court of Georgia: Will Georgia Law allow the representative of a debtor corporation to bring an alter ego action claim against the corporation's former principal; and if so, what is the measure of recovery? The Supreme Court of Georgia answered in Baillie Lumber Co. v. Thompson, 2005 Ga. *LEXIS* (April 26, 2005) that the corporation may bring such an action, and that if the principal is found liable under an alter ego theory, the principal should be liable for the entire amount of the debt.

Rozier v. Motors Acceptance Corp. (In re Rozier), 376 F.3d 1323 (11th Cir. 2004). Creditor Motors Acceptance Corp. appealed an order holding it in contempt for failure to return debtor's vehicle, which it had repossessed prior to debtor Chapter 13 filing. The Eleventh Circuit certified the question of ownership of a repossessed vehicle to the Georgia Supreme Court. The Eleventh Circuit received the answer that "ownership of collateral does not pass to a creditor upon repossession, but remains with the debtor until the creditor complies with the disposition or retention procedures of the Georgia UCC." Based on the Georgia Supreme Court answer, the Eleventh Circuit affirmed the lower court's order holding creditor in willful contempt of the automatic stay under Section 362 by refusing to return the vehicle.

Bell-Tel Fed. Credit Union v. Kalter, Tidewater Fin. Co. v. Chiodo (In re Kalter), 292 F.3d 1350 (11th Cir. 2002). Debtors, whose vehicles were repossessed prepetition, in two unrelated Chapter 13 cases moved for turnover and sanctions for stay violations against repossessing creditors. The bankruptcy court held the repossessed vehicles were property of the bankruptcy estate, awarded damages for the stay violation, directed the creditors to return the vehicles, and directed the debtors to make adequate protection payments. On appeal, the district court reversed, finding in favor of creditors. Debtors then appealed to the Eleventh Circuit, which relied on *In re Lewis* for the proposition that a debtor's equitable right to redeem does not bring the vehicle itself into property of the estate but differentiated the case from *Lewis* in that it was to be decided under Florida certificate of title law rather than Alabama law. Reviewing the title statute's provision allowing a creditor to obtain a new certificate of title upon repossession, the Circuit concluded that ownership of the vehicle passed to the creditor at the time of repossession.

Dzikowski, Trustee v. NASD Regulation, Inc. (*In re* Scanlon), 239 F.3d 1195 (11th Cir. 2001). Chapter 7 debtor-broker was liable to customers as a result of securities violations. Broker had to fund an escrow account for the benefit of customers. Broker's mother-in-law paid $650,000 into the account, the broker filed a Chapter 7 petition. Trustee claimed funds as property of the estate. § 541. Even though the mother-in-law was reimbursed by the debtor or his wife, Florida law holds the debtor had no control over the fund and no legal or equitable interest in it. The fund was not property of the estate. The issue was determined on a motion for summary judgment. Unresolved

is whether the trustee can recover any payments from the debtor to the mother-in-law.

Alvarez, *In re*, 224 F.3d 1273 (11th Cir. 2000), *cert. denied,* 121 S.Ct. 1083 (2001). Chapter 7 debtor brought state court action against his bankruptcy counsel, for counsel's alleged malpractice in filing debtor's case under Chapter 7 rather than Chapter 11. Matter was removed to the bankruptcy court, and debtor filed motion for determination of ownership of chose in action. The Bankruptcy Court held that debtor's legal malpractice claims accrued post-petition and were not estate property, which was reversed and remanded by District Court. Debtor appealed. The Court of Appeals held that: (1) a legal malpractice claim arising from bankruptcy counsel's alleged negligence in failing to follow client's instructions to file Chapter 11 reorganization case, rather than a liquidation case under Chapter 7, accrued at moment that Chapter 7 petition was filed, when client lost control of his assets, and was accordingly included in "property of the estate;" and (2) debtor could not pursue legal malpractice claim without trustee's participation. The conclusion is strengthened because the facts involved are rooted in prepetition conduct.

Witko v. Menotte (In re Witko), 347 F.3d 1040 (11th Cir. 2004). Debtor filed for bankruptcy on September 8, 1999, and in a separate divorce proceeding in January 2000, a state court denied Witko's request for alimony. The state appellate court affirmed that decision on December 15, 2000, and Witko sued his divorce attorney for malpractice. The trustee in the bankruptcy case sought determination by the bankruptcy court of whether or not the malpractice suit was property of the bankruptcy estate. The bankruptcy court held that it was property of the estate, and the district court affirmed. The Eleventh Circuit reversed because in order for a lawsuit to be property of the estate, it must have existed and been "sufficiently rooted in the pre-bankruptcy past." In Florida, a malpractice action has three elements: (1) attorney employment; (2) neglect or breach of duty; and (3) damages as proximate result of breach. The third element was met when the adverse judgment was entered. Because the malpractice case was not concluded until January 13, 2000 and Witko had not suffered any harm from the malpractice at the time of his bankruptcy filing, then the cause of action did not exist at the time the bankruptcy petition was filed, thus it could not be property of the estate.

Muse v. Accord Human Resources, Inc., 2005 U.S. App. LEXIS 7240 (April 18, 2005) (*not for publication*). Plaintiff in a Fair Labor Standards Act ("FLSA") case had filed Chapter 13 bankruptcy on November 7, 1997. Plaintiff's plan was confirmed on April 7, 1998 and he received a Chapter 13 discharge on August 8, 2003.

From January 3, 2000 to September 6, 2002, plaintiff was employed by Defendants. On June 6, 2003, plaintiff filed the FLSA claim seeking to recover unpaid overtime allegedly not paid to him during the entire time he was employed by defendants. Defendants raised the defense of judicial estoppel. The district court held that because plaintiff's claim arose during the pendency of his Chapter 13 case and he did not disclose the claim, then he was judicially estopped from asserting the claim.

The Eleventh Circuit reversed because plaintiff's claim did not arise until after confirmation of his Chapter 13 plan. The court based its holding on the interpretation of Section 1306(a) and 1327(b) in Telfair v. First Mortgage Corp., 216 F.3d 1333 (11th Cir. 2000). In Telfair, the court held that assets acquired post-confirmation are not property of the bankruptcy estate

unless they are necessary to maintain the bankruptcy plan. In this case, the court held that because there was no assertion that the FLSA claim was necessary to meet the terms of the bankruptcy plan, he had no duty to disclose the claim, and the claim was accordingly not property of the estate.

Charles R. Hall Motors v. Lewis (*In re* Lewis), 137 F.3d 1280 (11th Cir. 1998). An automobile was repossessed two days prior to the debtor's bankruptcy. The debtor filed an adversary proceeding seeking turnover and damages for violations of the automatic stay. The plan provided for the creditor to receive a secured claim plus interest to be paid in fixed payments. The bankruptcy court ordered the car turned over and awarded damages. The district court reversed and appeal was taken to the Eleventh Circuit. The Circuit Court affirmed the district court. Alabama law was not changed by the U.C.C. Upon default, title and right of possession goes to the secured lender. The debtor neither retains title nor a right of possession, nor any other functionally equivalent ownership interest in the automobile. Only the bare statutory right of redemption becomes property of the estate. The automobile, the subject of the right to redeem, was not property of the estate.

Motors Acceptance Corp. v. Rozier (*In re* Rozier), 348 F.3d 1305 (11th Cir. 2003). After decisions in Alabama and Florida cases, the Circuit is presented with the prepetition repossession issue in Georgia. The bankruptcy court held that Georgia law retained the title and right of redemption and thus the vehicle is property of the estate. The Circuit certified the question to the Georgia Supreme Court, which held ownership was retained by debtor. Consequently, the Eleventh Circuit affirmed the trial court and held that the vehicle must be returned to debtor upon demand.

Ford Motor Credit Co. v. Stevens (*In re* Stevens), 130 F.3d 1027 (11th Cir. 1997). Upon filing a Chapter 13 petition, a debtor's truck and casualty insurance policy on the truck become property of the estate under § 541(a)(1). Whether the proceeds of the policy become property of the estate, §541(a)(6), depends on a determination that the debtor has an interest in the proceeds. In some circumstances, a creditor, or beneficiary other than the debtor, may be entitled to the proceeds. A casualty insurance policy protects both the owner and the secured creditor. The proceeds act as a substitute for the insured collateral. Thus, the debtor has an interest such that the proceeds become property of the estate. The secured creditor's interest is determined by its allowed secured claim in the case. The secured creditor can only recover the balance of its allowed secured claim from the proceeds. The standing trustee is entitled to the rest and may recover any overpayment to a creditor. If the debtor has no interest in the proceeds, and the proceeds are not a substitute for the collateral, i.e. a credit life policy, the proceeds are not property of the estate.

Venn v. St. Paul Fire and Marine Ins. Co. (*In re* Kimbrell), 99 F.3d 1058 (11th Cir. 1996). A medical malpractice claim was pending when a physician filed a no asset Chapter 7 case. St. Paul provided a defense and refused a demand to settle within policy limits. An excess judgment was obtained and the Chapter 7 trustee filed suit for bad faith refusal to settle. The cause of action belongs to the trustee, and the amount of damages equals the excess judgment. The trustee is entitled to prejudgment interest from the date the excess judgment became final. The fact that the discharge prevented collection of the judgment from the debtor does not affect or reduce the liability of the insurer. Therefore, the trustee can collect the entire judgment plus interest, and the original

plaintiff receives a pro rata distribution as a general unsecured creditor.

Commercial Federal Mortgage Corporation v. Smith (*In re* Smith), 85 F.3d 1555 (11th Cir. 1996). Alabama law gives a mortgagor a statutory right of redemption for one year after the foreclosure sale. This right is a mere personal privilege and not a property right, but it still becomes property of the estate under the broad definition in § 541. Property rights are defined by state law, but federal bankruptcy law determines the extent that interest is property of the estate.

Monetary Group v. Barnett, 2 F.3d 1098 (11th Cir. 1993). A general partner of a limited partnership may be liable to the estate of a second partnership in which the limited partnership is a general partner for breach of a fiduciary duty. The responsible general partner may not personally benefit by transferring property of the second partnership to the limited partnership for purposes that do not benefit the second partnership.

Capital Factors, Inc. v. Empire for Him, Inc. (*In re* Empire for Him, Inc.), 1 F.3d 1156 (11th Cir. 1993). Prepetition accounts receivable collected and held under a factoring agreement are property of the estate, even though subject to a perfected security interest of the factor.

United States v. Challenge Air Int'l, Inc., 952 F.2d 384 (11th Cir. 1992). Property of the estate includes property seized by IRS in a prepetition levy against a third party. Ownership of the property was not affected by the levy. An administrative levy is in the nature of a 'provisional remedy.' It does not determine whether the government's rights to the seized property are superior to those of other claimants or determine the ownership of the seized property. It does, however, protect the government against diversion or loss while such claims are being resolved.

Gallucci, *In re*, 931 F.2d 738 (11th Cir. 1991). Gift to debtor postpetition was not property of the estate and did not fall within provisions of § 541(a)(7).

Thomas, *In re*, 883 F.2d 991 (11th Cir. 1989). Where purchase money security interest provided the creditor retained title to mobile home and debtor would remain in possession, the right to possession was the only interest that became part of the debtor's estate. The actual mobile home was not property of the estate of Chapter 13 debtors. Because the sales contract provided that secured creditor retained legal title to the home, the debtor's only right was the right of possession, which was contingent on their fulfilling their financial obligation under sale contract.

Inca Materials, Inc., *In re*, 880 F.2d 1307 (11th Cir. 1989). Funds impressed with constructive trust in favor of supplier of goods to debtor's supplier-affiliate were not property of the debtor's estate.

Saylors, *In re*, 869 F.2d 1434 (11th Cir. 1989). Alabama statutory right of redemption is property right of debtor within jurisdiction of bankruptcy court. Equitable right of redemption is also property right of debtor within jurisdiction of bankruptcy court. Bankruptcy court had

jurisdiction over debtor's home after the stay was lifted in Chapter 7 due to the immediate filing of a Chapter 13 proceeding and because the debtor's right of redemption was property of the estate.

T & B Scottsdale Contractors, Inc. v. United States, 866 F.2d 1372 (11th Cir. 1989). State law determines the extent and validity of the debtor's interest in property. Under Georgia law, funds deposited into the debtor's account by contractor were for the benefit of third party materialmen and thus, did not become property of the estate.

Jones v. Harrell, 858 F.2d 667 (11th Cir. 1988). Upon filing of bankruptcy petition, Trustee succeeds to all causes of action held by debtor at time bankruptcy petition is filed. Once a bankruptcy case is filed, only the trustee, and not the debtor, has power after filing to enter into settlement of personal injury claim arising prepetition. Debtor did not have authority to settle prepetition lawsuit after the bankruptcy petition was filed. Release executed by debtor was not authorized and had no legal effect.

United States v. Michaels, 840 F.2d 901 (11th Cir. 1988). Tax refund based on prepetition earnings or losses is property of bankruptcy estate and IRS erred in paying refund directly to debtors.

General Coffee Corp., *In re*, 828 F.2d 699 (11th Cir. 1987). Under Florida law, constructive trust arose in favor of defrauded party at time of debtor's fraud, and not of judgment on party's fraud claim, so that trust funds did not become part of debtor's estate.

Scaife, *In re*, 825 F.2d 357 (11th Cir. 1987). Trustee was entitled to bring action against creditor for prepetition usury, conversion, and Truth-in-Lending violations. Trustee is not agent of debtor, but rather the trustee sues as the debtor's successor in interest. *See also*, Whitley, *In re*, 772 F.2d 815 (11th Cir. 1985) (debtor Truth-in-Lending action).

Miller v. Shallowford Community Hospital, Inc., 767 F.2d 1556 (11th Cir. 1985). Trustee succeeds to all causes of action held by debtor at the time of filing, including contract actions. Where Georgia Supreme Court decision clarifying no fault insurance law was applied retroactively, debtor had contract claim at time of filing which was part of bankruptcy estate under § 547(a)(1).

Doan, Matter of, 672 F.2d 831 (11th Cir. 1982). Debtors' income tax refund was property of the estate, even though amount of refund did not become fixed until end of tax year, after date of filing. Relying upon Segal v. Rochelle, 382 U.S. 375 (1966).

§ 541(c) Unenforceable Restrictions on Property of the Estate.

Patterson v. Shumate, 504 U.S. 753, 112 S. Ct. 2242 (1992). Held that the ERISA pension funds were excluded from the estate by § 541(c)(2) as an applicable nonbankruptcy law. This is the plain

meaning of the statute. The public outcry over this holding should be directed to the provisions of ERISA. Creditors may not execute on ERISA funds outside of bankruptcy. Furthermore, even if the funds are brought into the estate, ERISA may constitute a federal nonbankruptcy exemption to protect them for the debtor, but this issue was not addressed by Supreme Court.

Menotte v. Brown (In re Brown), 303 F.3d 1261 (11th Cir. 2002). Chapter 7 debtor had established an irrevocable charitable remainder trust with an anti-assignment/anti-alienation "spendthrift" provision, from proceeds from her deceased mother's estate almost six years prior to debtor filing bankruptcy. Under the terms of the trust, the debtor was to receive annual income equal to seven percent (7%) of the trust's assets, payable in monthly installments, for her life. When debtor filed bankruptcy, she claimed her interest in the trust as exempt, and over objection by the bankruptcy trustee, the court allowed the exemption. On appeal, the Eleventh Circuit, applying Florida law, defined spendthrift trusts as those established "*for the maintenance of another*," which could not be satisfied where debtor was both settlor and beneficiary. Having decided that the spendthrift provision was invalid, the court then turned to the question of defining the "debtor's interest" for purposes of inclusion in property of the estate. Holding that invalidation of the spendthrift provision did not invalidate the trust itself, the court stated that "[w]here the only interest a settlor has retained for herself under a trust is the right to income for life, it is solely this interest which her creditors can reach." Thus, because the debtor placed assets in an irrevocable charitable remainder trust, reserving only the right to redesignate other charitable remainderman, only the debtor's income interest and not the corpus of the trust, would be included in property of her bankruptcy estate.

Meehan v. Wallace (*In re* Meehan), 102 F.3d 1209 (11th Cir. 1997). IRA is exempt property under Georgia law from execution, and, therefore, the IRA is not property of the estate under § 541(c)(2). Georgia law is "applicable non-bankruptcy law" which restricts execution on the debtor's interest in the IRA. The trust document need not restrict transfers, when state law restricts. Section 541(c)(2) is not limited to state spendthrift trust law. Following Patterson v. Shumate, the court rejected the equitable argument that the debtor had access to use the funds in the IRA. Note that the same result applies in Alabama because Code of Alabama § 19-3-1 exempts IRAs.

Government Securities Corp., *In re*, 972 F.2d 328 (11th Cir. 1992). A provision in a securities bond that terminates coverage upon the appointment of a receiver or liquidation is invalid as violative of § 541(c)(1)(B).

Lichstrahl, *In re*, 750 F.2d 1488 (11th Cir. 1985). Wording "applicable nonbankruptcy law" in § 541(c)(2) refers only to state spendthrift trust law. ERISA pension plans are excluded from the estate only if they are enforceable under state spendthrift trust law. Under Florida law, a spendthrift trust fails where beneficiary has absolute dominion over property. Pension plan was not excluded from estate under § 541(c)(2) where it was not a spendthrift trust. ERISA qualified pension plans are not exemptible under § 522.

Yates v. Hendon, 541 U. S. 1, 124 S. Ct. 1330 (2004). A widely used pension plan is an ERISA

qualified spendthrift trust. A physician debtor is the sole shareholder and president of a professional corporation, which had a profit sharing plan. Along with the physician, three other employees were covered by the plan. The plan did include an anti-alienation provision. The physician borrowed from the plan and only repaid the loan shortly before a petition under Chapter 7. A creative trustee sought to recover the loan payment as a preference. The Supreme Court resolved a split among the circuits to hold that a working owner of a business may qualify as a participant in the plan. Title IV of ERISA and IRC, as amended by Title II, clarify that the working owner can have a dual status as an employee and as the employer who established the plan. On remand, the Court will still have to address other questions about the ability to recover the funds, based on the facts of the transaction.

§ 541(d) Limited Interest.

Begier v. Internal Revenue Service, 496 U.S. 53, 110 S. Ct. 2258 (1990). The debtor does not own an equitable interest in property held in trust for another (§ 541(d)), i.e., that interest is not property of the estate. The trustee could not recover payments made to the IRS in satisfaction of the debtor's excise tax obligation, where those funds were deemed to be held in trust for the IRS. Debtor's payments of taxes to the IRS were considered "trust fund" taxes (26 U.S.C. § 7501) even though the funds paid to the IRS were not held in a segregated account. 26 U.S.C. § 7501 did not require the segregation of funds withheld for payment of excise taxes. A "trust" was created when the debtor's customers paid the funds to the debtor. The Court, citing legislative history, held that a court should employ "reasonable assumptions" to govern tracing of funds. The debtor's act of voluntarily paying its trust fund tax obligation is alone sufficient to establish the required nexus between the amount held in trust and the amount paid.

Fidelity Standard Mortgage Corp., *In re*, 839 F.2d 1517 (11th Cir. 1988). Section 541(d) excludes from the estate an investor's interest in a mortgage held by the debtor. The threshold question is whether the mortgage interest was sold to the investor prior to the filing.

§ 542(a) Turnover of Property of the Estate.

Builders Transport, Inc. v. Two Trees (In re Builders Transport, Inc.), 471 F.3d 1178 (11th Cir. 2006). Excess proceeds from a letter of credit issued to secure a debtor's performance of a lease were included in the debtor's Chapter 11 estate. The doctrine of independence did not apply to prevent a Chapter 11 debtor-lessee, as the customer on whose behalf a bank had issued a letter of credit, from pursuing a turnover claim against the lessor's assignee to recover excess proceeds from the letter of credit, which were not needed to satisfy the debtor's obligations under the lease. The debtor was not challenging the distribution of the proceeds from the letter of credit to the lessor's assignee. Instead, the debtor challenged the assignee's right to retain the letter of credit proceeds pursuant to their underlying lease agreement. The doctrine of independence protects only the "distribution" of proceeds of a letter of credit.

United States v. Whiting Pools, Inc., 462 U.S. 198, 103 S. Ct. 2309 (1983). The IRS is bound by the provisions of § 542(a) to the same extent as any other secured creditor. Because the property of the debtor seized by a creditor prior to the filing of a bankruptcy petition was property of the estate,

§ 542(a) applied requiring the IRS to return the property. Until such a tax sale takes place, transferring ownership from the debtor, the property remains the debtor's and thus is subject to the turnover requirement of § 542(a).

Charles R. Hall Motors v. Lewis (*In re* Lewis), 137 F.3d 1280 (11th Cir. 1998). Under § 542, the court may generally order a third party to turn property in its possession over to the debtor's estate if three primary requirements are met. First, such property must be "property of the estate." Second, at the moment the debtor filed a petition, the debtor must have had a right to use, sell or lease the property. Finally, upon request, the court must ensure that the third party's interest in the property is adequately protected. Here, the debtor's bare statutory right to redeem was insufficient to render vehicle "property of the estate" subject to turnover under § 542. Result may have been different if debtor's proposed plan exercised right to redeem by fulfilling debtor's secured obligations and paying expenses, as required under Alabama law.

Capital Factors, Inc. v. Empire for Him, Inc. (*In re* Empire for Him, Inc.), 1 F.3d 1156 (11th Cir. 1993). Prepetition accounts receivable collected and held under a factoring agreement are property of the estate and subject to turnover under § 542. Section 542(a) grants to the estate a possessory interest in certain property of the debtor that was not held by the debtor at the commencement of reorganization proceedings.

United States v. Challenge Air Int'l, Inc., 952 F.2d 384 (11th Cir. 1992). Internal Revenue Service (IRS) does not have any special immunity from reach of statute requiring turnover to trustee of property of debtor's estate.

§ 542(c) Transfers Without Notice or Knowledge of Bankruptcy Case.

Jones v. Harrell, 858 F.2d 667 (11th Cir. 1988). Section 542(c) was intended to protect persons without knowledge or notice of the bankruptcy case to the extent they pay a debt owing to the debtor. Creditor's transfer of $15,000 as payment toward debt fell within § 542(c)'s protection. It would be inequitable to require creditor to forfeit payment merely because it was paid to debtor rather than the trustee.

§ 542(e) Turnover of Information held by Attorneys or Accountants.

Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343, 105 S. Ct. 1986 (1985). Corporate debtor's directors tried to assert attorney client privilege against Chapter 7 Trustee. Supreme Court held that § 542(e)'s legislative history makes it clear that Congress did not intend to give the debtor's directors the right to assert the corporation's attorney-client privilege against the trustee. Congress intended that § 542(e) restrict, not expand, the ability of accountants and attorneys to withhold information from the trustee. The power to assert the attorney client privilege passes with management. When a bankruptcy case is filed, management effectively passes to the Trustee. Thus, the trustee of a corporate debtor has the power to waive the corporation's attorney-client privilege with respect to pre-bankruptcy communications. Holding is limited to

corporate debtors and has no application to individual cases.

§ 543 Turnover of Property by a Custodian.

Flournoy v. City Finance of Columbus, Inc., 679 F.2d 821 (11th Cir. 1982). Where trustee sought turnover of repossessed automobile pursuant to § 543 only, the repossessing creditor was not a "custodian" within the meaning of that section.

§ 544 Trustee as Lien Creditor and as Successor to Certain Creditors and Purchasers.

Gordon v. Terrace Mortg. Co. (In re Hong Ju Kim), 571 F.3d 1342 (11th Cir. 2009) Although security deed was signed by the debtor and witnessed, the attestation page failed to include a notary seal. A notary seal was included, however, in a rider attached to the security deed. Under Georgia law, the affidavit filed with the security deed adequately testified to deed's attestation.

Advanced Telecomm. Network, Inc. v. Allen (In re Advanced Telecomm. Network, Inc.), 490 F.3d 1325 (11th Cir. 2007). A corporate debtor filed an adversary proceeding to set aside settlement payments that it had made as fraudulent as to creditors. The bankruptcy court found that the defendants rebutted a state law statutory presumption that the corporate debtor was insolvent at the time of transfer. The Eleventh Circuit found that the court erred in valuing third-party claims asserted against the debtor at zero during the insolvency analysis. New Jersey law requires claims against a debtor to be included in an insolvency analysis. The court was required to discount the contingent liability according to the possibility of the liability becoming real. The mere fact that it may have been impossible to predict a $10 million dollar settlement 18 months earlier did not warrant a zero valuation..

Westgate Vacation Villas, Ltd. v. Tabas (In re International Pharmacy & Discount II, Inc.), 443 F.3d 767 (11th Cir. 2005). Bankruptcy trustee brought adversary action to avoid alleged fraudulent transfers made from bank account to creditor. The creditor defended on grounds that it could not be shown that the funds transferred were property of the estate. The central issue before the Eleventh Circuit was whether there was sufficient evidence to conclude that the transfers involved property of the debtor's estate given that the fraudulent transfers were made from an account held by an entity named "Interna c ional Pharmacy Inc. II," while the debtor's bankruptcy petition listed the name of the debtor as "Interna t ional Pharmacy & Discount II." There was sufficient evidence to find that the bank account was property of the debtor's estate: the difference in the name was only slight, the debtor's tax number was identical to the one listed on the bank account, and the payments from the account at issue were authorized by one of the same principals who controlled the debtor. Transfers made from the bank account involved property of the debtor and, thus, could be avoided by the trustee as fraudulent transfers.

Kapila v. Atlantic Mortgage & Investment Corp. (*In re* Halabi), 184 F.3d 1335 (11th Cir. 1999). Pre-petition, the debtor executed a mortgage which was recorded. Post-petition assignments and perfections by mortgagee and assignees were challenged by Chapter 7 trustee, relying on §§ 544 and 549. Trustee lost. Section 544 empowers the trustee to gather the property of the estate. But

property of the estate under § 541, only extends to rights of the debtor at the time of the petition. The mortgagee's assignment, and its assignee's subsequent reassignment, of the properly perfected mortgage on property of debtor did not involve the transfer of any property belonging to debtor or to debtor's estate. Further, the postpetition perfection by the assignees also did not involve a transfer of any property of the debtor or the debtor's estate as the mortgage had already been perfected by its predecessor prepetition. Thus, neither transaction was avoidable by trustee in the exercise of his strong-arm powers. The mortgagee's rights are not property of the estate so the assignments cannot be avoided.

Henry Lee Co. v. Tolz, Trustee, 157 F.3d 1290 (11th Cir. 1998). Chapter 7 Trustee brought § 544 action seeking recovery of funds being held under a writ of garnishment obtained within 90 days of the debtor's filing for bankruptcy protection. Creditor claimed its lien was not required to be perfected under the exception to perfection requirements for "rights represented by a judgment." U.C.C. § 9-104(b). Florida law does not fit garnished accounts in that exception, but requires perfection by possession. Because perfection was not within 90 days of the petition, the Trustee may recover.

General Coffee Corp., *In re*, 828 F.2d 699 (11th Cir. 1987). Section 544(a), the "strong-arm" provision of the Bankruptcy Code, permits a trustee to avoid secret liens against property in the debtor's possession. It grants a trustee the rights of an essentially ideal lienholder against property in which the debtor does not possess complete title. Debtor cannot use § 544 to defeat constructive trust beneficiary since the beneficiary has more than merely an equitable lien and would prevail over judicial lienholder. Case discusses but does not decide issue of conflicts between § 541(d) and § 544(a). The former excludes certain equitable interests from estate while the latter brings them into estate.

Hagendorfer, *In re*, 803 F.2d 647 (11th Cir. 1986). Although Alabama law does not permit reformation of a mortgage where such will prejudice the rights of a bona fide purchaser without notice for value, the trustee had constructive notice and a duty to inquire as to error in title description and thus, would not be prejudiced by reformation. The "strong arm" clause under § 544 did not set aside the Trustee's duty, as a hypothetical judicial lien creditor, to examine the record of title.

Davis, *In re*, 785 F.2d 926 (11th Cir. 1986). Bankruptcy court granted judgment to Trustee in action against FMHA to recover funds under § 544. The district court found that the debtor had defrauded FMHA in obtaining the loan by giving false collateral. Due to debtor's fraud, the district court dismissed the trustee's claim. The trustee acting under § 544 represents the creditors. Since the trustee's claims are for the benefit of the creditors, the fraud of the debtor does not require them to be forfeited. Thus, the fraud of the debtor is no defense to an action under § 544 by trustee.

Fulton Air Service, Inc., Matter of, 777 F.2d 1521 (11th Cir. 1985). Circuit was faced with the issue of whether a bankruptcy trustee, as a hypothetical bona fide purchaser, could avoid unrecorded state tax liens. Circuit concluded trustee, as a bona fide purchaser under § 544(a)(3), may avoid

the state's unrecorded tax liens for sales and use taxes and withholding taxes.

Load-it, Inc., *In re*, 774 F.2d 1077 (11th Cir. 1985). Chapter 11 debtor sought to avoid creditor's security interest in several tractors. Circuit affirmed lower court's decision that since creditor substantially complied with requirements for perfection under Georgia law, its interest was not voidable pursuant to § 544(a)(1).

§ 545 Statutory Liens.

WWG Industries, Inc., *In re*, 772 F.2d 810 (11th Cir. 1985). Debtor-in-possession sought to avoid mechanic's lien. Debtor-in-possession argued it should be treated as "bona fide purchaser" without actual or constructive notice of preexisting liens. As a true "bona fide purchaser," it should be able to defeats creditor's lien under Georgia law. Circuit disagreed and held that the creditor's lien was valid against the debtor-in-possession. Section 545 requires the lien in question to not be perfected as of the time of the filing of the bankruptcy petition. Here, because state law allowed relation back perfection to a time prior to the filing of the petition, § 546(b) operated to limit the powers granted under § 545. Thus, debtor-in-possession could not use § 545 to avoid the mechanic's lien.

§ 546(a) Limitation on Avoiding Powers.

IBT Int'l, Inc., v. Northern (Int'l Admin. Servs., Inc.), 408 F.3d 689 (11th Cir. 2005). Bankruptcy court had authority under § 546(a)(1) to extend time for filing avoidance action. Provision in § 546(a)(1) specifying that avoidance actions must be brought within two years of order for relief or one year after appointment of trustee, whichever is later, is not in nature of jurisdictional bar. Section 546(a)(1) is a statute of limitations subject to waiver, equitable tolling, and equitable estoppel. Acts of the debtor and its principal in transferring through a tangled and complex web of multi-step international transactions were sufficient to toll, on fraudulent concealment theory, the applicable statute of limitations. Bankruptcy court order extending time for filing avoidance action "through the time of the hearing" on a specific date extended the deadline until the time of the actual hearing, not just until the date specified in the order. The court's order was complete when orally announced by court on date that limitations period would otherwise have expired, not when it was reduced to paper and docketed.

Pugh v. Brook (*In re* Pugh), 158 F.3d 530 (11th Cir. 1998). Trustee sued debtor for accounting of assets and turnover. Debtor did not raise a statute of limitations defense at the trial level. On appeal, the District Court held the defense was waived. The issue in question is whether the limitations periods in §§ 546(a) and 549(d) constitute a bar to subject matter jurisdiction or are waivable statute of limitations defenses. The Circuit Court held that the two year limitations period are statutes of limitation and may be waived.

Levine v. Weissing, Trustee (*In re* Levine), 134 F.3d 1046 (11th Cir. 1998). A Chapter 7 debtor transferred non-exempt assets into exempt annuities. Trustee brought § 544 action to recover assets. Debtor contested action as untimely under rule for objecting to exemptions. Circuit held action was not a contest of debtor's exemptions, but instead was an action to avoid a transfer under

§ 544. An adversary action filed under § 544 may be filed within two years after the entry of the order for relief.

§ 546(c) Reclamation.

Rawson Food Service, Inc., *In re*, 846 F.2d 1343 (11th Cir. 1988). Section 546 is the exclusive means by which a seller can reclaim goods from a debtor. Unlike the Uniform Commercial Code § 546(c) requires that a reclamation demand be in writing; additionally, there is no waiver of the ten-day notice rule in instances of misrepresentation of solvency. In order to reclaim the seller must prove 1) a statutory or common law right to reclaim; 2) insolvency of the debtor when it received the goods; and 3) a written reclamation demand within ten days after the debtor received the goods. A seller may only reclaim goods which are in the debtor's possession when it receives the reclamation demand; the burden of proving possession is on the seller as part of its prima facie case.

§ 546(e) Transfers to Commodity Brokers.

Munford v. Valuation Research Corp. (*In re* Munford), 98 F.3d 604 (11th Cir. 1996). Pursuant to § 544(b), a trustee in bankruptcy or the debtor acting as trustee may avoid any transfer of property of the debtor that is voidable under the applicable state law. Section 546(e) is one of the exceptions to the trustee's avoidance power. That section protects transfers to a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency, that is made before the commencement of the case. The goal of § 546(e) was to minimize the disruption in the commodities and securities market in the event of a major bankruptcy affecting those industries. In this case, the payments were made to shareholders and not to one of the entities listed in the section and, therefore, § 546(e) was inapplicable.

§ 547 Preferences.

Gordon v. NovaStar Mortgage, Inc. (In re Hedrick), 524 F.3d 1175 (11th Cir. 2008). The belated recording of a refinancing mortgage is not preferential when the lien relates back to the prior lender's mortgage under Georgia's doctrine of equitable subrogation. On December 4, 2003, the debtors refinanced their mortgage and executed documents in favor of the refinancing lender. On December 10, the refinancing lender paid off the prior lenders. On January 7, 2004, the refinancing lender recorded its mortgage. On January 22, the cancellation of the prior mortgages were recorded. On April 5, debtors filed bankruptcy. January 6 was the 90 day preference date.

Under § 547(e)(1)(A), a transfer is perfected when a bona fide purchaser of property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee. Because the refinancing lender paid off the prior mortgage it was equitably subrogated to the prior mortgage holders' liens and deemed to have been perfected outside the preference period. No intervening buyer under any set of hypothetical facts could have acquired an interest superior to the new mortgage lender because the mortgages from the earlier debts remained on the record and were not cancelled until after the new lender recorded its mortgage. Because the old mortgages were still unsatisfied, a hypothetical creditor would have been put on notice to inquire further. The new lender's mortgage was perfected under Georgia's doctrine of equitable subrogation as soon the new lender paid off the old mortgages

In a companion case, the court determined that a mortgage lender that delayed recording its lien for eight days was entitled to invoke the "substantially contemporaneous" exchange defense under § 547(c)(1)(B). The plain meaning of that term conveys flexibility, not a hard and fast bright line rule. Here the refinancing lender's interest was perfected when the prior lenders received their checks eight days after the closing date.

§ 547(b) Preferential Transfers.

Bank of America v. Mukamai (In re Egidi), 571 F.3d 1156 (11th Cir. 2009). During the 90 day preference period, the debtor decided to consolidate her debt by using cash advances made on a line of credit from Capital One to make payments to MBNA totaling $16,065.00. The debtor's Chapter 7 trustee brought suit against the successor to MBNA to recover the payments alleging that the payments were avoidable as transfers under § 547(b). Under § 547(b) the transfer of funds from one credit card company to another to pay a credit card debt, at the direction of the debtor, involved a transfer of "an interest of the debtor in property." The payments to MBNA were debtor's discretionary use of borrowed funds to pay another debt. Once the credit card company extended the lines of credit to her she could have paid other creditors or purchased assets that would have become part of the estate and been available to other creditors.

Midwest Holding #7, LLC v. Anderson (In re Tanner Family, LLC), 556 F.3d 1194 (11th Cir. 2009). Payment of lease termination fee during 90 day preference period was avoidable under § 547(b) as a preferential transfer made "for or on account of an antecedent debt owed by the debtor before such transfer was made." A debt is "antecedent" to a transfer if it is preexisting or is incurred before the transfer. The term "debt" is defined under § 101(12) as a "liability on a claim." In turn, the term "claim" is defined under § 101(5)(A) as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." By making the terms "debt" and "claim" coextensive, Congress adopted the broadest possible definition of the term "debt." A "debtor incurs a debt to a creditor when the creditor has a claim against the debtor, *even if the claim is unliquidated, unmatured, unfixed, or contingent.*" Accordingly, when the debtor signed the lease at issue, the lessor had an unmatured claim against the debtor to receive monthly rental payments and because the term "debt" includes both contingent and unmatured claims the debtor had at that time a corresponding obligation to make those payments that equaled a debt.

Watts v. Argent Mortgage (In re Hunt), 306 Fed. Appx. 455 (11th Cir. 2008). Two security deeds given by the debtor to a mortgagee were perfected prior to commencement of the 90-day reachback period for purposes of the trustee's action to avoid the security deeds as a preference under § 547(b). Under Georgia law, a hypothetical bona fide purchaser would have found record title in the builder and the debtor's possession of the property, at issue, and that the builder had paid its lender and received an as-yet unrecorded cancellation of its lender's security deed. Accordingly, the transfer was made before the 90 day reachback period began and the trustee could not avoid the deeds.

Buckley v. Carrier Corp. (In re Globe Man. Corp.), 567 F.3d 1291 (11th Cir. 2009). Parties entered into a contract six months prepetition requiring six monthly installment payments. Payments were

due 30 days after the date of invoice. Two payments were made 28 days late, but within 90 preference period. Defendant argued ordinary course of business defense, but there was no record of prior dealings between the parties. The bankruptcy court entered judgment for the trustee. The Eleventh Circuit affirmed finding that where there is no prior course of business between the parties, the contract controls. Thus, the two payments were preferential, i.e. payments made on antecedent debts within 90 days of bankruptcy. The Eleventh Circuit further affirmed the disallowance of prejudgment interest because the decision was withing the bankruptcy court's discretion.

Tolz v. Gawlick (In re Forex Fid. Inter.), 222 Fed. Appx. 806 (11th Cir. 2007). Trustee for Chapter 7 debtor, a corporation engaged in the business of purchasing and trading foreign currency for its customers, sought to avoid as preferential transfers debtor's return of deposits to two customers. The evidence supported determination that the debtor's return of deposits conformed with industry standards as required for the ordinary-course-of business defense. Evidence that the debtor did not operate a well-run business was insufficient to establish that debtor operated a Ponzi-type scheme.

Barnhill v. Johnson, 503 U.S. 393, 112 S. Ct. 1386 (1992). For purposes of § 547(b)(4) a transfer made by check is deemed to occur on the date the check is honored. This is the time in which the debtor is in the position that it would have occupied if it had withdrawn cash from its account and handed it over to the petitioner.

Gray v. Manklow (*In re* Optical Technologies), 246 F.3d 1332 (11th Cir. 2001). Chapter 7 trustee sued sole shareholder of debtors to avoid fraudulent transfers from the debtors and for breach of fiduciary duties. Summary judgment granted for shareholders. Applying a *de novo* review, Circuit held the transfers which were made by other, non-debtor entities could not be attributed to debtors, on de facto merger theory, for purpose of avoidance as preferences or fraudulent transfers. No evidence was presented of the alleged de facto merger at the time of transfers. Further for purposes of determining insider status, former principals of debtor could not be regarded as "insiders," where former principals were not officers or directors of debtors at time of challenged transfers and did retain any continuing control over debtors' affairs.

Galloway v. First Alabama Bank (*In re* Wesley Industries, Inc.), 30 F.3d 1438 (11th Cir. 1994). Pursuant to § 547(b), a trustee may recover payments made within the 90 days preceding the filing of a bankruptcy petition. This provision allows a trustee to avoid any improper tactics that debtors and preferred creditors may employ in anticipation of a bankruptcy filing. Section 547(b)(4)(B) extends this 90-day window to a full year where the payment is to or for the benefit of an insider. Here, the transfers were not to an insider, but they directly benefitted an insider. Circuit held the preference- recovery period is one year when the transfer produces a benefit for an inside creditor even if the actual transferee is not an insider. This case was decided before the 1994 Amendments and has been superseded by the amendment to § 550.

Car Renovators, *In re*, 946 F.2d 780 (11th Cir. 1991). Chapter 7 trustee can avoid a transfer under § 547(b) and recover a payment by the debtor to the district attorney to replace two dishonored checks. The payment was made to avoid prosecution for purchasing goods with worthless checks.

The creditor did not fit within any of the exceptions of § 547(c) but argued that an exception should apply by virtue of the nondischargeability of this debt under § 523(a)(7). The Circuit rejected this argument noting that there was no court-ordered restitution or any criminal sentence. The Circuit left open the question of whether court ordered restitution could be avoided as a preferential transfer.

Nordberg v. Arab Banking Corp. *(In re* Chase & Sanborn Corp.), 904 F.2d 588 (11th Cir. 1990). Corporate debtor's prepetition payments on loan to individual who controlled the corporation constituted payments for or on account of antecedent debt even though the guarantee obligation to the lender was contingent upon the debtor's default. Given the broad and expansive reading of the term "debt" under the Code, it made no difference the claim was contingent.

Air Conditioning, Inc. of Stuart, *In re*, 845 F.2d 293 (11th Cir. 1988). Debtor pledged collateral as security for letter of credit issued by bank to creditor. Trustee brought preference action to avoid the transfer. Creditor argued no preference occurred because the letter of credit issued by the bank was not "an interest of the debtor in property," as required by the first sentence of section 547(b). Creditor contended that neither the letter of credit nor its proceeds were property of the estate. Circuit agreed. However, the collateral pledged to secured the letter of credit was property of the estate. When the debtor pledged its assets to secure the letter of credit, a transfer of debtor's property occurred under the provisions of § 547. Further, with respect to the first element under § 547(b), that the transfer be to or for the benefit of the creditor, the benefit to the creditor may be indirect and still satisfy the requirement of section 547(b)(1). With respect to the last element under § 547(b), that the creditor receive more than it would have received in a Chapter 7 liquidation had the transfer not been made, this element could be proven through the use of the debtor's uncontested schedules.

N & D Properties, Inc., *In re*, 799 F.2d 726 (11th Cir. 1986). Trustee could not maintain preferential transfer action. The transfers may be avoided only where property of the debtor is transferred. In this case, the collateral pledged was never conveyed to the debtor. It remained a third party's property even though it was pledged on behalf of the debtor. Same analysis for § 548 fraudulent transfers.

Conner, *In re*, 733 F.2d 1560 (11th Cir. 1984). Under the Bankruptcy Code the trustee in bankruptcy may avoid "any transfer of property of the debtor" that gives a creditor a preferred position among creditors of the bankrupt and that meets other enumerated requirements. A transfer is a voidable preference under section 547 only if made on or within 90 days before the filing of the bankruptcy petition. A transfer takes place upon service of garnishment summons rather than distribution, since under Georgia (and Alabama) law, that is when the garnishment lien attaches. Case may have been overruled by Barnhill v. Johnson, 503 U.S. 393, 397-98, 112 S.Ct. 1386, 1389, 118 L.Ed.2d 39 (1992). See also § 547(e) for timing of transfers.

Nicholson v. First Investment Co., 705 F.2d 410 (11th Cir. 1983). One of the elements which must be proven to avoid a preferential transfer is that the debtor be insolvent when the transfer was

made. A transfer occurs not when check is delivered, but when check is honored by bank. Note: Although this case construes Section 60 of the former Bankruptcy Act (the predecessor to § 547), it is nevertheless useful in construing § 547(b)(3).

§ 547(c)(1) Contemporaneous Exchange for New Value Defense.

Arrow Air, Inc., *In re*, 940 F.2d 1463 (11th Cir. 1991). The contemporaneous exchange for new value exception under § 547(c)(1) is an affirmative defense. Burden is upon the creditor asserting the defense to establishing all the required elements. The exception has three basic requirements: (1) the transferee must have extended new value to the debtor in exchange for the payment or transfer, (2) the exchange of payment for new value must have been intended by the debtor and transferee to be contemporaneous, and (3) the exchange must have been in fact substantially contemporaneous. A party seeking to shelter a payment under the contemporaneous exchange for new value exception must do more than simply show that some new value was given the debtor. That party must prove with specificity the measure of new value given the debtor in the exchange transaction he seeks to protect. Further, the challenged payment is protected only to the extent of the specific measure of new value shown.

Nordberg v. Arab Banking Corp. *(In re* Chase & Sanborn Corp.), 904 F.2d 588 (11th Cir. 1990). Circuit addressed whether new value included credit toward an outstanding and nonavoidable account. Circuit concluded that it does not. Credit toward an outstanding and nonavoidable account does not fall within the definition of new value under § 547(a)(2). If new value included credit toward such debts, § 547 would be a "tautological nullity".

Jet Florida Systems, Inc., *In re*, 861 F.2d 1555 (11th Cir. 1988). Section 547(c)(1) was intended to protect transfers which, while technically credit transactions, were intended to be and are in fact substantially contemporaneous exchanges "and not on account of an antecedent debt." The valuation of the contemporaneous exchange must be specific and should be made as of the date of transfer. The parties' intent to have a contemporaneous exchange for new value is not enough; there must actually be new value. Defendant also argued the ordinary course of business defense under § 547(c)(2). What the ordinary course of business is between a debtor and a creditor is essentially a factual question. Bankruptcy court found transfers were not in the ordinary course of business. Circuit held that although some minor changes in details regarding payment of debts incurred in the ordinary course of business will not automatically remove the payments from the scope of § 547(c)(2), it could not find the bankruptcy court's findings clearly erroneous.

Air Conditioning, Inc. of Stuart, *In re*, 845 F.2d 293 (11th Cir. 1988). Forbearance from exercising a preexisting right is not "new value" within §§ 547(a)(2) or 547(c)(1), nor is an agreement by a creditor to forego its right to foreclose on collateral. Thus, the creditor's forbearance of seizing the debtor's property in exchange for the debtor pledging collateral to secure a letter of credit was not new value.

Food Services, *In re*, 723 F.2d 820 (11th Cir. 1984). While normally a check is a credit transaction and would constitute a preference, if the check is presented within the normal course of affairs (30

days in U.C.C.), and honored, then it is a contemporaneous exchange. If a check is dishonored, payment ceases to be a contemporaneous exchange and becomes a credit transaction.

§ 547(c)(2) Ordinary Course of Business Defense.

Union Bank v. Wolas, Chapter 7 Trustee for the Estate of ZZZZ Best Co., Inc., 502 U.S. 151, 112 S. Ct. 527 (1991). Payments on long-term debt, as well as those on short-term debt, may qualify for ordinary course of business exception to trustee's power to avoid preferential transfers under § 547(c)(2).

Miller v. Florida Mining and Materials (*In re* A.W. & Associates, Inc.), 136 F.3d 1439 (11th Cir. 1998). Trustee challenged transfers as preferential. Defendant relied upon the ordinary course of business defense under § 547(c)(2). With respect to the second element of that defense, § 547(c)(2)(B) (that the transfers were within the ordinary course of business between this debtor and this creditor), the Circuit could not find the bankruptcy court was clearly erroneous in finding that the transfers were within the ordinary course of business between these parties considering the debtor's history of late payments, the creditor's apparent lack of concern about the account, and the creditor's practice of changing payment terms with each account. With respect to the last element of the ordinary course of business defense, the Circuit reversed the bankruptcy court, holding that § 547(c)(2)(C) requires an examination of industry standards to determine if a transfer was made "according to ordinary business terms." "Ordinary business terms" refers to the range of terms that businesses in the same or similar industry as the creditor engage. Only dealings so "idiosyncratic" that fall outside that broad range should be deemed extraordinary and therefore outside the scope of the ordinary course of business exception.

Barrett Dodge Chrysler Plymouth, Inc. v. Cranshaw (In re Issac LeaseCo, Inc.), 389 F.3d 1205 (11th Cir. 2004). Before Issac LeaseCo's creditors filed an involuntary bankruptcy petition on the debtor in 1996, LeaseCo. had had an agreement with Barrett Dodge Chrysler Plymouth where Barrett Dodge would sell used cars to LeaseCo. The transactions between the two parties were involved and typically took several weeks to complete, and the two had only begun their business relationship six months prior to LeaseCo.'s bankruptcy filing. Trustee David Cranshaw sought to recover funds paid by LeaseCo. to Barrett Dodge for ten cars purchased during the 90 day preference period, pursuant 11 U.S.C. § 547(b). Barrett Dodge objected to returning the money on grounds that under section 547(c), they were exempt from avoidance because they were made in the ordinary course of business. The bankruptcy court held that seven of the sales were in the ordinary course of business while three were not because they took 54, 70, and 84 days to complete, which is longer than the industry average. The district court reversed, stating that the three sales were in the ordinary course of business under section 547(c)(2)(B), then remanded to the bankruptcy court to determine whether those transactions fell under the ordinary business terms as described in section 547(c)(2)(C). The bankruptcy court held that the three transactions were not according to ordinary business terms, and because the parties did not have an express agreement as to payment due dates, the industry standard was 20 to 45 days. The district court affirmed, so Barrett Dodge appealed.

The Eleventh Circuit found that the bankruptcy court's findings were not clearly erroneous for the following reasons: (1) the court could not limit its examination of the parties' regular

dealings because they had only been working together for six months, so it was necessary to evaluate the industry standard for debt collection practices under section 547(c)(2)(C); (2) the bankruptcy court properly furthered policy of equal distribution among creditors, since not avoiding the transfer would have entitled Barrett Dodge to a larger percentage of the debtor's estate; (3) the industry standard for payment was properly evaluated by the bankruptcy court by its review of expert testimony. The Court affirmed the judgment of the district court.

Craig Oil Co., *In re*, 785 F.2d 1563 (11th Cir. 1986). Trustee filed action seeking to recover preferential transfer. Defendant asserted ordinary course of business defense. The goal of the ordinary course of business exception is to "leave undisturbed normal financial relations" between the debtor and its creditors. Section § 547(c)(2) should protect those payments which do not result from "unusual" debt collection or payment practices. Where such unusual collection practices exist, court must determine if the payment was in response to those efforts. Thus, the debtor's motive in paying creditor is relevant. Circuit could not find bankruptcy court's determination that these payments were out of the ordinary course of business and not according to ordinary business terms considering that the debtor made all its payments to this creditor by cashier's rather than corporate checks. No other creditor had received payments from the debtor by cashier's check. Likewise, this creditor only received a very small percentage of its payments from other debtors by cashier's checks. Circuit also held that lateness is particularly relevant in determining whether payments should be protected by the ordinary course of business exception. Untimely payments are more likely to be considered outside the ordinary course of business and avoidable as preferences.

§ 547(c)(3) Purchase Money Security Interests (Enabling Loan) Defense.

Fidelity Financial Services, Inc. v. Fink, Trustee, 522 U.S. 211, 118 S. Ct. 651 (1998). Section 547(b) authorizes trustees to avoid liens created within 90 days prior to the petition date. Section 547(c)(3)(B) excepts those liens perfected within 20 days after the debtor received possession of the collateral. State law governs the perfection process, but federal law governs the time period for the §547(c)(3) exception. Even though the state law at issue here permitted relation back of perfection within 30 days, the matter was controlled by federal statute which allowed only a 20 day window for perfection protection. Goal of Congress in enacting § 547(c)(3)(B) was to establish a uniform federal perfection period immune to alteration by state laws permitting relation back. The trustee prevailed and avoided a lien perfected 21 days after the debtor took possession.

Busenlehner, *In re*, 918 F.2d 928 (11th Cir. 1990). Section 547(c)(3) prevents trustees from avoiding enabling loans that meet certain conditions. Here, the only issue was whether the secured loan was perfected within the time allowed by the statute. Trustee argued perfection was not done within the time allowed by the Code. Creditor argued that under § 547(c), the physical act of perfecting a lien did not need to occur within the time allowed in § 547(c)(3) as long as, under state law, the security interest is deemed perfected within that period. Circuit agreed with the creditor and held that the creditor could use the state's relation back laws to fall within the time allowed in § 547(c)(3). This case is overruled by Fidelity Financial Services, Inc. v. Fink, Trustee, 522 U.S. 211, 118 S. Ct. 651 (1998).

Davis, *In re*, 734 F.2d 604 (11th Cir. 1984). The Circuit was faced with the issue whether § 547(c)(1) protects a lien securing an enabling loan from avoidance as a preference where the lien was perfected beyond the ten day grace period allowed by § 547(c)(3). The Circuit concluded that it does not. Section 547(c)(3) is the exclusive protection given to enabling loan security interests. The exception to § 547(c)(1) for contemporaneous exchanges for new value does not cover enabling loans. Where enabling loan security interest was perfected outside of the time period provided in the exception, creditor could not use § 547(c)(1) as an alternative exception.

§ 547(c)(4) Subsequent New Value Defense.

Jet Florida System, Inc., *In re*, 841 F.2d 1082 (11th Cir. 1988). Trustee brought action to recover alleged preferential action. Defendant asserted subsequent new value defense as provided in § 547(c)(4). Policy behind § 547(c)(4) is that a creditor who contributes new value in return for payments from the debtor, should not later be deemed to have depleted the bankruptcy estate to the disadvantage of other creditors. Section has 3 elements: 1) creditor extends new value after receiving challenged payment; 2) the new value is unsecured; 3) the new value remains unpaid. The "new value" provided must provide the debtor with a material benefit. The exception is limited to amount by which bankruptcy estate is enhanced by the subsequent advances. Where the debtor made payments on the arrearage due under lease during preference period, but did not use the leased premises during that period, neither the creditor's forbearance in terminating the lease nor the availability of the premises to debtor constituted a "new value" subsequent advances.

§ 547(c)(5) Floating Lien or Improvement in Position Defense.

Galloway v. First Alabama Bank (*In re* Wesley Industries, Inc.), 30 F.3d 1438 (11th Cir. 1994). Trustee sought to recover alleged preferential transfers. Defendant asserted the § 547(c)(5) floating lien exception. Section 547(c)(5) carves out an exception for inventory or accounts receivable that protects the transfer of a security interest in after- acquired property, i.e., a "floating lien," provided that the creditor does not improve its position within the vulnerable period prior to bankruptcy. To determine improvement, the court must compare the amount of debt outstanding to the value of collateral securing the debt (i.e., inventory and accounts receivable) at the beginning and end of the appropriate preference period.

Lackow Bros., *Matter of*, 752 F.2d 1529 (11th Cir. 1985). Trustee brought action to recover allegedly preferential transfers. Creditor argued that the payments were specifically excluded from the Trustee's avoidance power under § 547(c)(5). In order to fall within this exception to preferential transfers, a creditor must prove that its financial position did not improve within the ninety days prior to bankruptcy. If the secured creditor improved its secured position between 90 days before petition date and date of petition through debtor's payments, then § 547(c)(5) does not apply; and the payment is voidable to extent creditor's position was improved. For this case, the proper method of valuing collateral to determine whether creditor improved its position was "ongoing concern value" rather than "liquidation value." (This conclusion may have been reached because the only evidence before the court concerned ongoing concern value).

§ 547(e) Timing of Transfers.

Barnhill v. Johnson, 503 U.S. 393, 112 S. Ct. 1386 (1992). Supreme Court held that for purposes of § 547(b)(4) a transfer made by check is deemed to occur on the date the check is honored. This conclusion is consistent with § 547(e)(2)(A). That section provides that a transfer occurs at the time the transfer "takes effect between the transferor and the transferee...." Here, since the debtor retained the ability to stop payment on the check until the very last, the transfer of funds in this case can not be said to have "taken effect between the debtor and petitioner" until the moment of honor.

Conner, *In re*, 733 F.2d 1560 (11th Cir. 1984). Under § 547 a transfer generally is made when the transfer is "perfected." See § 547(e)(2)(A)-(B). For property other than realty, a transfer is perfected "when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee." § 547(e)(1)(B). This determination must be made by reference to state law. Under Georgia law a lien attaches to garnished funds upon service of the summons of garnishment. Once the lien attaches, no contract creditor can obtain a superior judicial lien. Case may have been overruled by Barnhill v. Johnson, 503 U.S. 393, 397-98, 112 S.Ct. 1386, 1389 (1992).

§ 548(a) Fraudulent Transfers.

Senior Transeastern Lenders v. Official Comm. of Unsecured Creditors (In re TOUSA, Inc.), 680 F.3d 1298 (11th Cir. 2012). Debtor-subsidiaries did not receive reasonably equivalent value in exchange for liens which they conveyed to new lenders providing financing for debtor-parent company's payment of settlement to its joint venture lenders. New loan transactions at most delayed debtors' inevitable bankruptcies. The opportunity to avoid bankruptcy does not free a company to pay any price or bear any burden.

Christians v. Crystal Evangelical Free Church, 521 U.S. 1114, 117 S. Ct. 2502 (1997). The Supreme Court remanded a case which held that the Religious Freedom Restoration Act of 1993 (RFRA) protected pre-petition tithes from avoidance under § 548 as fraudulent transfers. The case was remanded to the Eighth Circuit for consideration in light of City of Boerne v. Flores, 521 U.S. 507, 117 S. Ct. 2157 (1997) which held that RFRA was an unconstitutional restriction on the First Amendment right of free exercise of religion. RFRA prohibits generally applicable laws from imposing a substantial burden on exercise of religion unless (1) the law furthers a compelling governmental interest (2) in the least restrictive available means. By requiring a compelling state interest, the Supreme Court held that RFRA unconstitutionally changed the First Amendment right. New legislation may comply with this standard if it is not dependent on Section 5 of the 14th Amendment. Other Code sections affected by RFRA include § 1325(b) disposable income and § 707(b) dismissal. On remand, the 8th Circuit held that the Supreme Court has held in City of Boerne v. Flores that RFRA is unconstitutional when applied to state laws, exceeding the power given in § 5 of the 14th Amendment. However, RFRA is constitutional when applied to federal law and effectively amends § 548(a)(2)(A). The 8th Circuit again held that RFRA protects pre-petition tithes from recovery under § 548 as fraudulent transfers. RFRA effectively amended the Bankruptcy Code, by engrafting the additional clause to § 548(a)(2)(A) that a recovery that places a substantial burden on a debtor's exercise of religion will not be allowed unless it is the least restrictive means to satisfy a compelling governmental interest. Christians v. Crystal Evangelical Free Church (*In re* Young), 141 F.3d 854 (8th Cir. 1998).

BFP v. Resolution Trust Corporation, 511 U.S. 531, 114 S. Ct. 1757 (1994). Chapter 11 debtor brought fraudulent transfer action to avoid mortgage foreclosure sale arguing that the price received at mortgage foreclosure sale was less than "reasonably equivalent value" of property. Section 548 grants the trustee the power to avoid fraudulent transfers. Not only can actual fraud transfers be set aside but also other transfers called constructively fraudulent transfers. The constructive fraud provision at issue in this case applies to transfers by insolvent debtors. It permits avoidance if the trustee can establish (1) that the debtor had an interest in property; (2) that a transfer of that interest occurred within one year of the filing of the bankruptcy petition; (3) that the debtor was insolvent at the time of the transfer or became insolvent as a result thereof; and (4) that the debtor received "less than a reasonably equivalent value in exchange for such transfer." To determine if the debtor received less than reasonably equivalent value in exchange requires a judicial inquiry into whether the foreclosed property was sold for a price that approximated its worth at the time of sale. Supreme Court concluded that "reasonably equivalent value," for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with. Irregularities in the conduct of the sale that would permit judicial invalidation of the sale under applicable state law may deprive the sales price of its conclusive force under § 548(a)(2)(A). The opinion appears to be limited to foreclosure sales.

Dionne, as Trustee v. Keating (*In re* XYZ Options, Inc.), 154 F.3d 1262 (11th Cir. 1998). Trustee challenged transfer made pre-petition to satisfy a consent judgment. Judgment debtors claims res judicata prevented the bankruptcy court from going behind the judgment. The Circuit Court rejected the bar of res judicata. Where a prior judgment against a debtor was procured as part of a collusive scheme to hinder, delay, or defraud creditors, the Trustee may seek recovery under § 548(a)(1). The mere fact a transfer is part of a judgment does not insulate it. The Trustee is not bound by a previous judgment merely because the debtor was a party. The Trustee represents the creditors, who were not parties to the prior litigation. The Trustee must prove actual or constructive fraud. Actual fraud may be established with badges of fraud. Eleven badges of fraud include: (1) The transfer was to an insider; (2) The debtor retained possession or control of the property transferred after the transfer; (3) The transfer was disclosed or concealed; (4) Before the transfer was made the debtor had been sued or threatened with suit; (5) The transfer was of substantially all the debtor's assets; (6) The debtor absconded; (7) The debtor removed or concealed assets; (8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred; (9) The debtor was insolvent or became insolvent shortly after the transfer was made; (10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and (11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor. The elements of a claim of constructive fraud under § 548(a) are that: (1) the debtor had an interest in property; (2) the transfer of that interest occurred within one year of the bankruptcy petition; (3) the debtor was insolvent at the time of the transfer or became insolvent as a result thereof; and (4) the debtor received less than reasonably equivalent value in exchange for such transfer.

Grissom, *In re*, 955 F.2d 1440 (11th Cir. 1992). In determining whether property is transferred for reasonably equivalent value, the court cannot focus only on a percentage of the sales price to the market value. Instead, the court must consider the totality of the circumstances including the

percentage of market value, the existence of a fair appraisal, the extent of advertising the sale and the competitive conditions surrounding the sale considering the number of serious bidders. The court should presume that a legitimate foreclosure sale brings a price which is reasonably equivalent to the value, and the trustee has the burden of establishing specific factors to undermine confidence in the reasonableness of the price. This case was abrogated by the Supreme Court case of BFP v. Resolution Trust Corporation, 511 U.S. 531, 114 S. Ct. 1757 (1994).

Nordberg v. Arab Banking Corp. *(In re* Chase & Sanborn Corp.), 904 F.2d 588 (11th Cir. 1990). In fraudulent transfer actions, reasonably equivalent value is a question of fact, with the burden of proof on the trustee challenging the transfer. In this case there was "reasonably equivalent value," as the overall amount transferred to corporate debtor exceeded the amount transferred by the debtor.

Rodriguez, *In re*, 895 F.2d 725 (11th Cir. 1990). Chapter 7 trustee brought action to recover payments made by debtor on behalf of its subsidiary in the purchase of a corporate jet. Circuit held the debtor did not receive any direct or indirect benefit from the reduction in subsidiary's indebtedness and that the debtor did not benefit from use of plane itself. Circuit could find no justification to pierce subsidiary's corporate veil to find that debtor benefitted from making the loan payments.

Littleton, *In re*, 888 F.2d 90 (11th Cir. 1989). Nonjudicial foreclosure sale realizing only 63.49% of the property's fair market value was for a reasonable equivalent within the meaning of § 548. This decision was also abrogated by BFP v. Resolution Trust Corporation, 511 U.S. 531, 114 S. Ct. 1757 (1994).

Chase & Sanborn Corp., *In re*, 813 F.2d 1177 (11th Cir. 1987). Creditor trustee appointed pursuant to § 1123(b)(3)(B) challenged transfers as fraudulent. Transferee creditor argued the transfers were not transfers of the debtor's property. Circuit set forth broad standard for determining if property is property of the debtor in the § 548(a) context. Any funds under the control of the debtor, regardless of the source, are properly deemed to be the debtor's property, and any transfers that diminish that property are subject to avoidance. Control cannot be determined by the simple fact that a third party placed the funds in an account of the debtor with no express restrictions on their use. In determining whether the debtor had control of funds transferred to a noncreditor, the court must look beyond the particular transfers in question to the entire circumstance of the transactions.

Treadwell, *Matter of*, 699 F.2d 1050 (11th Cir. 1983). Debtor transferred his Social Security benefit funds to his daughters. Trustee challenged the transfers as fraudulent transfers. A bankruptcy trustee may bring back into the estate for the benefit of the bankrupt's creditors any property transferred for less than equivalent value within a year of bankruptcy, if the debtor was insolvent at the time. Love and affection of children are not "value" within § 548 and cannot be considered in determining "reasonably equivalent value." Provision of 42 U.S.C. § 407 that Social Security benefits are not subject to the operation of bankruptcy laws means that a bankruptcy law cannot

take away social security benefit or choice of exemption schemes. Gifts of accumulated Social Security benefits by the debtor to his daughters could be set aside.

§ 548(c) Good faith Defense.

Perkins v. Haines (In re International Mgmt. Assocs., LLC), 661 F.3d 623 (11th Cir. 2011). Good faith investments in a debtor's Ponzi scheme are "for value" under § 548(c) up to the amount of investment and are not subject to recovery by the bankruptcy trustee, while any transfers exceeding the amount of the principal are not made "for value" regardless of whether good faith investors have an equity interest in, or some other form of claim against the debtor.

Orlick v. Kozyak (In re Financial Federated Title & Trust, Inc.), 309 F.3d 1325 (11th Cir. 2002). Trustee for debtor-corporation filed adversary proceeding to avoid alleged fraudulent transfers, totaling approximately $14 million, to employees in furtherance of scheme to procure viaticated life insurance policies. The bankruptcy court denied employee's jury trial demand, held for trustee and determined that employee was estopped, regardless of her level of knowledge regarding the scheme, from invoking "good faith for value" defense under § 548(c). The district court affirmed, and the Eleventh Circuit disagreed with the bankruptcy and district courts' reliance on *In re Randy*, 189 B.R. 425 (Bankr. N.D. Ill. 1995). The Circuit, following *Merrill v. Allen (In re Universal Clearing House Co.)*, 60 B.R. 985 (D. Utah 1986), held that the bankruptcy court was in clear error when it found that the payments were without value as a matter of law, thereby precluding employee's defense, simply because they were made in furtherance of an alleged scheme. Accordingly, the Circuit vacated and remanded the case for a jury trial.

Torcise v. Community Bank of Homestead (*In re* Torcise), 116 F.3d 860 (11th Cir. 1997). The debtors, insiders, and the Bank structured loans and payments to favor themselves to the detriment of trade creditors. The unsecured creditors committee sought to recover transfers of accounts receivable. The Bank claimed a good faith defense under § 548(c). The debtors were guilty of fraud, so two alternatives are presented. First, the Bank may also be guilty of fraud, which eliminates the good faith defense to the receipt of a fraudulent transfer. If the Bank is not guilty of fraud, it still may not have acted in good faith. The Bank knew of the debtors' fraud, and it was an integral part of the fraud. The Bank did not act in good faith. It was too clever in recovering its debts.

§ 549(a) Postpetition Transactions.

Marathon Petroleum Co. v. Cohen (In re Delco Oil, Inc.), 599 F.3d 1255 (11th Cir. 2010). The Eleventh Circuit required an innocent vendor to return almost $2 million in payments the debtor transferred to vendor for delivery of post-petition goods to the bankruptcy estate. Section 362(c)(2) of the Code prohibits the post-petition use of cash collateral by a trustee or a debtor-in-possession, unless the secured party or the bankruptcy court after notice and a hearing authorizes the use of cash collateral upon a finding that the secured party's interest in the cash is adequately protected. There is no "reasonably equivalent" value exception to the trustee's right to recover unauthorized post-petition transfers under § 549(a). While, § 363(c)(1) allows a debtor-in-possession acting as a trustee to "enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing . . ," subsection (c)(2) forbids a debtor-in-

possession from using "cash collateral under paragraph (1) of this subsection unless - (A) each entity that has an interest in such cash collateral consents; or (B) the court, after notice and a hearing, authorizes such use . . . ."

§ 549(c) Protection for Good Faith Purchasers in Postpetition Transactions.

Centre de Tricots de Gaspe, *In re*, 782 F.2d 905 (11th Cir. 1986). Action was brought against postpetition purchaser of property. Purchaser relied upon § 549(c) good faith purchaser defense. Section 549(c) at that time required the property to be located outside the county which the bankruptcy was commenced in order to use its protection. Here, the bankruptcy case was commenced in the same county in which the land was located. Therefore, § 549(c) was inapplicable. Since this decision was rendered, this restriction upon the property's location has been removed from the Code.

§ 549(d) Limitations on Avoidance of Postpetition Transactions.

Pugh v. Brook (*In re* Pugh), 158 F.3d 530 (11th Cir. 1998). Trustee sued debtor for accounting of assets and turnover. Debtor did not raise a statute of limitations defense at the trial level. On appeal, the District Court held the defense was waived. The issue in question is whether the limitations periods in §§ 546(a) and 549(d) constitute a bar to subject matter jurisdiction or are waivable statute of limitations defenses. The Circuit Court held that the two year limitations period are statutes of limitation and may be waived.

§ 550(a) Liability of Transferee of Avoided Transfer.

Kingsley v. Wetzel (In re Kingsley), 518 F.3d 874 (11th Cir. 2008). The sole issue in this appeal was whether a bankruptcy court may adjust the amount of recovery under § 550 (liability of transferee of avoided transfers) to reflect the transferee's pre-petition repayment of funds or return of property to the debtor where the defendant knowingly accepted a transfer of $4,516 from his daughter and son-in-law (the debtors) in order to prevent a creditor from seizing the funds to satisfy debtors' credit card debts. Prior to the filing of the petition, the defendant paid some of the money back to the debtors or paid some of their bills. The bankruptcy court gave credit for this. Both §550 and Florida law provide that, to the extent that a transfer is avoided, the trustee may recover the property or the value of the property transferred from the initial transferee. The trustee argued that neither § 550 nor Florida law provide for the adjustment of the amount of recovery based on pre-petition payments to the debtors or their creditors where there has been a finding of actual fraud. The Court of Appeals affirmed citing § 105 which endows a bankruptcy court with the equitable power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code.

Dzikowski v. Northern Trust Bank (In re Prudential of Florida Leasing), 478 F.3d 1291 (11th Cir. 2007). A trustee is entitled under § 550(a) of the Code to recover transfers from the initial transferee or from any entity for whose benefit such transfer was made, but § 550(d) limits a trustee's recovery to only a single satisfaction under subsection (a). The court determined that the federal rule of common law would be used in interpreting the "single satisfaction" rule of avoided transfers. While the Bankruptcy Code is often interpreted by reference to state law, there are

instances where applying the Code requires a uniform rule of federal common law. In this instance the federal rule of common law rather than state law should be used to interpret the rule of single satisfaction under § 550(d) because the rule of single satisfaction concerns the judicial process as opposed to a substantive matter, and state law ordinarily does not govern federal court procedures.

IBT Int'l, Inc. v. Northern (Int'l Admin. Servs., Inc.), 408 F.3d 689 (11th Cir. 2005). A trustee may simultaneously avoid a transfer under § 544 and seek recovery under § 550. The trustee may seek recovery from those considered to be "mediate" transferees of the initial transferee and does not have to pursue the initial transferee. Bankruptcy court's decision to award prejudgment interest from time of transfers was not an abuse of discretion. A bankruptcy court may award interest from the date of demand, filing date of the suit, or from the point at which the transferee could have been said to hold the transfer wrongfully. The interest rate is within the discretion of the court, guided by principles of reasonableness and fairness, and by relevant state law.

Pony Express Delivery Servs., Inc. v. Andreini & Co. (In re Pony Express Delivery Servs., Inc.), 440 F.3d 1296 (11th Cir. 2006). Section 550(a)(1) provides that avoidable preferences can only be recovered from initial and mediate transferees. Under the "control test," the recipient of any avoidable transfer is the initial transferee if the recipient exercises legal control over the asset received such that the recipient has a right to use the asset for the recipients own purposes. If the recipient merely serves as a conduit for assets that were under the actual control of the debtor-transferor or the real initial transferee, § 550 does not apply. Under this test, an insurance broker was not the "initial transferee," but instead, was a mere conduit for debtor's insurance premiums, even though a wire transfer from the debtor to the broker was used to repay funds that the broker had advanced from its client trust account to pay the debtor's insurance premiums. The bankruptcy court concluded that the insurance broker was an initial transferee because the wire transfer was made to satisfy a debt the debtor owed the broker. The Eleventh Circuit rejected this argument finding that the broker did not exercise control over the funds as is required for an entity to become an initial transferee. The broker never intended to become a creditor when it sent checks to the debtor's insurance carriers. The deficiency created in the client trust account when debtor's check was returned for insufficient funds was, therefore, inadvertent. The broker had every expectation that the actual funds the check was drawn upon would be immediately forthcoming and charged no interest or any additional fees for its "loan." The dissent stated that three weeks passed before the premium payment and the transfer, and the transactions were not "effectively simultaneous."

IBT Int'l, Inc. v. Northen (In re Int'l Admin. Services, Inc.), 2005 WL 1017990 (11th Cir. Fla. May 3, 2005). International Administrative Services, Inc. ("IAS" or "Debtor") marketed financial advice to consumers who paid a high membership fee, and solicited its services on late night infomercials and in seminars. Many members had filed lawsuits against IAS and its founder and director, Charles Givens, as the information was not practical or was not necessarily new because it was simply common sense advice. IAS filed for Chapter 11 on June 20, 1996, and the Trustee had to take on the task of investigating the Debtor's fraudulent transfer of assets to IBT International, Inc. ("IBT") and Southern California Sunbelt Developers, Inc. ("SCSD"). Because of the complexity associated with discovery, the Trustee was granted an extension of time to file

avoidance actions until February 10, 1999 from June 20, 1998.

On February 10, 1999, the Trustee filed this adversary proceeding against several defendants, but IBT and SCSD were not determined to be necessary parties until August 17, 1999. At trial, the bankruptcy court entered a judgment in favor of the Trustee for $1,679,251.30, and IBT and SCSD appealed to the district court, which affirmed the bankruptcy court's findings. The defendants appealed to the Eleventh Circuit, making four arguments: (1) that the statute of limitations ran before the Trustee filed suit, (2) that the Trustee had to first avoid transfers to the initial transferees before he could bring a cause of action against subsequent transferees IBT and SCSD, (3) that the Trustee should have been required to trace every penny of the funds that were transferred from IAS, and (4) that the Trustee was not entitled to prejudgment interest.

On the first argument, the appellants urged the court to apply 11 U.S.C. § 546 (a)(1), which would have cause the statute of limitations to run on June 20, 1998, two years after the bankruptcy case was filed. They further contended that the bankruptcy court did not have the power to extend that statute of limitations, thus the enlargement order was ineffective against IBT and SCSD. This court disagreed because the bankruptcy court does have discretion to extend the filing period for an adversary proceeding, and the oral order granting the extension on September 3, 1998, was effective at that time, rather than when the written order was actually entered on September 17, 1998. The Trustee was also entitled to equitable tolling of the statute of limitations because he exercised due diligence in undertaking the complicated discovery matters, but due to fraud or extraordinary circumstances beyond his control (specifically because IAS failed to disclose documents that showed a money trail to IBT and SCSD until after September 3, 1998), then the Trustee was entitled to an extension.

The appellants next argued that the Trustee did not sue the initial transferees (a law firm and another corporation) before he sued the subsequent transferees, IBT and SCSD, and the transfers could not be avoided unless avoided in the correct chronology of events. While they cited In re Trans-End Technology, Inc., 230 B.R. 101 (Bankr. N.D. Ohio 1998), the Eleventh Circuit found that there are only two cases that support their argument, and the dissent in In re Slack-Horner Foundries, Co., 971 F.2d 577 (10th Cir. 1992), comments that there are no other cases to support that decision. In essence, the Eleventh Circuit decided not to follow those two cases' persuasive authority. Under other courts' handling of 11 U.S.C. § 550(a), the Eleventh Circuit agreed that if the Plaintiff Trustee could prove that an avoidable transfer existed, then he could skip the initial transferees and recover from the following transferees.

As to the issue of whether or not the Trustee had a duty to account for every penny that was transferred in the fraudulent scheme by IAS, the Eleventh Circuit held that while the Plaintiff does have the burden of proving which funds are property of the estate, a detailed accounting is unreasonable in the face of massive fraud where definite funds cannot be traced. The Trustee met his burden by a preponderance of the evidence that $1.05 million transferred to IBT originated from IAS. In addition, the bankruptcy court's calculation of prejudgment interest based on the Treasury bond rate was fair, and prejudgment interest should be calculated from August 20, 1993, which was the date when the transfers to the Appellants occurred, rather than from the date from when IBT and SCSD were added as parties to the complaint. In conclusion, the Eleventh Circuit affirmed the bankruptcy and district courts' decisions.

Reily v. Kapila (In re Int'l Mgmt.Ass'n), 399 F.3d 1288 (11th Cir. 2005). A Chapter 7 bankruptcy trustee brought an adversary proceeding to avoid a $100,000 stock repurchase transaction as a

fraudulent transfer pursuant 11 U.S.C. § 548. The Court of Appeals for the Eleventh Circuit had to address whether an insider to the transaction was an "entity for whose benefit" the voidable transfer was made and had to determine whether "benefit" was too broadly defined to meet the 11 U.S.C. § 550(a)(1) qualifications.

The bankruptcy case involved five connected corporations that managed assisted living facilities in Florida, the fifth of which was called International Management Associates (IMA). IMA was formed by Dr. Gichon and Gavriel Shade, and they later added a third shareholder, William B. Reily. The living facilities incurred financial hardship, and Reily left his management position and formed a corporation named Premier. Premier entered into an agreement with the mortgage company for the assisted living facilities (named Health Care REIT) to restructure the mortgage loans, giving REIT title of the facilities and giving Premier a lease to them as well as a $2.248 million loan. The loan was to be used to pay Dr. Gichon for outstanding loans as well as other creditors. Gichon and Shade conveyed their interests to Reily and REIT in return for $700,000, of which $100,000 served as stock payment in the indebted living facilities.

The corporate debtors filed for Chapter 7 bankruptcy about five months later because they still had other indebtedness. The Chapter 7 trustee sought to recover allegedly fraudulent and preferential transfers made to Dr. Gichon, and the trustee sought to pierce the corporate veil to hold Gichon and Reily liable for transferring the debtors' assets. In addition, Premier was brought into the suit because Reily was the sole shareholder of the corporation. Dr. Gichon and Reily filed answers to the complaint, but Premier did not respond, so default judgment was entered against Premier. The court allowed the trustee to avoid the $100,000 fraudulent transfer which had been paid for Dr. Gichon's stock.

On appeal, the district court reversed, holding that Dr. Gichon could not be bound by the default judgment because he had no control to make Premier respond to the allegations in the complaint. However, Reily did have such ability as sole shareholder and officer of Premier, thus he was accountable for Premier's failure to file an answer. The Eleventh Circuit reviewed the district court's decision *de novo.* The Eleventh Circuit found that because the corporations were in bankruptcy, then the stock transfer was likely worthless, or at least worth less than the $100,000 paid. The court found that the trustee could recover against Dr. Gichon because the debtor received "less than a reasonably equivalent value in exchange," thus the transfer was fraudulent and voidable. The bankruptcy court held that the trustee could recover from Reily under 11 U.S.C. § 550(a)(1), which allows the trustee to recover property transferred from "the initial transferee of such transfer or the entity for whose benefit such transfer was made." However, the Court of Appeals disagreed, stating that even though Reily gained total control of the debtors' assets, this was not a quantifiable benefit corresponding to the value of the property transferred or received, as described in Mack v. Newton, 737 F.2d 1343, 1359-60 (5th Cir. 1984). Because the stock was less than the $100,000 paid, Reily had no direct, tangible benefit since the assets were basically worthless. As a result, the district court was reversed, and the case was remanded.

Coggin v. Coggin (*In re* Coggin), 30 F.3d 1443 (11th Cir. 1994). Debtor transferred $13,000 to his son within one year of filing his bankruptcy petition. Trustee filed suit against the debtor to recover the funds transferred to the son. Even though there was no question the transfer was avoidable under § 548(a)(1), Circuit held that § 550(a)(1) does not allow recovery of an avoided transfer from the transferring debtor. The plain language of the statute indicated that a debtor was not intended to be an entity from whom recovery may be had under section 550(a)(1).

Nordberg v. Arab Banking Corp. *(In re* Chase & Sanborn Corp.), 904 F.2d 588 (11th Cir. 1990). Lender, to which debtor sent transfers with instructions to apply transfers to guaranteed loans, qualified as "initial transferee" for purposes of attempt to avoid transfers as voidable preferential transfers. Applying a "conduit test," the Circuit held that where a bank receives money from a debtor to pay off a debt owed to the bank, then that bank gained control of the funds and is liable as an initial transferee. However, when banks receive money for the sole purpose of depositing it into a customer's account, on the other hand, the bank never has actual control of the funds and is not a § 550 initial transferee. Here, the lender exercised control over funds immediately upon receiving them from debtor and applied them to reduce debt owed to lender. No party other than lender exercised control over funds after they left the debtor's control. Thus, lender qualified as an initial transferee.

Air Conditioning, Inc. of Stuart, *In re*, 845 F.2d 293 (11th Cir. 1988). Trustee brought preference action against creditor to recover collateral pledged by debtor to secure letter of creditor to creditor. Circuit held trustee could recover against the entity for whose benefit the transfer was made, which in this case was the creditor.

§ 552 Post-petition Effect of Security Interest.

Jett v. Lawyers Title Ins. Co., – So.2d – , 2007 WL 491034 (Ala. Civ. App. 2007). Assignee of mortgage brought an action against mortgagor seeking foreclosure. The mortgage became an unsecured debt after the probate court voided the deed to the mortgaged property. The debt that was originally secured by the mortgage was then discharged as part of the mortgagor's bankruptcy proceedings. Under § 552(a), the property was not subject to the pre-petition mortgage where the debtor did not obtain title to the property until well after she received her bankruptcy discharge. Section 552(a) of the Bankruptcy Code bars the application of the after-acquired title doctrine where title is acquired after the commencement of the bankruptcy case. Therefore, the assignee of the mortgage was not entitled to foreclose on the mortgage.

Financial Security Assurance, Inc. v. Tollman-Hundley Dalton, L.P., 74 F.3d 1120 (11th Cir. 1996). Applying the pre-1994 amendment § 552, federal law, not state law, defines rent and profits as used in § 552(b). Reversing the bankruptcy and district courts and rejecting the holdings of the Fifth and Ninth Circuits, the plain meaning of the statute and a Black's Law Dictionary definition of rent governed to make the § 552(b) exception to the general rule apply to hotel revenues. The dissent reads § 552(b) to define rent by state law. The 1994 amendments strike the reference to state law in § 552(b), so post-amendment cases will be consistent with this case.

§ 553 Setoff.

B. F. Goodrich Employees Fed. Credit Union v. Patterson (*In re* Patterson), 967 F.2d 505 (11th Cir. 1992). Bankruptcy Code does not create right of setoff. It merely preserves right. State law usually determines validity of right. Section 553 requires that the obligation between the debtor and creditor arise prior to the filing of the bankruptcy petition and that mutuality of obligation exists. Credit union, which placed administrative freeze on accounts of members who filed Chapter 13 petition, did not possess valid right of setoff because mutuality of obligation was not present under

Alabama law. Under Alabama law, mutuality is present when cross demands are "due from one party to the other in the same right." Here, the debtor's loan obligation to the credit union was not mature at time credit union froze accounts.

§ 554(a) Abandonment of Property of the Estate.

Midlantic National Bank v. New Jersey Department of Environmental Protection, 474 U.S. 494, 106 S. Ct. 755 (1986). Chapter 7 Trustee, pursuant to § 554(a), sought to abandon environmentally contaminated property as "burdensome to the estate" or as "of inconsequential value to the estate." Supreme Court held that a trustee could not exercise his abandonment power in violation of certain state and federal laws enacted to protect the public's health and safety from identified hazards. Section 554(a) did not preempt all state and local laws.

§ 704 Rights and Duties of Trustee.

Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343, 105 S. Ct. 1986 (1985). Corporate debtor's directors tried to assert attorney client privilege against Chapter 7 Trustee. The trustee of a corporation in Chapter 7 has the power to waive the corporation's attorney-client privilege with respect to pre-bankruptcy communications.

E. F. Hutton & Co. v. Hadley, 901 F.2d 979 (11th Cir. 1990). Bankruptcy trustee, who represented bankrupt corporation, lacked standing to pursue claims relating solely to fully paid securities of specific customer creditors of the debtor. Section 704 requires the trustee to "collect and reduce to money the property of the estate for which such trustee serves." Section 541 defines property of the estate as "all legal or equitable interests of the debtor in property as of the commencement of the case." The bankruptcy trustee failed to show any possessory interest whatsoever in these funds being sued over. No provision of the Code authorizes a Chapter 7 trustee to collect money not owed to the estate. The party asserting standing must demonstrate actual injury or the imminence of an injury. The injury must be traceable to the alleged unlawful conduct and a demonstration that the requested relief will likely redress the injury.

O'Halloran v. First Union Nat'l Bank of Florida, 350 F.3d 1197 (11th Cir. 2003). Bank challenged the standing of the Chapter 7 trustee to assert claims against Bank where the debtor maintained accounts for assisting and permitting the debtor's founder to embezzle funds under a Ponzi scheme. Even though the primary claimants were the investors who paid the monies into the accounts as a result of debtor's fraud, the debtor had voidable, as opposed to void, title to the funds in the accounts and thus the trustee had standing to pursue the state law claims.

Cusato Bros. Int'l, Matter of, 750 F.2d 887 (11th Cir. 1985). Chapter 7 Trustee of bankrupt beer and wine distributor liquidated beer and wine inventory. Action was brought to determine if proceeds from sale were subject to excise tax. Circuit held the Trustee was not "conducting business" in liquidating the debtor's inventory. Thus, the bankruptcy estate was not subject to excise tax liability. See generally 28 U.S.C. § 960 for the Trustee's obligations when he is "conducting business."

§ 706 Conversion.

Marrama v. Citizens Bank of Ma. (In re Marrama), – U.S. – , 127 S.Ct. 1105 (2007). Chapter 7 debtor forfeited his right to convert to Chapter 13 by engaging in bad faith conduct. There is no absolute right to convert from Chapter 7 to Chapter 13. The bankruptcy court and First Circuit each rejected debtor's argument that he had an absolute right to convert under § 706(a). Section 706(a) provides that a Chapter 7 debtor "may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title." The Court explained that the statute's legislative history, which stated that § 706(a) gives a debtor "the one-time absolute right of conversion," fails to give full effect to the express limitation found in § 706(d). Subsection (d) expressly conditions a debtor's right to convert on the debtor's ability to qualify as a "debtor" under Chapter 13. The Court concluded that a debtor who has acted in bad faith does not qualify as a "debtor" under Chapter 13 pursuant to § 1307(c) which provides that a Chapter 13 case may be dismissed or converted to Chapter 7 "for cause." A ruling that a Chapter 13 case should be dismissed or converted is tantamount to a ruling that the debtor does not qualify as a "debtor" under Chapter 13.

§ 707(a) Dismissal.

Dionne, Trustee v. Simmons (*In re* Simmons), 200 F.3d 738 (11th Cir. 2000). Debtor sought dismissal of her Chapter 7 case. Bankruptcy court denied motion and district court reversed. Circuit reversed district court holding § 707(a) clearly states that a case shall only be dismissed for cause. The burden for showing cause is on the moving party. The bankruptcy court judge found that it would be in the best interests of the creditors and the debtor to deny the motion and to allow her debts to finally be resolved. The debtor's history of abuse warranted the bankruptcy court's denial of the motion to dismiss. Here, dismissal would allow the debtor to hinder creditors, secret assets, and further the debtor's abuse of the system.

§ 722 Redemption.

Taylor v. AGE Federal Credit Union (*In re* Taylor), 3 F.3d 1512 (11th Cir. 1993). Redemption, codified at § 722, provides that a debtor may redeem personal property from a lien securing a dischargeable consumer debt by paying the secured lender the lesser of the fair market value of its collateral or the amount of the claim on the date the petition is filed.

§ 726(a) Distribution of Property of the Estate.

First National Bank of Boston v. Thomson Consumer Electronics, Inc., 84 F.3d 397 (11th Cir. 1996). Chapter 7 Trustee Chapter 7 trustee transferred accounts to Bank in satisfaction of debt. By the transfer, the underlying debt was extinguished and the collateral--the accounts receivable–was no longer property of the estate. Bank held a perfected security interest in accounts receivable. As assignee, bank is subject to all defenses and recoupment asserted by account debtor. U.C.C. § 9-318(1).

U.S. Trustee v. Fishback (*In re* Glados, Inc.), 83 F.3d 1360 (11th Cir. 1996). Interest allowed under § 726(a)(5) for Chapter 7 Trustee compensation should be computed from the date of the fee

compensation award rather from the date of appointment. As for other professionals, they were entitled to interest from date of fee award, rather than from date of submission of fee applications. The services are performed postpetition and claim arises postpetition, so unjust to follow statute literally.

Internal Revenue Service v. Davis (*In re* Davis), 81 F.3d 134 (11th Cir. 1996). IRS untimely filed a proof of claim, under Fed. R. Bankr. P. 3002(c). Issue was whether it be paid under § 726(a)(1) or § 726(a)(3)? Section 726(a)(1) makes no distinction between timely and untimely filed claims. The Circuit held that, even though untimely filed, the claim should be paid as a priority claim because the timeliness provisions of Rule 3002(c) do not apply to distributions under section 726(a)(1). The decision was controlled by the Bankruptcy Code in effect prior to the 1994 amendments.

Varsity Carpet Services, Inc. v. Richardson (*In re* Colortex Industries, Inc.), 19 F.3d 1371 (11th Cir. 1994). Section 726(a)(5), the fifth priority, codifies the "solvency exception." Under this exception, where the debtor ultimately proves solvent, a balance of the equities dictates that creditors may receive any surplus, including claims for interest arising postpetition on prepetition claims, ahead of payment to the debtor.

§ 727 Discharge.

Cadle Co. v. Parks-Matos (In re Matos), 267 Fed. Appx. 884 (11th Cir. 2008). Revocation of discharge under §§ 727(d)(3) and (a)(6)(A) requires a showing that the debtors willfully and intentionally refused to obey a court order. Mere inadvertence, mistake or inability to comply is insufficient. The debtors produced 694 documents prior to the deadline imposed by the bankruptcy court and another 5,300 documents after the deadline. Late production alone was insufficient to show willful or intentional refusal to follow a court order where the creditor did not show that the debtors refused to obey or ignored the order and also failed to show the late production resulted in injury to creditors or detriment to the bankruptcy proceeding.

§ 727(a)(1) Denial of Discharge for Non-Individual Debtors.

United States v. Gilbert, 136 F.3d 1451 (11th Cir. 1998). President of corporate DIP was indicted for concealing corporate assets of the estate under 18 U.S.C. § 3282. Under 18 U.S.C. § § 3284, the five year statute of limitations begins to run with the final discharge or denial of discharge. However, under § 727(a)(1) a corporate Chapter 7 debtor receives no discharge. Here, with no discharge, the statute of limitations began to run when the case converted from Chapter 11 to Chapter 7.

§ 727(a)(2) Denial of Discharge for Transfer of Property.

Coady v. D.A.N. Joint Venture III, LLP (In re Coady), 588 F.3d 1312 (11th Cir. 2009). Creditor filed a complaint to deny the debtor's discharge under § 727(a)(2)(A) claiming that the debtor concealed an equitable interest in his wife's businesses. Debtor argued that: (1) he did not have an equitable interest in his wife's property; and (2) that, in any event, such an interest could not constitute "property of the debtor" under § 727(a)(2)(A). The court found that the debtor had, with

the intent to shield assets from his creditors, diverted the fruits of his labor to increase the value of his wife's businesses and then used business assets to support his personal lifestyle. Although the debtor never legally owned the businesses his equitable interest in same constituted "property of the debtor" under § 541(a)(1) which includes "all legal or equitable interests of the debtor in property as of the commencement of the case."

Jennings v. Maxfield (In re Jennings), 533 F.3d 1333 (11th Cir. 2008). On the eve of bankruptcy, a Chapter 11 debtor transferred nonexempt assets to a builder in order to utilize his homestead exemption. A debtor may convert non-exempt assets to exempt assets prior to filing *unless* the debtor is motivated to make such a conversion by an actual intent to hinder, delay, or defraud his creditors. Here sufficient evidence supported a finding that the debtor had intent to defraud his creditors where debtor transferred $130,000 to a builder for improvements that had not yet been made to the debtor's homestead nine days prior to filing for bankruptcy, the amount paid was $85,000 more than the debtor was required by contract to pay the builder, and the payment occurred after the debtor was found liable for a creditor's injuries.

Equitable Bank v. Miller, 39 F.3d 301 (11th Cir. 1994). Creditor argued debtor's discharge should be denied under § 727(a)(2)(A) due to the debtor's transfer of assets. Section 727(a)(2) requires that the debtor act with the intent to hinder, delay, or defraud. The creditor must prove actual fraudulent intent on behalf of the debtor. Constructive fraud would be insufficient to support a § 727 action. Here, debtor had several valid reasons for effectuating transfers other than for fraudulent purposes.

Coggin v. Coggin (*In re* Coggin), 30 F.3d 1443 (11th Cir. 1994). A denial of discharge under section 727(a) is total, causing all creditors to continue to have a post-petition claim against the debtor and his present and future assets. Circuit upheld bankruptcy court determination denying the debtor his discharge after he transferred $13,000 to his to his son with the actual intent to hinder, delay, or defraud a creditor.

Wines v. Wines, 997 F.2d 852 (11th Cir. 1993). In order to deny a bankruptcy discharge, evidence of actual intent to defraud creditors must be shown. Under Fed. R. Bankr. P. 4005, the creditor has the initial burden of proof to establish that debtor has an actual, wrongful intent to defraud creditors.

Davis v. Davis, 911 F.2d 560 (11th Cir. 1990). Chapter 7 debtor transferred his interest in marital home to his wife within one year of filing petition. The day before the filing of the bankruptcy petition, the property was re-transferred back to himself. Section 727(a)(2) action was brought against the debtor seeking to deny him his discharge for the transfer of the property to his wife within one year of filing petition, with intent to hinder, delay or defraud creditors. The debtor argued that discharge should not be denied under § 727(a)(2), since the transfer did not diminish the assets available to creditors. Debtor also argued the term "transfer" under § 727(a)(2) required the property be "transferred and remained transferred" at the time a debtor files his bankruptcy petition. The Circuit rejected both of these arguments. A debtor is denied a discharge under §

727(a)(2), even if the transfer does not reduce the assets available to creditors. It is the intent which triggers the section, not the value of the transferred property. A debtor cannot avoid the application of this section by recovering the property or undoing the transfer.

§ 727(a)(4) Denial of Discharge for False Oath or Account.

Phillips v. Epic Aviation (In re Phillips), 476 Fed. Appx. 813 (11th Cir. 2012). A false oath is generally proven by circumstantial evidence or inferences drawn from circumstances surrounding the debtor. Thus, a bankruptcy court is entitled to look to the totality of the circumstances including the recklessness of a debtor's behavior to infer whether a debtor submitted a statement with intent to deceive.

Protos v. Silver (In re Protos), 322 Fed. Appx. 930 (11th Cir. 2009). Under § 727(a)(4) the debtor's schedules contained material omissions and inaccuracies sufficient to deny debtor's discharge where the debtor failed to disclose or improperly disclosed: (1) a security interest in the debtor's home given to a law firm that represented the debtor in other litigation; (2) the transfer of lake house furniture to the debtor's ex-wife; (3) pending litigation; (4) liabilities in First Capital Bank; (5) the transfer of a shell corporation to the debtor's ex-wife; (6) a bank account with *de minimis* funds; and (7) a financial statement that was not disclosed in the debtor's schedules. While "a single, isolated instance of non-disclosure *may* not support a finding of fraudulent intent," the repeated nature of non-disclosures and improper disclosures made by the debtor in his schedules supported the bankruptcy court's finding of fraudulent intent. Even false oaths regarding worthless assets such as the *de minimis* bank account and the shell corporation may bar the discharge of debts under § 727(a)(4).

Chalik, *In re*, 748 F.2d 616 (11th Cir. 1984). Circuit faced with the issue of whether a false oath regarding worthless assets constitutes a material omission and precludes discharge. Circuit concluded such omission would be a false oath. Detriment to the creditor need not be shown in order to bar discharge for making a false oath. The subject matter of a false oath is "material," and thus sufficient to bar discharge, if it bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property. The debtor may not escape a § 727(a)(4)(A) denial of discharge by asserting that the admittedly omitted or falsely stated information concerned a worthless business relationship or holding. Further, it makes no difference that the debtor does not intend to injure his creditors when he makes a false statement. Creditors are entitled to judge for themselves what will benefit, and what will prejudice, them. Here, the intentional omission of information necessary to determine the debtor's financial condition, even though information concerned valueless assets, was the making of a false oath within the meaning of § 727. The party objecting to the debtor's discharge has the burden of proving the objection by evidence establishing the basis of the objection. The burden then shifts to the debtor to explain the loss of assets or omission of information.

Raiford, Matter of, 695 F.2d 521 (11th Cir. 1983). Chapter 7 debtor plead guilty under 18 U.S.C.A. § 152 to the criminal charge of "knowingly and fraudulently mak[ing] false declaration[s] ... under penalty of perjury ... in relation to [a] case under [the bankruptcy laws]" and to "knowingly and fraudulently ... mak[ing] a false entry in [a] document affecting or relating to the property or affairs of a debtor" while contemplating the filing of a bankruptcy petition. Trustee brought action under § 727(a)(4) seeking to deny the debtor his discharge. Circuit held collateral estoppel applied to prevent debtor from relitigating factual issues. Here, debtor's guilty plea in the bankruptcy crime case under 18 U.S.C. § 152 collaterally estopped his defense to objection to discharge since both actions are based on the same underlying acts.

§ 727(a)(5) Denial of Discharge for Failure to Explain Loss of Assets.

Protos v. Silver (In re Protos), 322 Fed. Appx. 930 (11th Cir. 2009). Although debtor argued that he transferred his corporation and lake house furnishings to his ex-wife to comply with his divorce obligations more than a year prior to filing bankruptcy, the debtor's continued involvement in the day-to-day business operations of the corporation cast doubt on his explanation that he lost assets. The fact that the transfer occurred more than one year prior to the petition date was irrelevant because § 727(a)(5) does not contain a one year limitation period. As to the furnishings, the debtor continued to use same by living in the house after the purported transfer.

Hawley v. Cement Industries, Inc. (*In re* Hawley), 51 F.3d 246 (11th Cir. 1995). Section 727(a)(5) does not explicitly require a creditor to call upon a debtor to explain a loss of assets prior to filing an adversary proceeding. A denial of discharge under § 727(a)(5) requires only that the debtor fail to explain a loss of assets "before determination of denial of discharge under this paragraph." At trial, the creditor carries the initial burden of proof. Here, the creditor met its burden of proof by showing vast disparity between 1989 financial statement and 1990 Chapter 7 schedules. The burden then shifted to the debtor to satisfactorily explain the losses. To be satisfactory, 'an explanation' must convince the judge. Here, the explanation did not convince the judge.

Hughes, *In re*, 873 F.2d 262 (11th Cir. 1989). In explaining loss of assets in a § 727(a)(5) action, debtor may not simply place sacks of records before the bankruptcy judge and request the judge to sift through the documents and attempt to reconstruct the flow of the debtor's assets. Instead, debtor must present all records in an orderly, organized manner.

Chalik, *In re*, 748 F.2d 616 (11th Cir. 1984). Creditor brought § 727(a)(5) action seeking to deny the debtor his discharge. The party objecting to a discharge has the burden of proving the objection. But once that party meets the initial burden by producing evidence establishing the basis for his objection, the burden shifts to the debtor to explain satisfactorily the loss. To be satisfactory, "an explanation" must convince the judge. Vague and indefinite explanations of losses that are based upon estimates uncorroborated by documentation are unsatisfactory. Here, debtor failed to satisfactorily explain loss of assets.

§ 741(2) Definition of Customer.

ESM Government Securities, Inc., *In re*, 812 F.2d 1374 (11th Cir. 1987). For purposes of stockbroker liquidation, a "customer" is anyone who entrusts securities, cash or other property

with the debtor in connection with securities transactions, and loses said property due to the debtor's insolvency. There must also be an "indicia of a fiduciary relationship."

§ 1107 Rights, Powers, and Duties of Debtor in Possession.

WWG Industries, Inc., *In re*, 772 F.2d 810 (11th Cir. 1985). As "debtor-in-possession," the debtor enjoys nearly all the rights and powers that a trustee would have if the bankruptcy court were to appoint one, including the right to continue operation of its business.

§ 1110 Aircraft.

Airlift International, Inc., *In re*, 761 F.2d 1503 (11th Cir. 1985). A § 1110 stipulation constitutes a post-petition agreement between the parties entered into for purposes of preserving the estate. While similar to a § 365 assumption, although not identical, a § 1110 stipulation allows the trustee or debtor in possession to retain the aircraft or vessels subject to the normal requirements of section 365. The trustee must meet the obligations coming due under the existing executory contract or unexpired lease. The trustee's breach of a section 1110 stipulation is a post-petition breach giving rise to a section 503(b) claim for administrative expenses.

§ 1111(a) Scheduled Claims.

Analytical Systems, Inc., *In re*, 933 F.2d 939 (11th Cir. 1991). A proof of claim is deemed filed for any claim that appears in the schedules filed by the debtor. It is the creditor's responsibility to verify the accuracy of his claim as listed on the debtor's schedules and a creditor whose claim is not scheduled, scheduled improperly or scheduled as disputed, contingent or unliquidated must file a proof of claim with the bankruptcy court within the time fixed by that court.

§ 1112(b) Conversion or Dismissal.

In re Pegasus Wireless Corp., 391 Fed. Appx. 802 (11th Cir. 2010). BAPCPA mandates dismissal for cause under § 1112(b) unless the bankruptcy court finds that: (1) unusual circumstances prevent dismissal; or (2) that dismissal is not in the best interest of creditors. Cause for dismissal exists when a petition has not been filed in good faith or when there is no realistic possibility of an effective reorganization and it is evident that the debtor has filed bankruptcy to delay or frustrate the legitimate efforts of secured creditors to enforce their rights.

The Bal Harbour Club, Inc. v. AVA Development, Inc., et. al (*In re* The Bal Harbour Club, Inc.), 316 F.3d 1192 (11th Cir. 2003). After bankruptcy court dismissed case for abuse of bankruptcy process, Chapter 11 debtor-in-possession appealed, arguing that court failed to apply the "business judgment rule" to debtor nonprofit corporation's decision to file bankruptcy in an alleged attempt to avoid negotiated sale of corporate property. Both the district court and the Eleventh Circuit affirmed the dismissal, finding that bankruptcy court did not abuse its discretion in granting proposed purchaser's motion to dismiss. The Eleventh Circuit held that while the "business judgment rule" may afford a presumption of good faith, the party moving for dismissal met its burden of proof regarding debtor's bad faith, which constitutes cause, a ground for dismissal under § 1112(b).

Phoenix Picadilly, Ltd., *In re*, 849 F.2d 1393 (11th Cir. 1988). Creditors moved for dismissal of Chapter 11 single asset real estate case on grounds it was filed in bad faith. Circuit affirmed dismissal reciting several factors courts consider in determining if a case was filed in bad faith, including: (1) the debtor has only one asset in which it does not hold legal title; (2) the debtor has few unsecured creditors whose claims are small in relation to the claims of the secured creditors; (3) the debtor has few employees; (4) the property is the subject of a foreclosure action as a result of arrearages on the debt; (5) the debtor's financial problems involve essentially a dispute between the debtor and the secured creditors which can be resolved in state court; and (6) the timing of the debtor's filing evidences an intent to delay or frustrate the legitimate efforts of the debtor's secured creditors to enforce their rights. Debtor's choice of venue may also demonstrate bad faith. These factors may no longer be relevant in determining bad faith in a single asset real estate case, as Congress, in the 1994 Amendments, clearly expressed its intention that a case not be dismissed simply because the case is a single asset real estate case. 11 U.S.C. § 362(d)(3).

State Street Houses, Inc. v. New York State Urban Development Corp. (*In re* State Street Houses, Inc.), 356 F.3d 1345 (11th Cir. 2004). Bankruptcy Court dismissed a Chapter 11 single asset real estate case on ground that it was filed in bad faith. The factors of Phoenix Piccadilly were used to determine bad faith. Debtor-in-Possession argued that § 362(d)(3), enacted after Phoenix Piccadilly, shows Congressional intent to overrule that case. All the courts rejected this argument, but several cases from the Bankruptcy Court of the Middle District of Florida supported it. The Circuit noted that subsequent cases from that district rejected that conclusion. The guidelines for bad faith in Phoenix Piccadilly, Ltd., *In re*, 849 F.2d 1393 (11th Cir. 1988) and Albany Partners, Ltd., *In re*, 749 F.2d 670 (11th Cir. 1984) remain as precedent in this circuit.

Natural Land Corp., *In re*, 825 F.2d 296 (11th Cir. 1987). Creditor moved for dismissal of Chapter 11 case alleging it was not filed in good faith. Debtor argued dismissal was premature as it had not yet filed its plan of reorganization. Circuit held bankruptcy court could dismiss for bad faith, even in the absence of a plan of reorganization. Court gives several factors to consider when determining if case filed in bad faith, including:(1) the lack of a realistic possibility of an effective reorganization; (2) evidence that the debtor seeks merely to delay or frustrate the legitimate efforts of secured creditors to enforce their rights; (3) whether the debtor is seeking to use the bankruptcy provisions to create and organize a new business, not to reorganize or rehabilitate an existing enterprise; (4) the timing of the debtor's relevant actions; (5) whether the debtor appears to be merely a "shell" corporation; and (6) whether the debtor was created, or the subject property transferred to the debtor, for the sole purpose of obtaining protection under the automatic stay.

Moog, *In re*, 774 F.2d 1073 (11th Cir. 1985). Bankruptcy court *sua sponte* dismissed Chapter 11 case holding that individual debtor could not file Chapter 11. Circuit reversed holding a bankruptcy court could not *sua sponte* dismiss a petition under § 1112(b). After holding § 1112(b) gives the bankruptcy court no authority to *sua sponte* dismiss a case, the Circuit held that courts are given discretion to dismiss collusive, sham, or frivolous suits and may dismiss Chapter 11 filings "with demonstrably frivolous purposes absent any economic reality. The Circuit may have been referring to an inherent power as opposed to a statutory power. In any event, this case was decided prior to the amendment to § 105 which expressly provided authority for bankruptcy courts to act *sua sponte*.

Albany Partners, Ltd., *In re*, 749 F.2d 670 (11th Cir. 1984). Section 1112(b) allows dismissal for cause, and lack of good faith may constitute "cause." If there is no realistic possibility of an effective reorganization and it is evident that the debtor seeks merely to delay or frustrate the legitimate efforts of secured creditors to enforce their rights, dismissal of the petition for lack of good faith is appropriate.

§ 1113 Collective Bargaining Agreements.

Brada Miller Freight System, Inc., Matter of, 702 F.2d 890 (11th Cir. 1983). Section 365 also applies to collective bargaining agreements. As an ordinary commercial contract may be rejected by a trustee upon a showing that the rejection would benefit the estate, a greater showing is required, however, to reject a collective bargaining agreement. Note: This case was decided prior to both N.L.R.B. v. Bildisco and Bildisco, 465 U.S. 513 (1984) and the 1984 enactment of § 1113.

§ 1122 Plan Classification.

Holywell Corp., *In re*, 913 F.2d 873 (11th Cir. 1990). Section 1122 provides that "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interest of such class." Although the proponent of a plan of reorganization has considerable discretion to classify claims and interests according to the facts and circumstances of the case, this discretion is not unlimited. If the plan unfairly creates too many or too few classes, if the classifications are designed to manipulate class voting, or if the classification scheme violates basic priority rights, the plan cannot be confirmed.

Justice Oaks II, Ltd., *In re*, 898 F.2d 1544 (11th Cir. 1990). Any objection based on an alleged improper misclassification of a claim must be made prior to confirmation of the plan.

§ 1123(b) Plan Options.

Holywell Corp. v. Smith, 503 U.S. 47, 112 S. Ct. 1021 (1992). Trustee was appointed pursuant to confirmed Chapter 11 plan to liquidate and distribute the corporate debtors' property after the property was transferred to trust created by the plan. Trustee brought action for determination that he had no obligation to file income tax returns or pay taxes upon gain realized from sale of real estate. Supreme Court held Trustee was an "assignee" of "all" or "substantially all" of property of the corporate debtor, within meaning of the Internal Revenue Code provision requiring assignees for corporations to file returns and pay taxes for the corporations. With respect to the individual case, Trustee must file a return because he is the fiduciary of a trust of an individual, within meaning of the Internal Revenue Code provision requiring fiduciaries for individuals to file returns and pay taxes for the individuals.

United States v. Energy Resources Co., 495 U.S. 545, 110 S. Ct. 2139 (1990). Bankruptcy court has the authority to order the Internal Revenue Service to treat tax payments made by Chapter 11 debtor corporations as trust fund payments where the bankruptcy court determines that this designation is necessary for the success of the reorganization plan. The Court found authority in § 1123(b)(5) [now § 1123(b)(6)] which gives bankruptcy courts authority to approve reorganization

plans including "any...provision not inconsistent with the applicable provisions of this title."

Kare Kemical, Inc., *In re*, 935 F.2d 243 (11th Cir. 1991). In a Chapter 11 liquidation proceeding, debtor sought approval of a liquidation plan requiring the IRS to first satisfy the principal portion of the taxes owing and thereafter the accrued interest and penalties. Under the Energy Resources case, such a provision is available in a reorganizing Chapter 11 case. However, in a liquidation Chapter 11, a plan cannot require IRS to apply payments on trust fund tax claims to the principal portion of the claim before applying them to the interest in penalties. The reasons for allowing payment allocation in Chapter 11 reorganizations, regardless of whether tax payments are properly characterized as "voluntary," are not present in liquidation cases.

Chase & Sanborn Corp., *In re*, 813 F.2d 1177 (11th Cir. 1987). The reorganization plan approved by the bankruptcy court authorized a "creditor trustee" to pursue fraudulent transfer claims. Transferee creditor argued that the "creditor trustee" did not have standing to assert the claim under § 548 because he was neither a trustee in bankruptcy nor a debtor in possession. Circuit upheld bankruptcy court's determination to allow creditor trustee to assert the claim pursuant § 1123(b)(3)(B), which allows a plan to appoint a "representative of the estate" to enforce any claim or interest. Fact that the bankruptcy court did not formally and specifically appoint the creditor trustee to enforce the claims was immaterial since court approved plan which had such authorization. Note that this may be a way around the holding in Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 1205 S. Ct. 1942 (2000), which seems to limit standing for bankruptcy actions to the parties specifically named in the respective Code sections. Of course, this decision would seemed to be limited to Chapter 11s and only after confirmation.

§ 1126(a) Acceptance of Plan.

East Group Properties v. Southern Motel Assoc., Ltd., 935 F.2d 245 (11th Cir. 1991). In a Chapter 11 consolidation case, the creditors of the consolidated entities are combined for the purpose of voting on reorganization plans.

§ 1127(d) Modification of Plan.

Liquidity Solutions, Inc. v. Winn-Dixie Store, Inc. (In re Winn-Dixie Store, Inc.) 286 Fed. Appx. 619 (11th Cir. 2008). Under the mootness doctrine, a court can dismiss an appeal based on the court's lack of power to rescind transactions taken in consummation of a Chapter 11 plan. Dismissal based on mootness is generally granted when reversal of a confirmation order would "knock the props out from under the authorization for every transaction that has taken place and create an unmanageable, uncontrollable situation for the Bankruptcy Court."

Enron Corp. v. New Power Co. (In re New Power Co.), 438 F.3d 1113 (11th Cir. 2006). Creditor appealed confirmation of Chapter 11 liquidating plans filed by three consolidated debtors. Creditor argued that the bankruptcy court lacked authority to confirm debtors' second amended plan because new provisions in the plan were materially adverse to the creditor. The bankruptcy court deemed creditor's vote in favor of the first amended plan as a vote in favor of the second

amended plan and confirmed the plan over the creditor's objections. The Court of Appeals affirmed finding that the modifications were not material and adverse. The bankruptcy court properly deemed creditor's vote for the first amended plan as a vote for the second amended plan pursuant to § 1127(d) and Bankruptcy Rule 3019. A bankruptcy court may, after notice and hearing, deem a claim or interest holder's vote as a corresponding vote for or against a modified plan unless the modification materially and adversely alters the creditor's treatment. The creditor participated in the hearings leading to confirmation and was aware of the court's intent to appoint an examiner to investigate insider claims. The disclosure statement filed in connection with the first amended plan described the bankruptcy court's intention to appoint an examiner without reference to a time limitation on the examiner's powers. The disclosure statement disclosed the examiner's pending appointment and the subject matter of his investigation. Before the creditor cast its vote in favor of the first amended plan, the creditor was on notice that its claims would be investigated by an examiner and that its secured claim could be recharacterized as an equity interest. The examination order contained no temporal limitations on the scope of the examiner's investigatory powers. The second amended plan only more clearly laid out what creditor could expect concerning its claims and interests than did the first amended plan. The modification did nothing to alter the status of creditor's claims or interests and had no material effect on same.

§ 1129(a) Confirmation of the Plan.

Alabama Dept. of Econ. & Cmty. Affairs v. Ball Healthcare-Dallas, LLC (In re Lett), 632 F.3d 1216 (11th Cir. 2011). A creditor may challenge on appeal a confirmed Chapter 11 plan on the ground that it violates the absolute priority rule, despite the creditor's failure to formally object on that ground before the bankruptcy court notwithstanding the generally applicable civil plain error rule under which an issue not raised at the trial court level may not be heard on appeal absent a showing that a miscarriage of justice will result if the appellate court refuses to address the issue. The application of the absolute priority rule in a Chapter 11 cram down proceeding sufficiently places the matter before the bankruptcy court so as to preserve the issue for appeal.

United States v. Haas (*In re* Haas), 162 F.3d 1087 (11th Cir. 1998). To be confirmable, Chapter 11 plan must offer a reasonable prospect of success and be workable. Here, Chapter 11 plan called for 68-year-old debtor attorney to continue to actively practice law for 30 more years. Such a plan was was infeasible and could not be confirmed.

McCormick v. Banc One Leasing Corp.; U.S. Trustee (*In re* McCormick), 49 F.3d 1524 (11th Cir. 1995). Absent a finding that the action impeded the administration of the case or other consequences, an invocation of the Fifth Amendment privilege alone in a nondischargeability action does not constitute bad faith, as a basis for denying confirmation. Where the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirements of § 1129(a)(3) are satisfied.

Southern States Motor Inns, Inc., *Matter of*, 709 F.2d 647 (11th Cir. 1983). Circuit was faced with issue of what interest rate must be applied in calculating deferred payments of delinquent federal

taxes pursuant to § 1129(a)(9)(C). The bankruptcy court applied the then- current rate of interest established by the formula set forth in 26 U.S.C. § 6621 for interest on unpaid federal tax liabilities generally, less a 1% reduction for the "rehabilitation aspects" of the plan of reorganization. Circuit reversed holding Under the present value analysis of § 1129(a)(9)(C), the interest rate to be awarded to a tax priority claimant should be determined in light of market rates, length of payout period, quality of security, and risk of default. While statutory interest rate charged by Internal Revenue Service is relevant, it is not dispositive and bankruptcy court erred in relying exclusively on this rate. Additionally, there should be no reduction of the rates to accommodate "rehabilitation aspects" of a plan of reorganization.

§ 1129(b) Cram-Down.

Bank of America Nat'l Trust and Savs. Ass'n v. 203 North LaSalle Street Partnership, 526 U.S. 434, 119 S. Ct. 1411 (1999). Debtor's Chapter 11 plan granted prepetition equity owners the exclusive right to contribute new capital to and receive ownership interests in the reorganized debtor. A senior class of impaired creditors objected to the plan. The Supreme Court held that the exclusive opportunity to participate in the reorganized debtor by contributing new capital was property and the fact that it was an exclusive right meant that it was given "on account of" the equity owners' pre-bankruptcy interests. Chapter 11 plan could not pass the "absolute priority" test under § 1129(b)(2)(B)(ii). The Court discussed but did not decide the "new value" corollary to the absolute priority rule. Assuming a new value exception, the right to contribute new capital must be competitive by auction or somehow available to the public so that the market value of new equity can be determined, competing plans may suffice, but the equity must somehow be sold based upon the fairness of contribution and not based on the prior control.

Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 108 S. Ct. 963 (1988). Addressing absolute priority rule issues, the Supreme Court held the absolute priority rule provides that a dissenting class of unsecured creditors must be provided for in full before any junior class can receive or retain any property under a plan. To overcome the absolute priority rule, the junior class must make a contribution in money or money's worth, reasonably equivalent in view of all the circumstances. Here, interest holders argued future contributions of labor and management skills were "money or money's worth" so as to except the debtor's proposed Chapter 11 plan from the operation of the absolute priority rule. Supreme Court disagreed. The promise of future services is intangible, inalienable, and, probably, unenforceable. Any interest debtors retained was property and, thus could only be retained pursuant to a plan accepted by creditors or in compliance with the absolute priority rule.

Perimeter Park Inv. Assoc., Ltd., Matter of, 697 F.2d 945 (11th Cir. 1983). Cram-down allowed under Bankruptcy Act even where there is only one secured creditor, as long as adequate protection is provided.

§ 1141(a) Effect of Confirmation.

Eastman Kodak Co. v. Atlanta Retail, Inc. (In re Atlanta Retail, Inc.), 456 F.3d 1277 (11th Cir. 2006). The Court of Appeals determined that orders entered in a Chapter 11 case, including a cash

collateral order, orders authorizing the sale of the debtor's assets and establishing priority among creditors who would receive distribution of sale proceeds, and the confirmation order, did not preclude a subordinated creditor, under principles of res judicata, from pursuing its removed state court fraud claim against the lender in whose favor it had executed the subordination agreement, for failing to advise the creditor prior to its $30 million advance to the debtor of an alleged secret agreement between the debtor and the lender to use this advance to reduce the debtor's debt to the lender rather than to develop the debtor's business, even assuming that the lender's alleged fraud might have been raised in connection with these earlier orders as a basis for equitably subordinating its claims. The court reasoned that subordination would not have accorded the creditor full relief for damages that it allegedly suffered as a result of this alleged fraud as the distribution to the lender in bankruptcy was millions of dollars less than the damages sought in the creditor's fraud action. The court also held that the removed state court fraud claims were not based on the same nucleus of operative fact and did not involve the same cause of action as the matters previously dealt with by the bankruptcy court.

Finova Capital Corp. v. Larson Pharmacy Inc. (In re Optical Techs., Inc.), 425 F.3d 1294 (11th Cir. 2005). Any error by a bankruptcy court in purporting to exercise jurisdiction to confirm a plan that modified the terms of leases that the debtor, as lessor, had previously assigned did not render the confirmation order void or permit a collateral attack thereon by lessees that had been scheduled as creditors of the debtor and served with copies of the plan. The lessees were bound by the terms of the confirmation order regardless of whether the bankruptcy court had jurisdiction as part of the confirmation process to modify the lessees' rights under leases assigned to a non-debtor. The terms of the plan were plain and any objection to same could have been raised at confirmation. It is well settled that a mere error in the exercise of jurisdiction does not support relief under Rule 60(b)(4). As a general matter parties to a proceeding that fail to raise jurisdictional objections are barred from attacking jurisdiction collaterally. The only exception to this general rule arises when a party has been denied due process in order to challenge the court's jurisdiction collaterally. The lessees did not allege any defect in process.

Holywell Corp. v. Smith, 503 U.S. 47, 112 S. Ct. 1021 (1992). Trustee was appointed pursuant to confirmed Chapter 11 plan to liquidate and distribute the corporate debtors' property after the property was transferred to trust created by the plan. Trustee brought action for determination that he had no obligation to file income tax returns or pay taxes upon gain realized from sale of real estate. Trustee argued he was relieved from these obligations because the confirmed plan was silent to them. Supreme Court rejected this idea holding that § 1141(a) binds creditors of the corporate and individual debtors with respect to claims that arose before confirmation. It does not bind the creditor with respect to postconfirmation claims.

Piper Aircraft Corp., *In re*, 244 F.3d 1289 (11th Cir. 2001). Questions were raised as to the *res judicata* effect of the confirmation order. Under res judicata, also known as claim preclusion, a final judgment on the merits bars the parties to a prior action from re-litigating a cause of action that was or could have been raised in that action. Res judicata may be applied only if (1) the prior decision must have been rendered by a court of competent jurisdiction; (2) there must have been a final judgment on the merits; (3) both cases must involve the same parties or their privies; and (4) both cases must involve the same causes of action. If the claim in the new suit was or could have

been raised in the prior action then *res judicata* applies. Res judicata cannot bar a claim that was not in existence at the time of the original action unless the facts underlying the claim were actually raised in that action. Here, the confirmation dealt with the requirements of § 1129, and did address the conduct of unrelated third parties. Therefore, *res judicata* could not and did not apply.

Sipes v. Atlantic Gulf Communities Corp. (*In re* General Development Corp.), 84 F.3d 1364 (11th Cir. 1996). Whether creditor holds a mortgage or an executory contract, a confirmed plan vests the real estate free and clear of liens as provided in the plan and discharges the pre-petition debt. Confirmation of a Chapter 11 plan has three effects: (1) all creditors are bound by the plan; (2) all property vests in the debtor free and clear of all claims and interest of creditors, except as otherwise provided in the plan or confirmation order; and (3) the debtor is discharged of all prepetition debts. Procedural due process is satisfied when creditor receives disclosure statement, summary of plan, ballot for accepting or rejecting plan, correspondence evidencing debtor-in-possession's intent for treatment of claim, proof of claim form, and full plan was available for review, even though no notice of confirmation hearing was given.

Shure v. Bradford National Bank, et al (*In re* Sure-Snap Corp.), 983 F.2d 1015 (11th Cir. 1993). Creditor moved for attorney fees which was denied based upon effect of confirmed plan. District court held the agreement calling for the award of attorney's fees was no longer in force, since that agreement was terminated by virtue of the confirmation and consummation Chapter 11 plan. Circuit disagreed. The confirmation of the plan did not terminate the agreement; rather, confirmation prevented creditor from enforcing the terms of the agreement to collect pre-confirmation debt. Confirmation discharged the pre-confirmation liabilities under the agreement. The attorney fees sought were incurred post-confirmation and thus, were not discharged by the confirmation of the plan.

Justice Oaks, II, Ltd., *In re*, 898 F.2d 1544 (11th Cir. 1990). Confirmation of a plan of reorganization bars guarantor (creditor) from objecting to classification of creditor's claims.

§ 1141(d) Limitations of Discharge.

Spring Valley Farms, Inc., *In re*, 863 F.2d 832 (11th Cir. 1989). Property owners brought nuisance and trespass claims against debtor. Property owners had actual notice of the bankruptcy case but did not receive mandatory notice of claims bar date. Debtor argued claims were extinguished by operation of § 1141(d)(1)(A). Property owners argued § 1141(a)(1)(A) cannot authorize the discharge of a debt in violation of due process and the failure to receive notice under Bankruptcy Rule 2002(a)(8) constituted such a violation. Circuit agreed with property owners. Section 1141 does not discharge the debt of a creditor who was known to an individual corporate debtor and failed to receive notice under Rule 2002(a)(8), even if the creditor had actual knowledge of the general existence of the bankruptcy proceedings.

Gurwitch, *In re*, 794 F.2d 584 (11th Cir. 1986). The Bankruptcy Code makes clear that under § 1141(d)(2) confirmation of a plan of reorganization does not discharge tax liabilities made nondischargeable under § 523. Since under § 523(a)(1)(A) the tax claim of Internal Revenue

Service was a nondischargeable debt, whether or not a claim was filed or allowed, the Internal Revenue Service was not barred by res judicata from asserting claim against an individual debtor for further taxes due after the plan of reorganization was confirmed and the case closed.

§ 1146(c) Special Tax Provisions.

Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc., 128 S.Ct. 2326 (2008). Reversing the Eleventh Circuit, the Supreme Court held that §1146(a)'s stamp-tax exemption does not apply to transfers made before a plan is confirmed under Chapter 11. The state argued that stamp taxes assessed on the debtor's post-confirmation transfer of assets that the bankruptcy court approved prior to confirmation fell outside the stamp-tax exemption because the transfer did not occur under a confirmed Chapter 11 plan. Noting that §1146 is in a subchapter entitled "POSTCONFIRMATION MATTERS," the Supreme Court limited the stamp-tax exemption to postconfirmation transfers made under the authority of a confirmed plan.

Florida, Dep't of Revenue v. T.H. Orlando Ltd. (In re T.H. Orlando Ltd), 391 F.3d 1287 (11th Cir. 2004). T.H. Orlando, Ltd. and T.H. Resorts Associates, Ltd. ("debtors") were close to foreclosure on mortgages for three hotels, and filed for Chapter 11 bankruptcy in 1997. The mortgage lender agreed to accept $34.5 million to satisfy the mortgage balance, even though the total mortgage for the three hotels was $70 million if the debt was paid by August 31, 1997. Berkshire Mortgage Finance Corporation was willing to advance the $23.5 million, and they conditioned the loan on Kissimmee Lodge, Ltd, a non-debtor hotel next to debtors' hotels, ability to refinance its loan through Berkshire in the same transaction.

The Florida Department of Revenue ("FDOR") objected to confirmation of the debtors' plan for failure to comply with 11 U.S.C. § 1129(a)(1), alleging that they were not entitled to the exemption under 11 U.S.C. § 1146(c), which prohibits taxation under any law imposing a stamp or similar tax. "To qualify for an exemption under this provision, three conditions must be satisfied: (1) there must be a stamp tax or similar tax, (2) imposed upon the making or delivery of an instrument of transfer, (3) 'under' a confirmed Chapter 11 plan." 391 F.3d at 1291. The issue in this case is whether the Kissimmee hotel mortgage was a transfer "under" Orlando's plan where the bankruptcy estate and the debtor were not involved in that loan transaction.

The debtors and Kissimmee filed suit in the Circuit Court of Osceola County, Florida seeking a $161,425 refund in stamp and intangible taxes that Kissimmee had paid; the FDOR removed to the bankruptcy court. The bankruptcy court found in favor of Kissimmee, holding that because the Kissimmee refinancing agreement was essential to the confirmation of the Orlando plan, then the refinancing was "under a plan" pursuant to the plain meaning of § 1146(c). The district court reversed on grounds that § 1146(c) did not apply because the refinancing transaction between Berkshire Mortgage and Kissimmee involved two non-debtors.

The Eleventh Circuit looked to the plain language of the statute and to other circuits' interpretation of § 1146 to find that a transfer "under a plan" means that "a plan authorizes any transfer that is necessary to the consummation of the plan." ***Id.*** **The Court did not agree with the FDOR's argument that bankruptcy jurisdiction would be overreaching by including third-party transactions for non-estate property. Instead, the Court cited several bankruptcy court decisions that have given an exemption to non-debtors under Section 1146(c), and stated that divesting the court of jurisdiction in any case that involved a state trying to impose a stamp tax or similar tax**

on a non-debtor would lead parties to circumvent the system and the tax exemption by shifting the tax burden to third parties. The Eleventh Circuit concluded that § 1146(c) does exempt from stamp tax or similar tax a transfer that is necessary to the confirmation of a Chapter 11 plan, and because Orlando's Chapter 11 plan was expressly contingent on the transaction between Kissimee and Berkshire, then it was necessary to the plan's consummation. The district court's order was reversed.

§ 1208 Dismissal or Conversion of Chapter 12 Case.

Cotton, *In re*, 992 F.2d 311 (11th Cir. 1993). Chapter 12 Debtor sought dismissal of case while settlement was pending with the bankruptcy court. The bankruptcy court conditioned dismissal upon the implementation of the settlement. On appeal by debtor, Circuit held the Chapter 12 debtor could dismiss case notwithstanding the settlement. Under § 1208(b), a debtor has the right to immediate dismissal, provided that the case has not been converted to an involuntary proceeding and the debtor has not engaged in fraud that would make immediate dismissal unjust.

§ 1222 Chapter 12 Plan Options.

Travelers Insurance Co. v. Bullington, 878 F.2d 354 (11th Cir. 1989). Chapter 12 proposed plan calling for payment of secured debt over 30 years. Creditor objected arguing plan's thirty-year mortgage violates § 1222(c), which provides payments under a plan may never exceed five years. Circuit disagreed. A plan may provide for a payout period greater than five years, provided that it is "consistent with section 1225(a)(5)." Creditor's argument that payments under a plan can never exceed five years would render § 1222(b)(9) a nullity. Section 1222(b)(9) is an express exception to the § 1222(c) five-year limit and permits payments under a plan to extend over five years, but only when "consistent with section 1225(a)(5)."

§ 1225 Chapter 12 Confirmation.

Cornelison, *In re*, 901 F.2d 1073 (11th Cir. 1990). Creditor appealed confirmation of Chapter 12 plan. District court affirmed. Circuit remanded. The bankruptcy court's confirmation order contained no findings of fact. Rather, the confirmation order merely recited the language of § 1225. There was no discussion of the evidence which led the bankruptcy court to conclude that the proposed plans met the requirements of § 1225. The bankruptcy court must clearly state factual findings which support its legal conclusions, whatever those conclusions may be.

Travelers Insurance Co. v. Bullington, 878 F.2d 354 (11th Cir. 1989). Chapter 12 proposed plan calling for payment of secured debt over 30 years. Creditor objected arguing plan's thirty-year mortgage violates § 1225(a)(5)(B)(ii). Circuit disagreed. Section 1225(a)(5)(B)(ii) directs that the "value" is to be determined "as of the effective date of the plan" and not, as the creditor argued, "during the plan." The test is simply whether, as of the effective date of the plan, the present value of the property distributed is equal to or greater than the amount of the allowed secured claim. Here, debtor presented evidence the amount to be paid with interest rate would equal present value of creditor's claim. Further, by providing present value, the operation of Chapter 12 does not operate as an unconstitutional taking of appellant's property.

§ 1302(b) Rights and Duties of Chapter 13 Trustee.

Ford Motor Credit Co. v. Stevens (*In re* Stevens), 130 F.3d 1027 (11th Cir. 1997). A Chapter 13 Trustee sought to recover an overpayment from a creditor by withholding funds owed to same creditor by debtors in nearly 30 unrelated bankruptcy cases also administered by the Trustee. There was no statutory authorization for the Trustee's actions. A trustee's powers and duties are defined and limited by statute. The powers and duties of a Chapter 13 trustee are set forth in § 1302, which provides that among the duties of a trustee are the obligations to dispose of estate monies, to advise and assist the debtor in performance under the plan and to ensure that the debtor commences making timely payments. A Chapter 13 trustee is authorized to bring an adversary action to recover overpayments from a creditor. However, a Trustee may not divert funds from the plans of other debtors in order to satisfy the overpayment.

§ 1307 Conversion or Dismissal.

Futch v. Roberts (In re Roberts), 291 Fed. Appx. 296 (11th Cir. 2008). Appeal of order disallowing proof of claim as untimely filed was rendered moot by debtor's voluntary dismissal of case. The appeal did not divest the bankruptcy court of jurisdiction over debtor's motion to dismiss.

Cotton v. Stalzer (In re Cotton), 250 Fed. Appx. 968 (11th Cir. 2007). Bankruptcy court lacked jurisdiction to enter order of dismissal in Chapter 7 case while appeal of order denying debtor's motion for voluntary dismissal of Chapter 13 petition was pending.

§ 1322(b) Contents of Plan.

Universal American Mortgage Co. v. Bateman (*In re* Bateman), 331 F.3d 821 (11th Cir. 2003). This is a most important Chapter 13 case of first impression in this Circuit, reviewing the vague language of bankruptcy procedure and the interrelations of claims allowance and plan confirmation, §§ 502(a), 1322, 1325 and 1327, and Rule 3007. The Circuit denied a collateral attack on an improperly confirmed plan, but held an unchallenged residential mortgage lien and claim survived the plan provisions and discharge. Because of its importance, a lengthy review of this case is given.

The plan provided for a residential mortgage arrearage of $21,600, payable in fixed payments during the plan payments. The creditor timely filed a proof of a secured claim of $49,178.80 for the arrearage. No objection to the proof of claim was filed. Without objection, the plan was confirmed after the bar date for filing claims, sometimes called a late confirmation hearing. No appeal was filed. Over a year after confirmation, the debtor filed an objection to the proof of claim and the creditor responded with a motion to dismiss on the ground that the plan did not conform to the provisions of the Code, §§ 1322(b) and 1325(a). The bankruptcy court sustained the objection and denied the motion to dismiss, holding the creditor was bound by the confirmed plan provisions under §1327.

Before specifically addressing the issues, the Circuit gave a most helpful review of the confirmation and claims process. The debtor files a petition and proposed plan, which contains the treatment to be afforded each creditor. Before a plan is confirmed, the parties in interest have an opportunity to file claims and litigate any dispute over the claim. All parties have a responsibility to assure the confirmed plan results in a synthesis of the interests of all parties, consistent with the Code and

Rules. The debtor has a special duty to ensure that the plan provides an accurate and thorough treatment of all claims. The bankruptcy court has an independent duty to ensure that the proposed plan comports with the requirements of the Code. Once the plan is confirmed and the plan provisions are satisfied, the debtor receives a discharge.

The first issue is the objection to the claim and whether the creditor is bound by the claim amount provided for in the confirmed plan. Section 1322 states the mandatory contents of a plan. The holder of a secured claim is protected to the extent of the value of the collateral, § 506(a); however, § 1322(b)(2) prohibits any modification of a claim secured only by a homestead, even if the claim is undersecured. Nobelman v. Am. Savs. Bank, 508 U.S. 324 (1993). Often the mortgage is in default which can be cured, § 1322(b)(5), without an improper modification. Sections 1322(b)(2) and (5) permit the mortgage secured claim to be split into the current payments and the arrearage, but this does not compromise the amount of the arrearage. The debtor must provide treatment for the mortgage in the plan. If the creditor wants to receive payments under the confirmed plan, it must timely file a proof of claim. However, the creditor is not required to file a proof of claim as the unchallenged lien survives the discharge. Folendore, *In re*, 862 F.2d 1537 (11th Cir. 1989). The timely filing of a proof of claim constitutes prima facie evidence of the validity and amount of the claim, which is rebutted by an objection, § 502(a). Although § 502(a) does not provide for a time limit to file an objection, it must be filed prior to plan confirmation. Justice Oaks II, Ltd., *In re*, 898 F.2d 1544, 1553 (11th Cir. 1990). This time limitation is a primary key to the holding of this case. Thus, the confirmation of the plan without an objection to the timely filed proof of claim makes the claim deemed allowed and is prima facie evidence of the validity and amount of the mortgage arrearage, § 502(a). The objection to the claim should have been overruled. The bankruptcy court holding that the creditor should have protected its rights by objecting to the plan and confirmation and is thereafter bound by the terms of the confirmed plan is wrong and is reversed. The burden was on the debtor to have objected to the claim before confirmation to resolve the conflict between the proof of claim and the plan provision. The circuit refused to permit a plan provision to constitute a constructive objection to the claim, and refused to permit the failure to object to confirmation to act as acceptance to the plan treatment, which § 1325(a)(5)(A) permits an otherwise impermissible provision.

On the second issue of the denial of the motion to dismiss, the creditor argues that a confirmed plan with improper claim treatments is not entitled to res judicata under § 1327. The res judicata refers to claim preclusion, which is harsher than common law issue preclusion. It has the same finality and effect as any federal court final judgment on the merits. The terms of the confirmed plan on the treatment of a claim, however improper, fit within claim preclusion because it should have been presented prior to confirmation. If an objection to confirmation had been filed or the confirmation appealed, it would have prevailed. Absent such action, the confirmed plan is binding. The motion to dismiss was properly denied as a collateral attack.

Nevertheless, the Circuit follows the reasoning in Simmons v. Savell, 765 F.2d 547, 559 (5th Cir. 1985) that a secured creditor's lien survives a contrary plan confirmation. If the lien survives, so must any corresponding arrearage claim. Section 502(a) is the applicable provision for claims allowance and, consequently, should control over the more general policy considerations embodied in § 1327(a). Hobdy, *In re*, 130 B.R. 318, 321 (9th Cir. BAP 1991). The arrearage claim provided in the unchallenged timely filed proof of claim is unaffected by the terms of the confirmed plan. The creditor retains its rights under the mortgage, subject to the automatic stay, until the allowed claim is satisfied in full.

Nobelman v. American Savings Bank, 508 U.S. 324, 113 S. Ct. 2106 (1993). Chapter 13 debtor proposed plan to bifurcate claim on debtors' principal residence into secured and unsecured claims and reducing mortgage to fair market value of residence. Confirmation was denied. On appeal, debtor argued the protection of § 1322(b)(2) applies only to the extent the mortgagee holds a "secured claim" under § 506(a) in the debtor's residence. Supreme Court held § 1322(b)(2) prohibits the modification of a secured creditor's rights, as defined by state law. Section 1322(b)(2)'s protection is not limited to that portion of allowed "secured claims," determined by application of § 506(a). Section 506(a) can be used to determine if the claim is secured, but if it is secured, § 1322(b)(2) prevents any modification of the lender's rights. Here, where the lender's claim was secured only by a lien on the debtor's principal residence, applying § 506(a)'s valuation and bifurcation through a Chapter 13 plan would modify the rights of the holder of the security interest, which is prohibited under § 1322(b)(2).

American General Finance, Inc. v. Paschen (In re Paschen), 296 F.3d 1203 (11th Cir. 2002). Debtor's confirmed Chapter 13 plan provided for a "cram down" of mortgage creditor's claim, bifurcating the claim to secured for the value of the collateral and unsecured for the balance. The mortgage was on the debtor's principal residence. Creditor appealed confirmation and district court's subsequent affirmation. The Eleventh Circuit affirmed the matter of first impression, holding that congressional intent behind §§ 1322(c)(2) and 1325(a)(5) excepted short-term mortgages from the § 1322(b)(2) prohibition against modifying the rights of claimholders secured by principal residences.

American General Finance, Inc. v. Dickerson (*In re* Dickerson), 222 F.3d 924 (11th Cir. 2000), *cert. denied,* 121 S.Ct. 1604 (2001). Chapter 13 debtors filed complaint to change status of junior mortgagee's claim from secured to unsecured, on ground that value of residential mortgage property was less than amount of senior mortgage debt. The bankruptcy court entered judgment for debtors, which was reversed and remanded. The Court of Appeals held that junior mortgagee's lien against debtors' principal residence was unsecured due to inadequate equity in the residence to secure the lien. Applying the rule as set out in Tanner, it is now the rule within this circuit that § 1322(b)(2) of the Bankruptcy Code protects only those homestead mortgages that are secured by some existing equity in the debtor's principal residence according to § 506(a). This panel of the Circuit, in dicta, questioned the holding of Tanner, which this Court believed placed too much weight upon the valuation process.

Tanner v. FirstPlus Financial, Inc., f.k.a. Remodelers National Funding, (*In re* Tanner), 217 F.3d 1357 (11th Cir. 2000). Chapter 13 debtor brought adversary proceeding to "strip off" wholly unsecured junior mortgagee's lien on her residence. The bankruptcy court granted mortgagee's motion to dismiss, and was affirmed. The Court of Appeals held that Chapter 13 anti-modification provision did not apply to wholly unsecured junior homestead mortgage, and, thus, Chapter 13 debtor was entitled to "strip off" junior mortgagee's lien on her residence. Sections 506(a) and 1322(b)(2) should be interpreted together and the latter should not result in the former being a nullity. Bankruptcy courts should first determine the value of the homestead lender's secured claim

under § 506(a) and then protect from modification any claim that is actually secured by any amount of collateral in the residence. Any claim that is wholly unsecured, however, would not be protected from modification under § 1322(b)(2).

Commercial Federal Mortgage Corporation v. Smith (*In re* Smith), 85 F.3d 1555 (11th Cir. 1996). Circuit was faced with the issue of whether is whether § 1322(b) permits a debtor to exercise his state statutory right of redemption in a Chapter 13 plan by "curing" a default and "reinstating" a mortgage after a valid foreclosure sale of his property. Alabama law gives a mortgagor a statutory right of redemption for one year after the foreclosure sale. When a debtor files for Chapter 13 bankruptcy following the foreclosure sale of his property, he can cure the default in his plan through an exercise of his Alabama statutory right of redemption. However, this right cannot be modified under a Chapter 13 plan, and it must be exercised as dictated under Alabama law by making a lump sum payment within one year of the foreclosure sale that includes the principal, interest and other charges under the mortgage. Therefore, there is a bright-line termination date of the right to cure a default through a Chapter 13 plan, and that date is the date of the sale of the mortgaged property. This case was decided under pre-1994 Amendment law. The 1994 Amendments to § 1322(c) essentially codified this result.

Green Tree Acceptance, Inc. v. Hoggle (*In re* Hoggle), 12 F.3d 1008 (11th Cir. 1994). Debtor attempted to cure postconfirmation default through modification. Circuit faced with issue of whether § 13222(b)(5) allows for the curing of defaults after confirmation. Section 1322(b)(5) expressly authorizes plans to provide for the timely curing of any default and maintenance of payments during the life of the plan. Congress could have easily inserted the word prepetition to modify default but failed to do so. The plain meaning of § 1322(b)(5) permits cure of any default whether occurring prior to the filing of the petition or subsequent to confirmation of the plan.

Saylors, *In re*, 869 F.2d 1434 (11th Cir. 1989). In Chapter 13 case filed immediately after discharge in Chapter 7 case, Circuit held the Chapter 13 plan may cure arrearages on home mortgage, even though the personal liability on the underlying mortgage debt has been discharged in the prior Chapter 7 proceeding.

Terry, *In re*, 780 F.2d 894 (11th Cir. 1985). Under §§ 1322(b)(2) and 1322(b)(5) residential mortgages that would otherwise permit the lender to declare the entire debt presently due, may be modified by the plan to cure the default and reinstate regular installment payments.

§ 1322(c) Modification of Rights of Holders of Secured Claims Secured Only by A Security Interest in Debtor's Principal Residence.

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§ 1325(a) Confirmation of Plan.

Whaley v. Tennyson (In re Tennyson), 611 F.3d 873 (11th Cir. 2010). An above median income debtor must remain in bankruptcy for a minimum of five years, unless all unsecured creditors' claims are paid in full.

DaimlerChrysler Fin. Servs. v. Barrett (In re Barrett), 543 F.3d 1239 (11th Cir. 2008). A creditor may pursue an unsecured deficiency claim when the debtor surrenders a 910 vehicle under § 1325(a)(5)(C). The issue presented was whether under § 1325(a)'s hanging paragraph the surrender of a 910 vehicle fully satisfies a creditor's claim secured by the vehicle and prevents the creditor from filing an unsecured claim for any remaining deficiency. Surrender does not automatically fully satisfy the creditor's claim. A plain reading of § 1325(a)'s hanging paragraph makes clear that Congress intended to and did make § 506(a) inapplicable to a 910 vehicle and by knocking out § 506, the hanging paragraph leaves the parties to their contractual entitlements. The deficiency claim is to be governed by the parties' contract and applicable state law, and will depend on whether the contract and state law provide recourse.

Graupner v. Nuvell Credit Corp. (In re Graupner), 537 F.3d 1295 (11th Cir. 2008). The question before the court was whether a debtor's negative equity in a trade-in vehicle is protected against "cramdown" under the hanging paragraph following § 1325(a)(9). The court determined that negative equity is a debt for the money required to make the purchase of a new vehicle rather than an "antecedent debt" and is, therefore, protected against "cramdown." Prior to BAPCPA under § 506(a), the debtor could use the cramdown option with or without the lienholder's consent by proposing a plan that would pay the secured portion of the claim in full with present value interest pursuant to § 1325(a)(5)(B)(ii). BAPCPA amended § 1325(a) by adding a hanging paragraph which provides that "section 506 shall not apply" to claims secured by vehicles purchased by a debtor within the 910 day period preceding the petition date. To fall within the hanging paragraph and be entitled to the anti-bifurcation protection, four requirements must be satisfied: (1) the creditor must have a "purchase money security interest" in the collateral; (2) the debt must have been incurred within 910 days before the filing of the debtor's bankruptcy case; (3) the collateral for the debt must consist of a motor vehicle; and (4) the vehicle must have been acquired for the personal use of the debtor. If these requirements are met, the allowed secured claim is fixed at the amount of the creditor's claim without resort to the "cramdown" provision mandated by § 506(a). A purchase money security interest in a trade-in transaction includes the payment of negative equity for purposes of § 1325(a)'a hanging paragraph, precluding bifurcation of the debt into secured and unsecured portions and cramdown of a creditor's secured claim.

Nuvell Credit Co., LLC v. Dean (In re Dean), 537 F.3d 1315 (11th Cir. 2008). The hanging paragraph added to §1325 by BAPCPA did not affect the secured nature of 910 claims or a 910 creditor's right to interest. The holder of such claim is entitled to the present value of the entire

claim under § 1325(a)(5)(B)(ii).

Till v. SCS Credit Corp., 124 S.Ct. 1951 (2004)

Certiorari to the U.S. Court of Appeals for the Seventh Circuit. Reversed. 4 + 1 – 4.

Plurality opinion by Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer.

Chapter 13 Debtors purchased a used truck from Instant Auto Finance, respondent, defaulted on their payments, and filed a joint petition for Chapter 13 bankruptcy relief. They now seek confirmation of their Chapter 13 plan, proposing an interest rate on the secured portion of respondent's claim of 9.5% per year. Debtors (petitioners) used the national prime rate of 8% and increased it to a "prime-plus" or "formula rate" to take into account the risk incurred by creditors dealing with borrowers in bankruptcy. Respondent objected to the proposed interest rate, arguing that a 21% rate (the contract rate) was more appropriate because that is the rate they could receive if they foreclosed on the vehicle and reinvested the loan proceeds for the same period of time and same risk level. Upon the U.S. Supreme Court's granting their writ of certiorari, the Debtors appealed the judgment of the United States Court of Appeals for the Seventh Circuit, which had held that the contract rate was presumptively proper.

The Respondent Creditor contends that applying the contract interest rate was appropriate to ensure that the creditor received future disbursements under the Debtors' plan, as it was entitled to a total present value which at least equaled the Creditor's claim. The Debtors argue that a lower rate should be applied as it was more practicable to use a rate that Debtors could afford in completing their Plan. A plurality of the United States Supreme Court determined that the appropriate interest rate to be applied to installment payments under a Chapter 13 plan is the national prime rate as adjusted to reflect the specific risks associated with the Debtors. The "prime-plus" method begins with the national prime interest rate and augments it with an amount to be determined by the court "to account for the risk of nonpayment posed by borrowers in their financial position." Debtors have a higher risk of default than the general population, so the prime rate is adjusted based on the circumstances of the estate, the nature of the security and the duration and feasibility of the plan. Evidence is required on the adjustment and creditors have the burden to show any upward adjustment. The plurality approved this method over the "presumptive contract rate" (favored by the four dissenting Justices), and the "coerced loan" (approved by the court of appeals in this case) and "cost of funds" (favored by the dissenting judge in the court of appeals) methods to calculating the disbursement.

The prime-plus approach is common in the financial community and minimizes the need for expensive and time-consuming evidentiary proceedings. Alternative methods, such as the coerced loan, presumptive contract rate, and cost of funds approaches, are overly complicated, imposing substantial evidentiary costs, and directed at making a creditor whole rather than guaranteeing that the Debtors' payments had the required present value. The formula approach is more straightforward and objective, and does not inquire into a creditor's prior interactions with a debtor, but rather is in sync with financial market fluctuations, the Debtors' risk of nonpayment, and the type of loan. The Supreme Court reversed the Court of Appeals and remanded the case to the Bankruptcy Court.

Justice Thomas concurred in the result with opinion, giving it a plurality. He concluded that "the statute that Congress enacted does not require a debtor-specific risk adjustment that would put secured creditors in the same position as if they made another loan." Thus, the statute

contains no requirement that "the proper interest rate must also reflect the risk of nonpayment."

Justice Scalia filed a dissenting opinion, in which Chief Justice Rehnquist, Justice O'Connor, and Justice Kennedy joined.

Associates Commercial Corp. v. Rash, 520 U.S. 953, 117 S. Ct. 1879 (1997). A Chapter 13 plan provided for the debtors to retain a Kenworth tractor truck for use in a freight-hauling business and to pay the present value over the life of the plan under § 1325(a)(5)(B). The lender valued the collateral at retail and the debtors valued it at wholesale. The Supreme Court held that the collateral should be valued under § 506(a) by its replacement value, defined as the price a willing buyer in the debtor's situation would pay a willing seller to purchase property of like condition. Because the opinion interprets § 506(a), which applies to all chapters, the decision should govern the Chapter 11 cram-down provision, § 1129(b)(2)(A), as well as § 722 redemption, § 362 stay relief, and adequate protection.

Rake v. Wade, 508 U.S. 464, 113 S. Ct. 2187 (1993). A Chapter 13 debtor must pay interest on arrearage on residential real mortgage debt. Postpetition, preconfirmation interest is required by § 1325(a)(5). These statutory provisions for interest do not depend upon the terms of the indebtedness. The 1994 Amendments amended §1322(e) and seems to have overruled this case. Amended § 1322(e) provides that "the amount necessary to cure the default, shall be determined in accordance with the underlying agreement and applicable non-bankruptcy law."

Johnson v. Home State Bank, 501 U.S. 78, 111 S. Ct. 2150 (1991). Debtor filed Chapter 13 case after receiving Chapter 7 discharge. The debtor's good faith under § 1325(a)(3) may be implicated when a debtor files serially under Chapter 7 and Chapter 13. However, there is nothing per se wrong when the debtor files for Chapter 13 after receiving a Chapter 7 discharge.

Saylors, *In re*, 869 F.2d 1434 (11th Cir. 1989). Even though debtor filed Chapter 13 petition day after bankruptcy court lifted automatic stay in Chapter 7 proceeding, this fact alone did not evidence bad faith. Debtor was entitled to file Chapter 13 petition for purposes of curing arrearages on mortgage debt after discharge in Chapter 7 proceeding. A determination of whether a plan has been proposed in good faith is finding of fact reviewable under clearly erroneous standard.

Waldron, *In re*, 785 F.2d 936 (11th Cir. 1986). Good faith test gives bankruptcy court discretionary means to deny confirmation for abuse of bankruptcy law's intended purposes. Bankruptcy court should have denied confirmation for lack of good faith where debtors filed Chapter 13 solely to reject a contract and were not financially distressed. Circuit seems to be adding a "financial peril" prerequisite in order to be eligible for Chapter 13 under the guise of § 1325(a)(3)'s good faith requirement.

Terry, *In re*, 780 F.2d 894 (11th Cir. 1985). A secured creditor holding a mortgage on the debtor's principal place of residence is not entitled to receive interest on arrearage, absent a specific

provision in the mortgage, where debtor is curing default and reinstating. Creditor argued it was entitled to present value under § 1325(a)(5) which includes interest on arrearage. Circuit acknowledged that § 1325(a)(5) allows a secured creditor an additional amount for the time value of money by awarding interest on past due installments. However, this analysis was inapplicable to residential mortgages. The allowance of § 1325(a)(5)(B)(ii) interest would in and of itself constitute a modification of the mortgage contract prohibited under § 1322(b)(2). If contracts had provided for interest on arrearages, the bankruptcy court would have had to give it to them under the prohibition against modification in § 1322(b)(2). This case was abrogated by Rake v. Wade, 508 U.S. 464, 113 S.Ct. 2187, 124 L.Ed.2d 424 (1993). Rake v. Wade was technically abrogated by the introduction of § 1322(e). Therefore, this may be good law again.

Fawcett, *In re*, 758 F.2d 588 (11th Cir. 1985). Obligation is on debtor when seeking court's confirmation of a plan to specify as accurately as possible the amounts it intends to pay to the creditors. Any ambiguity in the plan must be construed against the debtor, as draftsman of the plan. This comports with the long-standing rule that ambiguous terms of a document are to be interpreted against the party that drafted them. One of the key considerations in court approval of a plan is whether the plan is proposed in good faith. 'Good faith' requires 'honesty of intention,' ... in the sense of focusing on the debtor's conduct in the submission, approval and implementation of a Chapter 13 bankruptcy plan.

Kitchens, *In re*, 702 F.2d 885 (11th Cir. 1983). Circuit reversed the bankruptcy court for not considering whether the debtor was acting in good faith. To confirm a plan of reorganization, § 1325(a)(3) requires that the plan be proposed in good faith. There is no comprehensive definition of good faith and the facts of each bankruptcy case must be individually examined to determine if the plan has been proposed in good faith. Factors to be considered include: (1) the amount of the debtor's income from all sources; (2) the living expenses of the debtor and his dependents; (3) the amount of attorney's fees; (4) the probable or expected duration of the debtor's Chapter 13 plan; (5) the motivations of the debtor and his sincerity in seeking relief under the provisions of Chapter 13; (6) the debtor's degree of effort; (7) the debtor's ability to earn and the likelihood of fluctuation in his earnings; (8) special circumstances such as inordinate medical expense; (9) the frequency with which the debtor has sought bankruptcy relief; (10) the circumstances under which the debtor has contracted his debts and his demonstrated bona fides, or lack of same, in dealings with his creditors; (11) the burden which the plan's administration would place on the trustee; (12) the type of debt to be discharged and whether such debt would be nondischargeable under Chapter 7; (13) substantiality of the repayment to the unsecured creditors; and (14) the accuracy of the plan's statements of debts and expenses and whether any inaccuracies are an attempt to mislead the court. There is no minimum percentage which must be paid to unsecured creditors in order to qualify as proposed in good faith.

§ 1325(b) Projected Disposable Income.

Hamilton v. Lanning (In re Lanning), 130 S. Ct. 2464 (2010). The Supreme Court adopted the “forward looking approach” for determining “projected disposable income,” finding that the bankruptcy “court may account for changes in the debtor’s income or expenses that are known or virtually certain at confirmation.”

§ 1325(c) Income Deduction Orders.

Hammonds, *In re*, 729 F.2d 1391 (11th Cir. 1984). Circuit was faced with the issue of whether the bankruptcy court could issue an income deduction order to Aid to Families With Dependent Children (AFDC). Welfare benefits are included in the debtor's Chapter 13 estate. Congress anticipated that AFDC benefits could be used to fund Chapter 13 plans. Debtor whose sole income is AFDC money is entitled to seek relief under Chapter 13 and bankruptcy court may order AFDC checks sent directly to trustee.

United States v. Devall, 704 F.2d 1513 (11th Cir. 1983). Chapter 13 debtors listed social security benefits as regular income. Bankruptcy Court issued an income deduction order to the Social Security Administration, requiring that a portion of each debtor's benefits be sent directly to the Chapter 13 trustee. Social Security Administration appealed arguing the anti-assignment provision of the Social Security Act prohibited the income deduction order. Circuit found the Social Security Act's anti-assignment provision, which purported to prohibit the assignment of social security benefits, was in conflict with the Code's grant of authorization to direct entities to pay income to the Chapter 13 trustee. Circuit held the later-enacted Bankruptcy Code prevailed over the more general anti-assignment provision of the Social Security Act. Social Security anti-assignment law is designed to protect recipients from losing their only funds, not to relieve the Social Security Administration from administrative burdens. Bankruptcy court will give recipient protection through undue hardship test. This decision was rendered before the enactment of 42 U.S.C. § 407(b) which clearly limits the applicability of the bankruptcy statutes to social security disability benefits.

§ 1326(c) Trustee Payments.

Ford Motor Credit Co. v. Stevens (*In re* Stevens), 130 F.3d 1027 (11th Cir. 1997). A Chapter 13 Trustee sought to recover an overpayment from a creditor by withholding funds owed to same creditor by debtors in nearly 30 unrelated bankruptcy cases also administered by the Trustee. While holding no statutory authority for the Trustee's action, Circuit also held that by withholding the amount of the overpayment from the unrelated plans, the Trustee violated his statutory obligation to make payments to creditors according to confirmed plans as required in § 1326(c).

§ 1327(a) Effect of Confirmation.

Florida Dept. of Rev. v. Rodriguez (In re Rodriguez), 367 Fed. Appx. 25 (11th Cir. 2010). State violated the terms of the debtor's confirmation order, but not the stay, by sending three demand letters to collect child support post-confirmation. Section 362(b)(2)(B) excepts "the collection of a domestic support obligation from property that is not property of the estate." This exception applied because post-confirmation all of the debtor's property not necessary to fulfill the requirements of the plan revested with the debtor. § 1327(b). Post-confirmation, the property was "not property of the estate" and was, therefore, subject to the § 362(b)(2)(B) child support exception. Section 362(a) must, however, be read in conjunction with § 1327(a) which provides that a confirmed plan binds the debtor and creditors"whether or not the claim of such creditor is provided for by the plan . . . " Although § 362(a) does not operate as a stay against the collection

of domestic support obligations from property that is not property of the estate, § 1327(a) trumps § 362 upon confirmation.

United Student Aid Funds, Inc. v. Espinosa, 130 S. Ct. 1367 (2010). Debtor's confirmed plan provided that the debtor would repay the principal owed on his student loan debt, but discharged accrued interest once the debtor repaid the principal. Although the debtor did not file an AP under § 523(a)(8) claiming undue hardship, the student loan creditor received notice of the plan and its treatment thereunder, but failed to object to same. The Supreme Court found that the order was not void under Rule 60(b)(4). A judgment is void under Rule 60(b)(4) if the judgment was premised on a jurisdictional error or a violation of due process. Even though the bankruptcy court committed a legal error in confirming the plan without an undue hardship hearing, the error was not jurisdictional because the court had authority to enter the confirmation order. Likewise the judgment did not violate the creditor's right to due process because the creditor received actual notice of the debtor's proposed plan. Where a party is notified of a plan's contents and fails to object to confirmation, that party has been afforded a full and fair opportunity to litigate, and the party's failure to avail itself of that opportunity will not justify Rule 60(b)(4) relief.

Universal American Mortgage Co. v. Bateman (*In re* Bateman), 331 F.3d 821 (11th Cir. 2003). This is a most important Chapter 13 case of first impression in this Circuit, reviewing the vague language of bankruptcy procedure and the interrelations of claims allowance and plan confirmation, §§ 502(a), 1322, 1325 and 1327, and Rule 3007. The Circuit denied a collateral attack on an improperly confirmed plan, but held an unchallenged residential mortgage lien and claim survived the plan provisions and discharge. Because of its importance, a lengthy review of this case is given.

The plan provided for a residential mortgage arrearage of $21,600, payable in fixed payments during the plan payments. The creditor timely filed a proof of a secured claim of $49,178.80 for the arrearage. No objection to the proof of claim was filed. Without objection, the plan was confirmed after the bar date for filing claims, sometimes called a late confirmation hearing. No appeal was filed. Over a year after confirmation, the debtor filed an objection to the proof of claim and the creditor responded with a motion to dismiss on the ground that the plan did not conform to the provisions of the Code, §§ 1322(b) and 1325(a). The bankruptcy court sustained the objection and denied the motion to dismiss, holding the creditor was bound by the confirmed plan provisions under §1327.

Before specifically addressing the issues, the Circuit gave a most helpful review of the confirmation and claims process. The debtor files a petition and proposed plan, which contains the treatment to be afforded each creditor. Before a plan is confirmed, the parties in interest have an opportunity to file claims and litigate any dispute over the claim. All parties have a responsibility to assure the confirmed plan results in a synthesis of the interests of all parties, consistent with the Code and Rules. The debtor has a special duty to ensure that the plan provides an accurate and thorough treatment of all claims. The bankruptcy court has an independent duty to ensure that the proposed plan comports with the requirements of the Code. Once the plan is confirmed and the plan provisions are satisfied, the debtor receives a discharge.

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is undersecured. Nobelman v. Am. Savs. Bank, 508 U.S. 324 (1993). Often the mortgage is in default which can be cured, § 1322(b)(5), without an improper modification. Sections 1322(b)(2) and (5) permit the mortgage secured claim to be split into the current payments and the arrearage, but this does not compromise the amount of the arrearage. The debtor must provide treatment for the mortgage in the plan. If the creditor wants to receive payments under the confirmed plan, it must timely file a proof of claim. However, the creditor is not required to file a proof of claim as the unchallenged lien survives the discharge. Folendore, *In re*, 862 F.2d 1537 (11th Cir. 1989). The timely filing of a proof of claim constitutes prima facie evidence of the validity and amount of the claim, which is rebutted by an objection, § 502(a). Although § 502(a) does not provide for a time limit to file an objection, it must be filed prior to plan confirmation. Justice Oaks II, Ltd., *In re*, 898 F.2d 1544, 1553 (11th Cir. 1990). This time limitation is a primary key to the holding of this case. Thus, the confirmation of the plan without an objection to the timely filed proof of claim makes the claim deemed allowed and is prima facie evidence of the validity and amount of the mortgage arrearage, § 502(a). The objection to the claim should have been overruled. The bankruptcy court holding that the creditor should have protected its rights by objecting to the plan and confirmation and is thereafter bound by the terms of the confirmed plan is wrong and is reversed. The burden was on the debtor to have objected to the claim before confirmation to resolve the conflict between the proof of claim and the plan provision. The circuit refused to permit a plan provision to constitute a constructive objection to the claim, and refused to permit the failure to object to confirmation to act as acceptance to the plan treatment, which § 1325(a)(5)(A) permits an otherwise impermissible provision.

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Nevertheless, the Circuit follows the reasoning in Simmons v. Savell, 765 F.2d 547, 559 (5th Cir. 1985) that a secured creditor's lien survives a contrary plan confirmation. If the lien survives, so must any corresponding arrearage claim. Section 502(a) is the applicable provision for claims allowance and, consequently, should control over the more general policy considerations embodied in § 1327(a).

Hobdy, *In re*, 130 B.R. 318, 321 (9th Cir. BAP 1991). The arrearage claim provided in the unchallenged timely filed proof of claim is unaffected by the terms of the confirmed plan. The creditor retains its rights under the mortgage, subject to the automatic stay, until the allowed claim is satisfied in full.

Systems & Serv. Tech., Inc. v. Davis (In re Davis), 314 F.3d 567 (11th Cir. 2002). Debtor's Chapter 13 plan provided for 10% to unsecured creditors and included claim of creditor secured by vehicle valued at $6,000 and unsecured for the balance of approximately $2,300. Debtor fell behind in her payments to trustee, and bankruptcy court granted relief from stay to creditor. When the stay was lifted, the trustee immediately ended all disbursements to creditor and sent a letter to debtor and

the clerk of court indicating that debtor had fulfilled the plan, though creditor had received less than 5% of the principal of its secured claim and nothing on its unsecured claim. Thereafter, the bankruptcy court granted a discharge of the debtor, and the trustee issued a final report, explaining creditor's secured claim as "paid out" and unsecured claim as disallowed. Creditor moved to vacate discharge, and the bankruptcy court denied the motion, citing the importance of the finality of discharge and that creditor had essentially received the relief sought when the court lifted the automatic stay. When the district court affirmed, creditor appealed again. Reviewing the district court de novo, the Eleventh Circuit held that a confirmed plan must be fulfilled according to its original terms unless modification is approved by bankruptcy court order. As such, the Circuit vacated the debtor's discharge, holding that the trustee could not unilaterally modify creditor's secured claim to reduce the amount owed to that which had been received and/or disallow the unsecured claim entirely.

Russo v. Seidler (*In re* Seidler), 44 F.3d 945 (11th Cir. 1995). Debtor filed declaratory judgment action against mortgagee to determine the validity or extent of the lien. A judgment was entered in favor of the debtor that the mortgage lien was satisfied. Mortgagee appealed. Mortgagee did not obtain a stay of judgment pending appeal. Chapter 13 plan made no provision for mortgagee and plan was confirmed. The order of confirmation was not appealed. District court dismissed the appeal as moot pursuant to § 1327 and the Court of Appeals reversed. While § 1327(a) may have a res judicata effect as to certain issues which were or should have been addressed in the confirmation process, there is no authority indicating that § 1327 is capable of mooting an appeal of issues not decided within the confirmation order. Here, confirmation of the plan did not moot the creditor's appeal from the adversary proceeding determining the validity of the lien.

§ 1327(b) Post Confirmation Vesting of Property of the Estate in the Debtor.

Telfair v. First Union Mortgage Corp., 216 F.3d 1333 (11th Cir. 2000), *cert. denied* 121 S. Ct. 765 (2001). Post confirmation creditor applied debtor's payments to recover attorney's fees rather than to principal debt. Debtor argued such actions violated the automatic stay under § 362. Circuit had to reconcile § 1306 (dealing with Chapter 13 property of the estate), § 1327 (dealing with the vesting of property of the estate post confirmation) and § 362. The Circuit adopted the estate transformation approach, which regards only that property necessary for the execution of the plan as remaining property of the estate after confirmation. Here, after confirmation, only the amount required for the plan payments remained property of the estate. The debtor's loan payments, made outside of the plan, were therefore no longer property of the estate and thus, the creditor's application of a portion of those payments to attorney's fees did not violate § 362(a). You should consider the impact of this case if the confirmed plan or the confirmation order provides for the retention of all property as property of the estate after confirmation.

Muse v. Accord Human Resources, Inc., 2005 U.S. App. LEXIS 7240 (April 18, 2005) (*not for publication*). Plaintiff in a Fair Labor Standards Act ("FLSA") case had filed Chapter 13 bankruptcy on November 7, 1997. Plaintiff's plan was confirmed on April 7, 1998 and he received a Chapter 13 discharge on August 8, 2003.

From January 3, 2000 to September 6, 2002, plaintiff was employed by Defendants. On June 6, 2003, plaintiff filed the FLSA claim seeking to recover unpaid overtime allegedly not paid

to him during the entire time he was employed by defendants. Defendants raised the defense of judicial estoppel. The district court held that because plaintiff's claim arose during the pendency of his Chapter 13 case and he did not disclose the claim, then he was judicially estopped from asserting the claim.

The Eleventh Circuit reversed because plaintiff's claim did not arise until after confirmation of his Chapter 13 plan. The court based its holding on the interpretation of Section 1306(a) and 1327(b) in Telfair v. First Mortgage Corp., 216 F.3d 1333 (11th Cir. 2000). In Telfair, the court held that assets acquired post-confirmation are not property of the bankruptcy estate unless they are necessary to maintain the bankruptcy plan. In this case, the court held that because there was no assertion that the FLSA claim was necessary to meet the terms of the bankruptcy plan, he had no duty to disclose the claim, and the claim was accordingly not property of the estate.

§ 1327(c) Status of Property Vesting in Debtor Upon Confirmation.

Thomas, *In re*, 883 F.2d 991 (11th Cir. 1989). Debtor argued that lien securing property was voided by the confirmation of their plan of reorganization, even though no proof of claim was ever filed by creditor or on creditor's behalf. Circuit held that § 1327(c) does not operate to extinguish a lien on property passing through bankruptcy for which no proof of claim was filed. Because no action was done in the case to void or set aside the lien, the lien passed through the bankruptcy.

§ 1328 Effect of Confirmation.

State of Florida Dept. of Rev. v. Diaz (In re Diaz), 647 F.3d 1073 (11th Cir. 2011). As a matter of first impression, the Eleventh Circuit held that interest on a child-support obligation that accrues post-petition is nondischargeable and may be collected personally against the debtor after the debtor receives a Chapter 13 discharge. The Chapter 13 confirmation order did not discharge either the pre-petition interest nor the post-petition interest on the child-support debt even though the bankruptcy court had entered a final order determining the amount of child-support to include principal only. The disallowed portion of the State's claim was not discharged. Disallowance of a claim and nondischargeability are separate issues Although a creditor whose claim is disallowed may not collect from the bankruptcy estate, disallowance of a claim does not necessarily discharge the underlying debt and eliminate the debtor's personal liability.

§ 1328(a) Chapter 13 Discharge.

Pennsylvania Department of Public Welfare v. Davenport, 495 U.S. 552, 110 S. Ct. 2126 (1990). Supreme Court held restitution orders imposed as a condition of probation in state criminal proceedings were "claims" dischargeable in a Chapter 13 reorganization. Congress subsequently overruled the result in Davenport by expressly withdrawing the Bankruptcy Court's power to discharge restitution orders under § 1328(a)(3).

Kitchens, *In re*, 702 F.2d 885 (11th Cir. 1983). Following a debtor's completion of all payments under a Chapter 13 plan, the debtor is granted a discharge, which is more liberal than a Chapter 7 discharge. Chapter 13 discharge will discharge some debts which would be nondischargeable under Chapter 7. Circuit noted § 523(a)(5) debts which are not discharged in Chapter 13. Section

1328(a) provides a list of the types of debts which are not discharged in Chapter 13.

§ 1329(a) Modification of a Confirmed Chapter 13 Plan.

Systems & Serv. Tech., Inc. v. Davis (*In re* Davis), 314 F.3d 567 (11th Cir. 2002). Debtor's Chapter 13 plan provided for 10% to unsecured creditors and included claim of creditor secured by vehicle valued at $6,000 and unsecured for the balance of approximately $2,300. Debtor fell behind in her payments to trustee, and bankruptcy court granted relief from stay to creditor. When the stay was lifted, the trustee immediately ended all disbursements to creditor and sent a letter to debtor and the clerk of court indicating that debtor had fulfilled the plan, though creditor had received less than 5% of the principal of its secured claim and nothing on its unsecured claim. Thereafter, the bankruptcy court granted a discharge of the debtor, and the trustee issued a final report, explaining creditor's secured claim as "paid out" and unsecured claim as disallowed. Creditor moved to vacate discharge, and the bankruptcy court denied the motion, citing the importance of the finality of discharge and that creditor had essentially received the relief sought when the court lifted the automatic stay. When the district court affirmed, creditor appealed again. Reviewing the district court de novo, the Eleventh Circuit held that a confirmed plan must be fulfilled according to its original terms unless modification is approved by bankruptcy court order. As such, the Circuit vacated the debtor's discharge, holding that the trustee could not unilaterally modify creditor's secured claim to reduce the amount owed to that which had been received and/or disallow the unsecured claim entirely.

Green Tree Acceptance, Inc. v. Hoggle (*In re* Hoggle), 12 F.3d 1008 (11th Cir. 1994). A confirmed Chapter 13 plan paid the lender who financed the residential mobile home by maintaining the current payments through direct payments from the debtor and by curing the prepetition defaults through payments from the trustee, pursuant to § 1322(b)(5). Debtor defaulted on current payments to the lender. Lender moved for relief from the automatic stay and debtor modified the plan to cure the postconfirmation defaults through payments from the trustee. Circuit held § 1322(b)(5) permits plan to cure any default, including those occurring postconfirmation. As such, debtor could use provisions of § 1329 to modify the plan to cure the postconfirmation default. In each instance where the debtor proposes a postconfirmation modification, a judicial inquiry should be undertaken to determine whether a proposed modification to cure a default will comport with § 1322(b)(5)'s requirements that such a cure be effected within a reasonable time and simultaneously maintain payments on the long term loan. Legislative intent is for Chapter 13 plans to be flexible, including modifications required by unforeseen problems.

§ 1141 Effect of Confirmation.

IRT Partners, L.P. v. Winn-Dixie Stores, Inc. (Winn-Dixie Stores, Inc.), 639 F.3d 1053 (11th Cir. 2011). Lessors were not entitled to amend their proofs of claim post-confirmation where the lessors original claims were reduced by the bankruptcy court without objection or appeal and the debtors Chapter 11 plans were confirmed without objection by the lessors. In the absence of a compelling reason, a confirmed plan should be accorded *res judicata* effect. Here there was nothing to compel the post-confirmation amendment where the lessors allowed their claims to be reduced without objection or appeal and did not object to the plan of reorganization.

§ 1146 Special Tax Provisions.

Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc., 128 S.Ct. 2326 (2008). Reversing the Eleventh Circuit, the Supreme Court held that §1146(a)'s stamp-tax exemption does not apply to transfers made before a plan is confirmed under Chapter 11. The state argued that stamp taxes assessed on the debtor's post-confirmation transfer of assets that the bankruptcy court approved prior to confirmation fell outside the stamp-tax exemption because the transfer did not occur under a confirmed Chapter 11 plan. Noting that §1146 is in a subchapter entitled "POSTCONFIRMATION MATTERS," the Supreme Court limited the stamp-tax exemption to postconfirmation transfers made under the authority of a confirmed plan.

CASES UNDER RELATED STATUTES

9 U.S.C. § 2 Validity, Irrevocability, and Enforcement of Agreements to Arbitrate.

Solymar Investments, Ltd. v. Banco Santander S.A., 672 F.3d 981 (11th Cir. 2012). A two-step process is required in considering the arbitrability of any contract containing an arbitration clause. First, the resolution of any formation challenges to the contract are to be decided by the court, i.e. fraudulent inducement, parole evidence, etc. Once the court is satisfied that the contract is binding, all other issues are left to the arbitrator.

Given v. M&T Bank Corp. (In re Checking Account Overdraft Litigation MDL No. 2036), 674 F.3d 1252 (11th Cir. 2012). Through the delegation provision of the parties' arbitration agreement, the parties manifested their intent to arbitrate whether the account holder's claims were within the scope of the arbitration agreement. The delegation provision provided that any issues regarding whether a particular dispute or controversy was subject to arbitration would be decided by the arbitrator. Courts should enforce valid delegation provisions as long as there is clear and unmistakable evidence that the parties manifested their intent to arbitrate such a gateway question.

CompuCredit Corp. v. Greenwood, 132 S. Ct. 665 (2012). Provisions of the Credit Repair Organization Act requiring credit-repair companies to disclose to consumers their "right to sue" for violations of the CROA did not preclude enforcement of an arbitration agreement containing a class action waiver. A"right to sue" does not preclude mandatory arbitration.

Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 126 S.Ct. 1204 (2006). A challenge to the validity of a contract as a whole, and not specifically to the arbitration clause within it, must be brought before the arbitrator, not the court. The borrowers asserted that usurious finances charges rendered the entire contract invalid. As a matter of substantive federal arbitration law, an

arbitration provision is severable from the remainder of the contract and unless the challenge is to the arbitration clause itself, the validity of the entire contract must be resolved by the arbitrator, not the court.

9 U.S.C. § 10 Same; Vacation; Grounds; Rehearing.

Perhach v. Option One Mortg. Corp., 382 Fed. Appx. 897 (11th Cir. 2010). Arbitration agreements are not coercive simply because an employer requires them as a condition of employment. Arbitration agreements are valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of the contract. Mere inequality in bargaining power is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.

11 U.S.C. § 105 Power of Court.

In re Gleason, 492 Fed. Appx. 86 (11th Cir. 2012). Order suspending attorney from practicing before the bankruptcy court for sixty days was not an abuse of discretion. The attorney's responses to a show cause order and his attempt to contact the judge *ex parte* amounted to bad faith and "sanctionable professional misconduct."

Parker v. Jacobs (In re Parker), 485 Fed. Appx. 989 (11th Cir. 2012). The bankruptcy entered an order permanently disbarring an attorney from practicing before the court where the attorney consistently failed to appear at or habitually came late and unprepared to scheduled hearings; failed to pay filing fees on numerous occasions; made a practice of misappropriating clients' funds; intentionally filed false or incomplete information in the court; and concealed assets and mismanaged trust funds. The bankruptcy court had authority to impose sanctions under Rule 9011(c) (permitting sanctions for violation of Rule 9011(b)), and under § 526(c)(5)(B) (permitting a civil penalty for violation of § 526(a)(2)). That authority included disbarment pursuant to a local rule which allowed disbarment due to attorney misconduct. Federal courts, including bankruptcy courts, possess inherent authority to impose sanctions against attorneys and their clients.

Franken v. Mukamal (In re Creative Desperation Inc.), 449 Fed. Appx. 776 (11th Cir. 2011). Bankruptcy court did not abuse its discretion by imposing sanctions against debtor's counsel ethical violations where counsel repeatedly sought to represent parties with directly opposing interests both in the bankruptcy action and in outside litigation; submitted false and misleading documents to the court; and filed several frivolous pleadings without conducting any diligence to determine their legal or factual validity.

11 U.S.C. § 328 Limitation on Compensation of Professional Persons.

Denison v. Marine Mile Shipyard, Inc. (In re New River Dry Dock, Inc.), 497 Fed. Appx. 882 (11th Cir. 2012). Once the bankruptcy court learned of a professional's adverse interest, the court had the authority to revisit fee award pursuant to both § 330(a)(2)[awarding compensation less than the amount requested] and § 328(c)[denying fees to a professional who is not a disinterested person "at any time" during such professional's employment]. A bankruptcy court retains

jurisdiction over an award of fees even after the conclusion of the bankruptcy case.

11 U.S.C. § 505 Determination of Tax Liability.

Dubov v. Read (In re Read), 692 F.3d 1185 (11th Cir. 2012). Section 505(a)(2)(C) was added by the BAPCPA to prevent bankruptcy courts from determining the amount or legality of any *ad valorem* tax on real or personal property of the estate after the time for contesting or redetermining that amount under applicable nonbankruptcy law had expired. Prior to the amendment, a debtor was free to contest *ad valorem* tax claims that arose many years prior to the filing of a voluntary bankruptcy petition, but which had not been contested or adjudicated prepetition. By amending the statute to include § 505(a)(2)(C), Congress expressly intended to protect creditors by prohibiting a debtor from contesting *ad valorem* tax claims after the time for filing an action challenging the assessment of such taxes has expired under state law. Thus, § 505(a)(2)(C) had to be interpreted as an exception to general rule that, if the time for taking certain action under applicable nonbankruptcy law has not expired as of commencement of bankruptcy case, then that time period will be extended at least two years after order for relief. Thus §505(a)(2)(C), dealing specifically with time for bankruptcy court to make determination on amount or legality of tax and limiting bankruptcy court to time provided under nonbankruptcy law with no provision for extension thereof, controlled over the more general rule on extension of nonbankruptcy time limits that have not run on petition date.

11 U.S.C. § 522(b) Exemptions.

In re Cassell, 713 F.3d 81 (11th Cir. 2013). Ch. 7 trustee objected to a Georgia exemption claimed by debtor in her right to receive annuity payments under a fixed life annuity purchased prepetition with inherited funds. After certification, the Georgia Supreme Court responded "that a single-premium fixed annuity purchased with inherited funds may qualify as an exempt annuity . . . and that the determination of whether a right to receive payment from an annuity is 'on account of' age . . . is not necessarily based on the existence of a single factor but requires consideration of a variety of factors pointing to the existence of a causal connection between the payee's age and the right to payment." *Silliman v. Cassell*, 738 S.E.2d 606, 608 (Ga. 2013). The single-premium fixed annuity was designed to provide income as a substitute for wages even though the purchase was funded by an inheritance and made just one year before bankruptcy where: (1) self-employed debtor did not have access to a pension plan; (2) was 65 at the time of purchase and testified she purchased the annuity to support her in retirement; (3) the fixed-sum life annuity gave the debtor the right to immediate monthly payments, but at the same time divested her of the right to withdraw the corpus; (4) after payments began debtor had no authority over the corpus or the amount or frequency of payments from the annuity; and (5) there was no evidence that the annuity was purchased as a pre-bankruptcy plan to exempt assets.

11 U.S.C. § 523(a)(2)(B) Discharge Exception for Debts From Use of False Financial Statements.

Davenport v. Frontier Bank (In re Davenport), 508 Fed. Appx. 937 (11th Cir. 2013). Bank reasonably relied on materially false financial statement submitted by debtor in deciding to renew a loan. Reasonable reliance is to be evaluated based on the circumstances of the case, including: (1) previous business dealings giving rise to a relationship of trust; (2)"red flags" alerting any prudent lender to misrepresentations; and (3) whether minimal investigation would have revealed

inaccuracies.

AAFCOR, LLC v. Spires (In re Shelton), 481 Fed. Appx. 520 (11th Cir. 2012). Sophisticated lender, which took a security interest in debtor's assets without realizing that real property was owned by debtor's brother, could not recover for fraud under Alabama law absent showing of reasonable reliance on the debtor's or his brothers's alleged misrepresentations. Lender relied on its independent investigation into debtor's assets, which in fact uncovered deed to the brother, and could not reasonably rely on debtor's interpretation of deed's legal description. Under Alabama law, a party that undertakes an independent investigation and learns the truth is presumed to rely on his own investigation and not on the alleged fraudulent misrepresentation. Real estate investors are presumed to have examined the title records and knowledge of the contents of those records is imputed to them.

11 U.S.C. § 523(a)(4) Discharge Exception for Fiduciary Debts, Embezzlement, or Larceny.

Bullock v. BankChampaign (Bullock), 133 S. Ct. 1754 (2013). The Supreme Court resolved a split among the circuits concerning the mental state that must accompany the bankruptcy-related definition of "defalcation." The Supreme Court held that the term includes a culpable state of mind requirement involving knowledge of, or gross recklessness in respect to, the improper nature of the fiduciary behavior.

11 U.S.C. § 541 Property of the Estate.

Bond Safeguard Ins. Co. v. Wells Fargo Bank, 502 Fed. Appx. 867 (11th Cir. 2012). Sureties filed a complaint in district court against lender claiming the lender's actions caused the ruin of a bankrupt debtor's business, thus, causing the sureties to have to pay $16 million on their performance bonds. The district court dismissed the case finding that the cause of action was property of the debtor's bankruptcy estate and, thus, the sureties lacked standing to pursue same. If a cause of action alleges only indirect harm to a creditor (i.e., an injury which derives from harm to the debtor), and the debtor could have raised a claim for its direct injury under the applicable law, then the cause of action belongs to the estate. A general claim that applies equally to all creditors and can be brought by the debtor is property of the bankruptcy estate.

Thomas v. Bender (In re Thomas), 516 Fed. Appx. 875 (11th Cir. 2013) The proceeds of a postpetition real estate sale arising from a prepetition option contract constituted property of the estate. Whether a debtor's interest constitutes property of the estate is a federal question, but courts look to state law to decide whether the debtor had a legal or equitable interest in the property when he filed for bankruptcy. Under Florida law, the prepetition option contract gave the debtor a valid legal interest in the property. The bankruptcy estate encompasses the proceeds, product, offspring, rents, and profits from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case. The sales proceeds constituted proceeds of the option contract and were also property of the estate. The court distinguished this case from *Bracewell v. Kelley (In re Bracewell)*, 454 F.3d 1234 (11th Cir. 2006) in which the 11th Cir. found that disaster payments for prepetition crop losses authorized by postpetition legislation were not property of the estate. Here the debtor had more than a mere

"hope, a wish and a prayer" that he might profit from the option contract because the contract gave him a valid legal interest in the property and he was in a position to affect the outcome of the complete deal.

11 U.S.C. § 544 Trustee as Lien Creditor and as Successor to Certain Creditors and Purchasers.

Wells Fargo Bank v. Codrington (In re Codrington), 716 F.3d 1344 (11th Cir. 2013). Chapter 7 trustee, using the trustee's strong arm powers under § 544(a)(3), undertook to avoid a mortgage, which while otherwise valid, was unattested by an unofficial witness on the signature page of the deed. The bankruptcy court entered judgment in favor of the trustee. The 11th Cir. affirmed after certifying state law questions to the Supreme Court of Georgia. Under Georgia state law a mortgage that was not attested to by an unofficial witness and signed by an unofficial witness was not "duly filed, recorded, and indexed," and was not eligible for recording; thus, the mortgage did not provide constructive notice to subsequent bona fide purchasers.

Zuppardo v. BC Properties Limited, LLC (In re J.H. Investment Services, Inc.), 2011 WL 330242 (11th Cir. 2011). Chapter 11 trustee lacked standing under § 544(a) to avoid a creditor's interest in property sold prepetition by the debtor where the avoidance would only benefit another creditor. Trustees generally lack standing to bring claims that belong solely to the estate's creditors, the outcome of which will not affect the bankruptcy estate or the rights of all other creditors. Because the ownership of the property at issue could be resolved entirely under state law, the Bankruptcy Code would not be involved in the resolution of the dispute. The question of ownership was a matter that had to be decided in state court.

11 U.S.C. § 548 Fraudulent Transfers and Obligations.

Crumpton v. Stephens (In re Northlake Foods, Inc.), 715 F.3d 1251 (11th Cir. 2013). Debtor's transfer to shareholder was not avoidable as constructively fraudulent. Benefits provided to Chapter 11 debtor as a result of its prepetition subchapter S election constituted "reasonably equivalent value" for its corresponding obligation to pay dividends to a shareholder. Debtor gained greater flexibility to shift its tax status whenever it determined it was advantageous to do so, debtor freed up cash that otherwise would have been dedicated to paying its tax liability, and debtor gained additional time to pay, as it did not have to satisfy its obligation to shareholders until year after they incurred their tax liability. The purpose of voiding transfers unsupported by reasonably equivalent value is to protect creditors against the depletion of a bankrupt's estate. Therefore, § 548(a)(1) does not authorize voiding a transfer which confers an economic benefit upon the debtor.

Stathopoulos v. Alford (In re McMillin), 482 Fed. Appx. 454 (11th Cir. 2012). The bankruptcy court properly applied the "control test" for determining when funds provided to a debtor by a third party become property of the debtor's estate so that an allegedly fraudulent transfer of the funds to a non-creditor is subject to avoidance under § 548. Here the funds were not property of the estate where the funds were only in the debtor's bank account for a few hours; the debtor did not have the power to designate which party would receive the funds nor disburse same; and the funds were not owed to the debtor. The debtor merely facilitated the transfer of the funds.

Transfer was not avoidable.

Goldberg v. Rosen (In re Niroomand), 493 Fed. Appx. 11 (11th Cir. 2012). Attorney fees and costs paid by Chapter 7 debtor to prepetition counsel were not recoverable as fraudulent transfers absent evidence that the debtor was insolvent at the time of transfer. Chapter 7 trustee filed a complaint against the law firm to recover the attorneys' fees and costs as fraudulent transfers under § 548 and argued that the debtor was insolvent at the time of the transfers. Although debtor testified she was insolvent at the time of transfer, debtor had signed an affidavit of solvency when she retained the law firm in which she testified she could pay her anticipated debts. The bankruptcy court heard the debtor's testimony and discredited it which was entirely within the court's province. *See* Rule 8013 ("due regard shall be given to the opportunity of the [bankruptcy] court to judge the credibility of the witnesses").

11 U.S.C. § 550 Liability of Transferee of Avoided Transfer.

Martinez v. Hutton (In re Harwell), 628 F.3d 1312 (11th Cir. 2010). A defendant raising the equitable exception to § 550(a)(1) must show lack of control, that he was a mere conduit, and that he acted in good faith. Here the case was remanded to ascertain whether the attorney masterminded and facilitated the fraudulent transfers or was he simply using his trust account to disperse funds as directed by the debtor.

11 U.S.C. § 707 Dismissal of a Case or Conversion to a Case Under Chapter 11 or 13.

Witcher v. Early (In re Witcher), 702 F.3d 619 (11th Cir. 2012). Addressing an issue of first impression, the Eleventh Circuit held that a debtor's ability to pay his or her debts may be taken into account under the totality of the circumstances test set forth under § 707(b)(3)(B) when the presumption of abuse does not arise under § 707(b)(2) [means test]. Debtors' decision to keep paying for "unnecessary, luxury items" showed that they were not prepared to earnestly engage in the "give and take process" of bankruptcy. Section 707(b)(3) comes into play when the presumption of abuse under § 707(b)(2) does not arise or is rebutted. Under § 707(b)(3), the court shall consider "whether the debtor filed the petition in bad faith," § 707(b)(3)(A), or whether the "totality of the circumstances of the debtor's financial situation demonstrates abuse," § 707(b)(3)(B). The 11th Cir. rejected the debtors' narrow reading of § 707(b)(3)(B) under which ability to pay would not be considered under the totality of the circumstances test. BAPCPA made it harder to obtain chapter 7 relief by eliminating the "presumption in favor of granting the relief requested by the debtor" that had existed in the previous version of § 707(b), adding a means test that created a presumption of abuse, and lowering the standard from "substantial abuse" to "abuse." The Eleventh Circuit did not decide whether a debtor's ability to pay his or her debts can alone be dispositive under the totality of the circumstances test.

Ransom v. MBNA, 131 S. Ct. 716 (2011). When calculating an above-median income Chapter 13 debtor's "projected disposable income," the debtor cannot deduct an ownership expense for an unencumbered vehicle. Looking at the text of the statute, the Supreme Court's holding turned on whether an expense amount is *applicable* under § 707(b)(2)(A)(ii)(I) to a debtor that does not

have an actual car payment. Because the word "applicable" is not defined by the Code, the Court had to rely on the word's ordinary meaning. An expense amount in the tables for National and Local Standards is only applicable if the debtor actually incurs costs that correspond to it during the life of the plan.

11 U.S.C. § 1129(b) Cram-down.

RadLAX Gateway Hotel, LLC v. Amalgamated, 132 S. Ct. 2065 (2012): Cramdown plan which contemplated sale of encumbered assets of Chapter 11 debtors free and clear of all liens had to satisfy requirements set forth in § 1129(b)(2)(A) specifically dealing with the cramdown of such sales plans, and could not be confirmed on an indubitable equivalence theory, where the plan did not allow creditor with lien on assets to credit bid at sale.

11 U.S.C. § 1222 Contents of Plan.

Hall v. U.S. (In re Hall), 135 S. Ct. 1882(2012). Capital gains tax liability arising from the post-petition sale of the debtors' farmland was not a tax liability "incurred by the estate," and was thus neither collectible nor dischargeable in the Chapter 12 plan. Chapter 12 estates are not taxable entities. The debtors, not the estate itself, are required to file the tax return and are liable for the taxes resulting from their post-petition farm sale. The post-petition federal income tax liability was not "incurred by the estate" and was, thus, neither collectible nor dischargeable in the Chapter 12 plan.

11 U.S.C. § 1141 Effect of Confirmation.

State of Florida, Dept. of Rev. v. Davis (In re Davis), 481 Fed. Appx. 492 (11th Cir. 2012). Disallowance of a child support claim is not the same as ruling on a debtor's liability. The bankruptcy court enjoined the Florida DOR from collecting past due child support post-discharge after the court disallowed the department's late filed claim. The bankruptcy court ruled that even though child support obligations are non-dischargeable under the Code, its prior determination that the debtor had no liability was res judicata as to any other court because no claim had been filed. It was a violation of the confirmation order and the discharge injunction for the DOR to enforce the debt. The 11th Cir. reversed citing *Diaz*. The bankruptcy court's decision as to 'liability' for a debt is really only a decision about whether the non-dischargeable debt will be paid by the bankruptcy estate as part of the bankruptcy plan." The bankruptcy court may disallow a claim, but neither the discharge injunction nor principles of preclusion bar a child support creditor from pursuing the debt post-bankruptcy. In *Diaz,* the bankruptcy court found that the debtor was liable for the principal on a child support obligation but disallowed the prepetition interest that was owed (in a default situation). The debtor completed all payments under this Chapter 13 plan and received his Chapter 13 discharge. A year and a half later when the DOR sought to recover the disallowed prepetition interest and accrued postpetition interest, the bankruptcy court held the DOR in contempt for violating the discharge injunction and numerous other orders, including the order confirming the bankruptcy plan. The district court affirmed the bankruptcy court's judgment, reasoning that, even though a child support obligation could not be discharged in bankruptcy, res judicata and collateral estoppel barred the

DOR from relitigating the debtor's liability for the interest on the child support obligation. The 11th Cir. reversed and held that because domestic support obligations cannot be discharged in bankruptcy and because the discharge injunction only applied to dischargeable debts, it was not a violation of the bankruptcy court's discharge injunction for the DOR to pursue a debt owed for a child support obligation in state court postconfirmation.

11 U.S.C. § 1146 Special Tax Provisions.

Florida Dept. of Rev. v. Piccadilly Cafeterias, Inc. (Piccadilly Cafeterias, Inc.), 484 F.3d 1299 (11th Cir. 2007), *cert. granted*, 128 S.Ct. 741 (U.S. Dec. 7, 2007)(No. 07-312). In a matter of first impression, the Eleventh Circuit held that the stamp-tax exemption applicable to transfers of substantially all of a Chapter 11 debtor's assets under a confirmed reorganization plan could apply to those pre-confirmation transfers of the debtor's assets that were necessary to the consummation of a confirmed plan of reorganization. The case turned upon whether pre-confirmation transfers may constitute transfers "under a plan confirmed." The court explained that although it had yet to address whether the § 1146(c) tax exemption applies to pre-confirmation transfers, the Third and Fourth Circuits have both held that the § 1146(c) tax exemption may not apply to such transfers based on a strict reading of the plain language of § 1146(c) exempting from stamp taxes any asset transfers "under a plan confirmed" under § 1129. The Eleventh Circuit concluded that the better reading of "under a plan confirmed" looks not to the timing of the transfers, but to the necessity of the transfers to the consummation of a confirmed plan. The strict temporal construction of § 1146(c) articulated by the Third and Fourth Circuits ignores the practical realities of Chapter 11 reorganization cases.
The court further determined that, at the very least, some nexus between the pre-confirmation sale and the confirmed plan was required to be demonstrated.

11 U.S.C. § 1306 Property of the Estate.

Waldron v. Brown (In re Waldron), 536 F.3d 1239 (11th Cir. 2008). Chapter 13 debtors' postpetition claims for underinsured motorist benefits were property of the estate and had to be scheduled notwithstanding the fact that on confirmation, so much of the estate property that was not necessary to fulfillment of the plan had revested in the debtors. The debtors argued that upon confirmation all property of the estate revested in same by operation of § 1327(b) and, therefore, the underinsured motorist claims, which were not part of the debtors' plan, did not become property of the estate. Based on the plain language of § 1306(a), debtor's postpetition claims were property of the estate. Property interests comprising the preconfirmation estate property are transferred to the debtor at confirmation, and this 'vesting' is free and clear of the claims or interest of creditors provided for by the plan. Postconfirmation, property of the estate once again accumulates by operation of § 1306(a) until the case is closed, dismissed, or converted.

12 U.S.C. § 2607 Prohibition Against Kickbacks and Unearned Fees.

Freeman v. Quicken Loans, Inc., 132 S. Ct. 2034 (2012): Mortgagors brought a class action against mortgagee for violation of the Real Estate Settlement Procedures Act section prohibiting

the splitting of fees for which no services were provided in return. The Supreme Court held that the section of RESPA at issue did not prohibit a single settlement-service provider's retention of an unearned fee but, instead, only covers a provider's fee split with one or more other persons.

12 U.S.C. §§ 5201-5261 Emergency Economic Stabilization Act.

Miller v. Chase Home Fin., LLC, 677 F.3d 1113 (11th Cir. 2012). Borrower had no private cause of action under the Home Affordable Modification Program for lender's refusal to permanently modify loan.

15 U.S.C. § 1629 Civil Liability.

Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 130 S. Ct. 1605 (2010). The Fair Debt Collection Practices Act (FDCPA)'s bona fide error defense does not apply to violations of the FDCPA resulting from a debt collector's mistake of law. As a general rule ignorance of the law will not excuse any person. Where Congress has chosen to provide a mistake of law defense, it has done so explicitly requiring, for example, "actual knowledge."

15 U.S.C. § 1640 Civil Liability.

Edwards v. Niagara Credit Solutions, Inc., 584 F.3d 1350 (11th Cir. 2009). Debt collection agency's practice of not revealing its identity in pre-recorded telephone messages left on consumer's answering machines was not protected by the bona fide error defense.

Jones v. General Motors Acceptance Corp. (In re Jones), 279 Fed. Appx. 825 (11th Cir. 2008). Debtor who brought a TILA action failed to establish that the creditor's GAP insurance premium was a finance charge that should have been disclosed in the automobile purchase contract as required to maintain a claim under TILA where the applicable casualty insurance contract was clear and unambiguous regarding GAP coverage.

15 U.S.C. § 1679c(1) Findings and Purposes.

Picard v. Credit Solutions, Inc., 564 F.3d 1249 (11th Cir. 2009). A statute's provision for a private right of action alone is inadequate to show that Congress intended to prohibit arbitration of statutory claims. The Credit Repair Organization Act (CROA) requires organizations offering credit repair services to inform consumers of their right to a private cause of action for violations of the Act. This provision did not create a right to sue only in a judicial forum and did not manifest a congressional intent to prevent a consumer from entering into an enforceable arbitration agreement for claims against an organization for allegedly failing to perform promised credit repair services.

15 U.S.C. § 1681c(b) Requirements Relating to Information Contained in Consumer Reports.
Harris v. Mexican Speciality Foods, Inc., 564 F3d. 1301 (11th Cir. 2009). Plaintiffs filed a class

action against merchants under the Fair and Accurate Credit Transactions Act (FACTA) and alleged that the merchants failed to comply with the Act's requirement for truncation of credit card numbers on sales receipts. The merchants challenged the Act's statutory-damages provision authorizing an award of damages ranging from $100 to $1,000 because the Act does not specify any criteria for assessing the appropriate amount of damages within that range. The Eleventh Circuit held that the Act is not unconstitutionally vague on its face. Potential defendants have notice under the Act of the consequences of violating same. FACTA clearly defines what conduct is prohibited and the potential range of fine that accompanies noncompliance.

15 U.S.C. § 1681n Civil Liability for Willful Noncompliance.

Safeco Ins. Co. of America v. Burr, 127 S.Ct. 2201 (2007). Liability for "willfully" failing to comply with the Fair Credit Reporting Act (FCRA) goes not only to acts known to violate the Act, but also to reckless disregard of statutory duty. Title 15 U.S.C.A. § 1681n(a) states that "[a]ny person who willfully fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer" for actual or statutory damages, punitive damages, and reasonable attorney fees. Consumers had brought a class action against two insurers in connection with automobile or homeowners policies alleging violation of the FCRA because of failure to transmit adverse action notices reflecting negative credit reports. The Supreme Court granted certiorari to resolve a conflict in the circuits as to whether § 1681n(a) reaches reckless disregard of FCRA's obligations and to clarify the notice requirement of § 1681m(a). Where willfulness is a statutory condition of civil liability, it has generally been construed as covering not only knowing violations of a standard, but reckless ones as well, reflecting common law usage. Thus, reckless disregard could fall under the willfulness provision of § 1681n(a).

15 U.S.C. § 1692g Congressional Findings and Declaration of Purpose.

Yunker v. Allianceone Receivables Mgmt., Inc. (In re Yunker), 701 F.3d 369 (11th Cir. 2012). Even though settlement specifically reserved creditor's right to appeal district court order finding dunning letter violated § 1692g claim, the settlement rendered the case moot. The court of appeals did not have jurisdiction despite creditor's reservation of its right to appeal. Article III "limits the jurisdiction of the federal courts to actual cases and controversies." Settlement generally renders the case moot. Three exceptions: (1) where one issue has become moot, but the case as a whole remains alive because other issues have not become moot; (2) when one party unilaterally alters its conduct to terminate the dispute, such as ceasing allegedly illegal conduct; and (3) where a controversy is capable of repetition, yet evades review. Here no issues remained to be litigated; there was no evidence creditor unilaterally altered its conduct to terminate the dispute where debtor also acted and accepted the terms of the settlement; and the situation was not capable of repetition as to creditor.

United States of America v. Rothstein (In re Rothstein, Rosenfeldt, Adler, P.A.), 717 F.3d 1205 (11th Cir., June 12, 2013). Following attorney's plea of guilty to charges stemming from Ponzi scheme, and entry of preliminary order of forfeiture, bankruptcy trustee for attorney's law firm

filed petition, claiming interest in forfeited bank accounts and other properties listed in the information. The district court dismissed the trustee's claims. The Eleventh Circuit held that, as a matter of first impression, funds from investors in Ponzi scheme which were deposited in law firm's bank accounts and commingled with legitimate income firm received were not "traceable to" attorney's scheme so as to be subject to forfeiture.

15 U.S.C. § 1692g(a) Validation of Debts.

Clark v. Shapiro and Pickett, LLP (In re Clark), 452 Fed. Appx. 890 (11th Cir. 2012). Mortgagor whose home was placed into foreclosure status by mortgagee that hired law firm to conduct foreclosure sale was in default on mortgage at time of foreclosure, precluding her claim against mortgagee and law firm for alleged violation of FDCPA where mortgagor was in arrears $1,334.54 prepetition in addition to fees, escrow deficiencies, and expenses that accrued postpetition, as well as three post-petition monthly mortgage payments.

15 U.S.C. §1692e False or Misleading Representations.

Reese v. Ellis, Painter Ratterree & Adams, LLP, 678 F.3d 1211 (11th Cir. 2012). Borrowers filed a class action against a law firm that represented a lender, alleging that firm's dunning letter violated the Fair Debt Collection Practices Act. District court dismissed the complaint for failure to state a claim, but the Eleventh Circuit reversed finding that the complaint sufficiently alleged that the firm's dunning letter and enclosed documents were an attempt to collect a "debt" within the meaning of the FDCPA. The fact that the dunning letter related to the enforcement of a security interest did not prevent it from also relating to the collection of a debt within the meaning of the FDCPA.

15 U.S.C. § 1692k(a)(3) Civil Liability.

Marx v. General Rev. Corp., 133 S. Ct. 1166 (2013). Under Fed. R. Civ. P. 54(d)(1), a district court has discretion to award litigation costs to a prevailing party unless a federal statute "provides otherwise." In an action under the FDCPA in which the district court awarded costs to the successful defendant debt collector, the Supreme Court held that the FDCPA provision specifying that a court may award attorneys' fees and costs when an action is brought in bad faith and for the purpose of harassment does not displace a district court's discretion to award costs under Rule 54(d)(1). Therefore, a prevailing defendant in an FDCPA case may be awarded costs even where the lawsuit was not brought in bad faith and for the purpose of harassment.

28 U.S.C. § 157 Procedures.

Sundale, Ltd. v. Florida Assocs. Captial Enters. LLC (In re Sundale, Ltd.), 499 Fed. Appx. 887 (11th Cir. 2012). The 11th Cir. upheld a ruling that in keeping with Art. III, a state-law counterclaim for recoupment could be finally adjudicated by the bankruptcy court. The counterclaim was a purely defensive matter springing from the same transaction as the plaintiff's cause of action. The plaintiff sought a declaratory judgment regarding the extent, validity, and

priority of claims it had that stemmed from secured loans made to the debtor. In response, the debtor filed a counterclaim for recoupment of funds paid to the lender company concerning the secured loans on the theory that the funds were intended to satisfy a debt for monies that had been wrongfully diverted from an estate and merely disguised as a loan. The court noted that such a counterclaim was necessarily resolved in the resolution of the debtor's claim.

Stern v. Marshall, 131 S. Ct. 2594 (2011): Bankruptcy court lacks "constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim." Bankruptcy courts can only enter final judgment: (1) on matters stemming from the bankruptcy itself; and (2) matters necessary to the claims resolution process.

MJO Holding Corp. v. Welt (In re Happy Hocker Pawn Shop, Inc.), 212 Fed. Appx. 811 (11th Cir. 2006). The Eleventh Circuit affirmed an order granting motion for leave to sue Chapter 7 trustee in state court on various tort claims based on conduct that occurred when the trustee for debtor pawnshop took possession of a non-debtor pawnshop by changing the locks on the non-debtor's doors. The bankruptcy court granted the non-debtor's motion for leave to sue trustee in state court on the ground that it lacked subject matter jurisdiction over the complaint and the district court affirmed. The Eleventh Circuit affirmed finding that: (1) The complaint did not constitute a core proceeding under § 157(b) where the complaint alleged tortious actions against property that was not property of the bankruptcy estate; (2) The complaint did not invoke a substantive right created by the Bankruptcy Code as it was based on state law, not federal law; and (3) The complaint was not "related to" the bankruptcy proceeding under § 157(c)(1) because the damages sought against the trustee individually would not go to the bankruptcy estate.

Whiting-Turner Contracting Co. v. Elec. Mach. Enters., Inc. (In re Elec. Mach. Enters., Inc.), 479 F.3d 791 (11th Cir. 2007). Debtor, subcontractor, filed an adversary proceeding against a general contractor to compel turnover of money allegedly owed debtor under its subcontract. The general contractor moved to compel arbitration pursuant to the parties' arbitration agreement. Finding the matter to be a core proceeding, the bankruptcy court denied the general contractor's motion to compel arbitration and the district court affirmed. The Eleventh Circuit reversed finding that the dispute did not involve any right created by the Bankruptcy Code, and was not one that would arise only in bankruptcy, so as not to be within the "core" jurisdiction of the bankruptcy court. Even assuming that the bankruptcy court had "core" jurisdiction, the court explained that is could not, solely on that basis, decline to enforce a contractual arbitration agreement between the parties, unless the court also found that enforcing the agreement would inherently conflict with the Bankruptcy Code.

28 U.S.C. § 157(b) Core Matters.

Continental Nat'l Bank of Miami v. Sanchez (*In re* Toledo), 170 F.3d 1340 (11th Cir. 1999). Debtor was a partner in a real estate development. Another partner sued to challenge the validity of a mortgage on partnership property. The estate only had an interest in the partnership, but not the realty, so there was some question as to core status. If it was a core proceeding, the district court should apply the deferential standards of appellate review to the bankruptcy court's disposition

of it. If it was a non-core proceeding, the bankruptcy court could only submit proposed findings of fact and conclusions of law, not a final order or judgment, and the district court was obligated to conduct a *de novo* review. 28 U.S.C. § 157(b)(2) lists fourteen specific types of actions that are considered core proceedings, and provides a fifteenth, catch-all category for "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship." § 157(b)(2)(A)-(O). The statutory list provides that it is not intended to be an exhaustive list of core proceedings. The district court held the matter was core under 28 U.S.C. § 157(b)(2)(K), which applies to "determinations of the validity, extent, or priority of liens." Circuit disagreed holding that 157(b)(2)(K) encompasses only proceedings to determine the validity, extent, or priority of liens on the estate's or the debtor's property. Here, the proceeding was to determine the validity, extent, or priority of a lien on non-estate property and therefore, the matter was a non-core proceeding.

28 U.S.C. § 157(c) Authority to Hear Non-Core Matters.

Gallucci, *In re*, 931 F.2d 738 (11th Cir. 1991). Bankruptcy courts may not hear cases involving noncore, unrelated matters. Action by Chapter 7 trustee for turnover of property that was not property of the estate was noncore, unrelated matter over which bankruptcy court did not have jurisdiction. Debtor acquired property via gift after the Chapter 7 petition was filed.

Brickell Inv. Corp. *In re*, 922 F.2d 696 (11th Cir. 1991). If IRS files an unjustified proof of claim, a debtor in possession is entitled to attorney fees under a prevailing party application. However, an application for attorney's fees under Equal Access to Justice Act is not a core proceeding. This is so even though the request stems from core proceeding. As non-core, the bankruptcy court may submit proposed findings of fact and conclusions of law to the district court. The district court may enter a final order or judgment after considering the proposed findings and conclusions and reviewing *de novo* any matters to which a party has properly objected. Even though bankruptcy court may hear related to non-core matters, with the consent of all the parties, such consent must be express.

28 U.S.C. § 157(d) Withdrawal of the Reference.

Dionne, Trustee v. Simmons (*In re* Simmons), 200 F.3d 738 (11th Cir. 2000). Bankruptcy Court denied Debtor's motion to dismiss Chapter 7 case. The Trustee was attempting to recover assets. This case is the sixth petition filed since March 1988. On appeal, the District Court withdrew the reference and dismissed the case. The Eleventh Circuit reversed. A district court may only withdraw reference of a case for cause shown. Before withdrawing the reference, the district court should consider such goals as advancing uniformity in bankruptcy administration, decreasing forum shopping and confusion, promoting the economical use of the parties' resources, and facilitating the bankruptcy process. Here, the Bankruptcy Court handled the case appropriately to gather assets and distribute them to creditors.

28 U.S.C. § 157(e) Jury Trials.

Langenkamp v. Culp, 498 U.S. 42, 111 S. Ct. 330 (1990). A creditor who files a proof of claim against the estate submits to the equitable jurisdiction and, therefore, loses the Seventh

Amendment right to a trial by a jury in a subsequent action by the trustee for preferential transfer. By filing a claim against a bankruptcy estate the creditor triggers the process of "allowance and disallowance of claims," thereby subjecting himself to the bankruptcy court's equitable power. If a party does not submit a claim against the bankruptcy estate, however, the trustee can recover allegedly preferential transfers only by filing what amounts to a legal action to recover a monetary transfer. In those circumstances the preference defendant is entitled to a jury trial.

Granfinanciera v. Nordberg, 492 U.S. 33, 109 S. Ct. 2782 (1989). In Granfinanciera, the Supreme Court held that where a person who has not submitted a claim against the bankruptcy estate is sued by the trustee in bankruptcy to recover an allegedly fraudulent monetary transfer, the Seventh Amendment right to a jury trial exists. Seventh Amendment protects a litigant's right to jury trial only if cause of action is legal in nature and it involves matter of private right. Here, the nature of relief sought by bankruptcy trustee--recovery of money payments--conclusively demonstrated that cause of action was properly characterized as legal rather than equitable, such that creditors were prima facie entitled to jury trial under Seventh Amendment. The Court specifically declined to decide whether 28 U.S.C. § 1411 permits bankruptcy courts to conduct jury trials in fraudulent conveyance actions and, whether the Seventh Amendment or Article III allow jury trials in fraudulent conveyance actions to be held before non-Article III bankruptcy judges subject to the oversight provided by the district courts. Granfinanciera overruled the decision of the Eleventh Circuit Court of Appeals in Chase & Sanborn Corp., *In re*, 835 F.2d 1341 (11th Cir. 1988).

Graham, *In re*, 747 F.2d 1383 (11th Cir. 1984). Whether a jury trial is warranted under the Seventh Amendment depends on whether issue is legal or equitable. An action to set aside a conveyance is equitable, and thus, a trustee's § 544 action is equitable. Therefore, no jury trial is required in a § 544(b) action.

28 U.S.C. § 158 Appeals.

In re Celotex Corp., 700 F.3d 1262 (11th Cir. 2012). Neither a bankruptcy order nor a district court order denying a motion for leave to appeal was final for purposes of the 11th Cir.'s jurisdiction under § 157(d). The bankruptcy court order ruling that it had exclusive jurisdiction to adjudicate the colleges' claims for damages did not resolve the litigation on the colleges' claims. The jurisdiction order merely identified the forum in which the claims would be heard. Likewise, the district court order did not resolve the merits of the colleges' claims against the trust. *See* § 158(a)(3)[a circuit court lacks jurisdiction to review a district court's denial of leave to appeal]. Because neither order was final nor fell within any of the exceptions to the final judgment rule, the 11 Cir. dismissed the appeal.

Fisher Island Ltd. v. Fisher Island Invs., Inc. (Fisher Island Invs., Inc.), 518 Fed. Appx. 663 (11th Cir. 2013). Late filed notice of appeal of bond order was not justified based on excusable neglect factors: (1) the danger of prejudice to the nonmovant; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the movant; and (4) whether the movant acted in good faith.

Movant had reason to monitor orders issued by the district court because it had earlier appealed a separate order of the court. Counsel is required to pay heed to impending deadlines and filings that must be made to protect the client's interest. An attorney's strategic miscalculations do not qualify as excusable neglect. Nor does counsel's inattention to filing deadlines ordinarily constitute excusable neglect. Nor did movant have standing as movant was not ordered to post bond. The Art. III "person aggrieved doctrine" governs standing in a bankruptcy court.

DeLauro v. Porto (In re Porto), 645 F.3d 1294 (11th Cir. 2011). A district court's order affirming a bankruptcy court's decision on the merits was a final, appealable order under the *Budinich* finality rule despite the existence of an unresolved issue involving attorney fees. Thus, the notice of appeal, which was filed approximately three and a half months after entry of the district court order was untimely. In *Budinich v. Becton Dickenson & Co.*, 486 U.S. 196 (1988), the Supreme Court established a bright-line rule that the issue of attorney's fees is always collateral to the merits, and a decision on the merits, even if the attorney's fees issue remains unresolved, is immediately appealable. Under *Budinich*, the time for appeal of substantive claims starts to run from the date of the first order where the first order disposes of the party's substantive claims but not claims relating to attorney's fees. The Supreme Court explained that the bright-line rule accords with the "traditional understanding, that a decision on the merits is a 'final decision' for purposes of § 1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case." *Budinich*, 486 U.S. at 202-03.

Barben v. Donovan (In re Donovan), 532 F.3d 1134 (11th Cir. 2008). A bankruptcy court's order denying a motion to dismiss a case for abuse of the provisions of Chapter 7 was not a final, appealable order. Under 28 U.S.C. § 158(d), courts of appeals "have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this subsection." Generally, to be "final" under 28 U.S.C. § 158(d), an order must end litigation on the merits, leaving nothing to be done but execute the judgment. By denying the motion to dismiss, the bankruptcy court permitted the Chapter 7 case to continue. The bankruptcy court did not conclusively resolve the bankruptcy case as a whole, nor did the court resolve any adversary proceeding or claim.

Connecticut National Bank v. Germain, 503 U.S. 249, 112 S. Ct. 1146 (1992). Bankruptcy trustee brought suit seeking to hold creditor liable for various torts and breaches of contract. Bankruptcy Court denied creditor's motion to strike Trustee's demand for a jury trial, and the District Court affirmed. The Court of Appeals dismissed creditor's attempted appeal for lack of jurisdiction, holding that a court of appeals may exercise jurisdiction over an interlocutory order in bankruptcy only when the district court issues the order after having withdrawn the case from the bankruptcy court, and not when the district court acts in its capacity as a bankruptcy court of appeals. Supreme Court reversed holding the unambiguous language of 28 U.S.C. § 1292 provides jurisdiction for review in the courts of appeals and is not limited to orders issued by district courts sitting as bankruptcy trial courts rather than appellate courts. Thus, jurisdiction of the courts of appeals is not limited to just that provided by 28 U.S.C. § 158(d).

Saber, *In re*, 264 F.3d 1317(11th Cir. 2001). Bankruptcy court's order denying trustee's motion

for summary judgment on fraudulent transfer and preference avoidance claims was not “final order” from which appeal would lie. Something more was left to do--quiet title to the property. Even though bankruptcy court closed the adversary proceeding, there was still no “final order.” An adversary proceeding is not "concluded" for jurisdictional purposes simply because it is closed. Here, neither party received the relief requested or prevailed.

Atlas, In re, 210 F.3d 1305 (11th Cir. 2000). The Bankruptcy Court, found a willful stay violation of the automatic stay and imposed sanctions, and was affirmed at the District Court. As a matter of first impression, the Court of Appeals, held that Bankruptcy Court order awarding damages and attorney fees and costs was not final and appealable, where bankruptcy court's order did not leave for future resolution only the amount of attorney fees and costs, but also deferred assessment of punitive and actual damages. As Court of Appeals' jurisdiction in bankruptcy proceedings is limited to final decisions of the district court, where the order granting judgment on the issue of liability still requires a further assessment of damages; such order is not considered an appealable final order. In order to avoid piecemeal litigation, a bankruptcy court's order is not final for purposes of appellate jurisdiction where bankruptcy court finds liability for violation of the automatic stay, but defers assessment of damages.

Crosby v. Monroe County, 394 F.3d 1328 (11th Cir. 2004). Plaintiff in a Section 1983 civil rights action filed an appeal with the Eleventh Circuit Court of Appeals and then filed for Chapter 13 relief. Part of the appeal was an award of attorneys’ fees to the defendant. After the parties agreed that the portion of the appeal dealing with an award of attorney’s fees against the plaintiff debtor was moot because plaintiff had no assets with which to satisfy an award, the Court of Appeals stated in a footnote that the plaintiff appellant’s bankruptcy filing did not prevent the court from adjudicating the merits of the appeal. The court cited Martin-Trigona v. Champion Fed. Sav. & Loan Ass’n, 892 F.2d 575, 577 (7th Cir. 1989), for the proposition that the automatic stay in inapplicable to suits by the debtor. The Court also stated that because plaintiff debtor had filed Chapter 13, he retains standing to pursue legal claims on behalf of the estate.

Dzikowski v. Boomer’s Sports & Recreation Center, Inc. (*In re* Boca Arena, Inc.), 184 F.3d 1285 (11th Cir. 1999). During a trial of an adversary proceeding, a partial final judgment against one defendant was entered, pursuant to Fed. R. Civ. P. 52(c). The action remained pending against the other defendants. Bankruptcy Court did not certify the partial judgment for immediate review, under Fed. R. Civ. P. 54(b). The Eleventh Circuit dismissed the appeal for lack of jurisdiction. Rule 7054(a) incorporates Fed. R. Civ. P. 54(a) - (c). A bankruptcy judgment that disposes of fewer than all claims is not a final, appealable order. The order must leave nothing except execution of the judgment to be final. 28 U.S.C. § 158(a) does not relax the standard of finality in 28 U.S.C. § 1291.

Clay County Bank v. Culton (*In re* Culton), 111 F.3d 92 (11th Cir. 1997). In a question of first impression, the appeal was dismissed for lack of jurisdiction. After the Chapter 7 discharge, debtors filed a theft report on $42,800 of jewelry. Bank moved to reopen case and filed adversary proceeding to revoke discharge. Bankruptcy court dismissed adversary proceeding as barred by statute of limitations. District court reversed by applying equitable tolling and remanded. Appeal

was taken to the Eleventh Circuit. Court held an order is not final and appealable when remanded for significant judicial activity, as opposed to mere enforcement of judgment. An interlocutory order modifying an injunction, 28 U.S.C. § 1292(a)(1), is not appealable until the discharge is revoked (a ruling on the merits). Furthermore, this exception allowing appeals must meet the Carson test of irreparable consequence and an effective challenge requires immediate appeal. There is strong policy against piecemeal appeals.

OB/GYN Solutions, L.C. v. Six (*In re* Six), 80 F.3d 452 (11th Cir. 1996). Bankruptcy court disallowed a claim, which is a final, appealable order. The court also granted partial summary judgment in adversary proceeding, holding the same claimholder had no lien on personal property. This ruling is interlocutory which can only be appealed by permission. There is a more flexible standard of finality in appeals of bankruptcy orders. An order of marginal finality can be appealed if the question presented is fundamental to further conduct of the case. The summary judgment order can be reviewed as it is duplicative of the issues raised in disallowing the claim and it is fundamental to reorganization.

Lockwood v. Snookies, Inc. (*In re* F.D.R. Hickory House, Inc.), 60 F.3d 724 (11th Cir. 1995). A district court order affirming a bankruptcy court order disapproving a proposed settlement and release agreement is an interlocutory order and not reviewable by the court of appeals. The appeal was dismissed for lack of jurisdiction. Under 28 U.S.C. § 158(a), the judgment is not final and it does not fit within one of the three exceptions to the final judgment rule. The collateral order doctrine permits review of interlocutory orders that (1) finally determines a claim, (2) determines rights which will be lost after a final judgment, and (3) present a significant and unresolved question of law. The doctrine of practical finality permits review, where an interlocutory order determines rights, orders delivery of property, or payment of a sum, with execution permitted. The final exception to finality applies to questions that are fundamental to further conduct of the case.

T & B Scottsdale Contractors, Inc. v. United States, 866 F.2d 1372 (11th Cir. 1989). A district court's decision to include funds in the bankruptcy estate is a final appealable order.

Briglevich, *In re*, 847 F.2d 759 (11th Cir. 1988). Where the district court remands a case to the bankruptcy court for more than merely mechanical or ministerial findings, the district court order is not final and the court of appeals has no jurisdiction.

The Charter Co., *In re*, 778 F.2d 617 (11th Cir. 1985). In bankruptcy cases, finality exists when a particular adversary proceeding or controversy is resolved, not the entire bankruptcy litigation.

General Coffee Corp., *In re*, 758 F.2d 1406 (11th Cir. 1985). Pursuant to 28 U.S.C. § 158, Court of Appeals does not have jurisdiction to hear a direct appeal from the bankruptcy court.

International Horizons, Inc., *Matter of*, 689 F.2d 996 (11th Cir. 1982). District court has appellate

jurisdiction over final orders of bankruptcy court and interlocutory orders by leave of court. The court of appeals has appellate jurisdiction only over final orders of district court and not interlocutory orders.

28 U.S.C. § 455(b) Disqualification of Justice, Judge, or Magistrate judge

Ginsberg v. Evergreen Security, Ltd (In re Evergreen Security, LTD.) 570 F.3d 1257 (11th Cir. 2009). The Eleventh Circuit upheld the imposition of both compensatory sanctions in the amount of $371,517.69 and the suspension of a New York attorney from practicing before a Florida bankruptcy court for five years for filing various recusal motions in bad faith where the attorney failed to investigate the accusations made against the bankruptcy judge before filing the recusal motions and merely used the motions to delay the proceedings before the court.

Bush v. Washington Mutual Bank (In re Bush), 232 Fed. Appx. 852 (11th Cir. 2007). Whether a bank's foreclosure sale was invalid due to the automatic stay was not properly before the court. The debtor failed to appeal, in his prior bankruptcy case, the district court's order affirming the bankruptcy court's order lifting the stay. The debtor had failed, moreover, to challenge the bank's motion for relief from the stay in his current case on the grounds of the alleged invalidity of the foreclosure sale, thereby waiving the issue. The court also found that the district judge was not required to recuse himself from hearing the debtor's appeal. A judge's ruling in a related case is not sufficient basis for recusal, except where pervasive bias is shown. A judge is not disqualified merely because a litigant sues or threatens to sue him.

28 U.S.C. § 1292 Interlocutory Decisions.

Laurent v. Herkert (In re Laurent), 196 Fed.Appx. 771 (11th Cir. 2006). A bankruptcy court's order granting a trustee's motion to redirect payments did not meet the criteria warranting leave to file an interlocutory appeal. District courts may grant leave to hear appeals of interlocutory orders entered by bankruptcy judges pursuant to 28 U.S.C. § 158(a). Because 28 U.S.C. § 158(a) does not provide the district court any criteria for determining whether to exercise their discretionary authority to grant leave to appeal, courts must look to 28 U.S.C. § 1292(b) which governs discretionary interlocutory appeals. Under § 1292(b), a party must demonstrate: (1) the order presents a controlling question of law; (2) over which there is a substantial ground for difference of opinion among courts; and (3) the immediate resolution of the issue would materially advance the ultimate termination of the litigation. The trustee's motion to redirect payments did not present any issues of controlling law over which there is disagreement among courts. Instead, it resolved practical issues concerning to whom the trustee should pay certain funds.

28 U.S.C. § 1334 Bankruptcy cases and proceedings.

Lawrence v. Goldberg, 573 F.3d 1265 (11th Cir. 2009). Chapter 7 trustee, the trustee's court-approved attorneys, investigators retained with the bankruptcy court's approval to assist the trustee in locating estate assets, and creditor who agreed, with court approval, to finance the trustee's efforts to bring trust assets into the Chapter 7 estate, were all individuals protected by

the *Barton* doctrine under which "a debtor must obtain leave of the bankruptcy court before initiating an action in district court when that action is against the trustee or other bankruptcy-court-appointed officer, for acts done in the actor's official capacity."See *Barton v. Barbour*, 104 U.S. 126, (1881). The *Barton* doctrine applies to actions against officers approved by the bankruptcy court when those officers function "as the equivalent of court appointed officers." *Carter v. Rodgers*, 220 F.3d 1249, 1252 (11th Cir. 2000).

Marshall v. Marshall, 547 U.S. 293, 126 S.Ct. 1735 (2006). The probate exception to federal jurisdiction, an exception that reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate and further precludes federal courts from disposing of property that is in the custody of a state probate court, was not applicable to deprive a bankruptcy court of jurisdiction over a widow's claim that her stepson tortiously interfered with her expectancy of inheritance. The debtor's claim did not involve the administration of an estate, the probate of a will, or any other purely probate matter. The debtor sought *in personam* judgment against the son, not the probate or annulment of a will. Probate court ruling that it had exclusive jurisdiction of widow's claims against stepson could not deprive federal court of jurisdiction over debtor's tort claim asserted in her bankruptcy proceeding.

28 U.S.C. § 1334(b) Jurisdiction.

Winchester Global Trust Co. v. Entrust NPL, Corp. (In re Ryan), 276 Fed. Appx. 963 (11th Cir. 2008). The sole issue before the Eleventh Circuit was whether the bankruptcy court had subject matter jurisdiction to resolve a dispute between two non-debtors over which entity owned certain business records relating to property sold as part of the debtor's bankruptcy estate. The district court determined that the bankruptcy court lacked jurisdiction to determine the ownership of the disputed records, but the Eleventh Circuit reversed finding that the *Lemco Gypsum/Pacor* "conceivable effect" test was satisfied. Under the "conceivable effect" test adopted in *Miller v. Kemira, Inc. (In re Lemco Gypsum, Inc.)*, 910 F.2d 784, 788 (11th Cir. 1990), a dispute is "related to" a case under title 11 when its result "could conceivably" have an "effect on the estate being administered in bankruptcy." The proceeding need not necessarily be against the debtor or against the debtor's property if it could affect the administration of the bankruptcy estate. The key word in the test is conceivable which makes the jurisdictional grant extremely broad. The dispute between the two non-debtors over the documents could conceivably affect the bankruptcy estate because resolution of the dispute could impact the amount of money in the estate where failure to turnover the documents could leave one of the non-debtor's a viable claim for a refund from the estate of all or part of the $60,000 purchase price.

Justice Cometh, Ltd. v. Lambert (In re Lambert), 426 F.3d 1342 (11th Cir. 2005). District court had original, non-appellate jurisdiction over complaint for alleged willful violation of the automatic stay. The district court entered an order dismissing the complaint for lack of jurisdiction finding that the complaint should have been brought in the bankruptcy court and finding that it was without jurisdiction to address stay issues except in appellate capacity. The court of appeals reversed finding that district courts have original, non-appellate jurisdiction over Title 11 cases. It is unquestionable under 28 U.S.C. § 157(a) that district courts may provide that any and all cases under Title 11 or any and all proceedings arising under Title 11

may be referred to the bankruptcy court for that district. The court of appeals concluded, however, that the explicit language of § 1334 grants *original* jurisdiction over Title 11 cases and clearly forecloses a conclusion that the district court lacked subject matter jurisdiction over the case.

Brickell v. Dunn et al. (In re Brickell), 142 Fed.Appx. 385 (11th Cir. 2005)(*not selected for publication)*. A chapter 7 trustee holding property of the estate for distribution to creditors is subject to garnishment by creditors of a creditor. There is no reason to impose a per se ban on garnishment of bankruptcy trustees. While garnishment should not be allowed if it unnecessarily complicates the administration of the bankruptcy estate, the only burden in this case was the substitution of one creditor's name and address for another. Furthermore, the trustee did not object to complying with the garnishments.

Celotex Corp. v. Edwards, 514 U.S. 300, 115 S. Ct. 1493 (1995). A conflict between a district court and a bankruptcy court is resolved by a 7-2 decision. The majority, by Chief Justice Rehnquist, held that judgment creditors must obey an injunction from the Florida bankruptcy court prohibiting execution, without first obtaining permission. The judgment creditors were proceeding directly against the surety on a supersedeas bond. The bankruptcy court found that collection would have an adverse impact on a successful reorganization. The Texas district court, that approved the supersedeas bond, granted permission under R. 65.1. to execute. The Fifth Circuit affirmed and held the Florida injunction was improper. The Supreme Court reversed, upholding the well-established rule that "persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." Bankruptcy courts have comprehensive jurisdiction in order to deal efficiently and expeditiously with all matters connected with the estate, not just those proceedings involving the property of the debtor or the estate. Judgment creditors should have challenged the injunction in the Florida courts rather than collaterally attacking in the Texas courts. The dissent objected to the jurisdiction and constitutionality of an Article I court issuing the injunction based on "related to" jurisdiction which prevents an Article III court from exercising jurisdiction.

Ankenbrandt v. Richards, 504 U.S. 689, 112 S. Ct. 2206 (1992). The Constitution does not exclude domestic relations cases from federal jurisdiction. Statutory interpretation of diversity jurisdiction has crafted an exception for the issuance of a decree determining the domestic relationship as to granting or modifying a divorce, alimony or child custody. The exception does not include enforcement of such a decree. Abstention does not apply when no proceedings are pending in state tribunals. Recognizing that abstention should rarely be invoked, the Court stated it may apply when a case presents difficult state law questions with important public policy issues beyond the case at bar.

Carter v. Rogers, 220 F.3d 1249 (11th Cir. 2000), *cert. denied,* 121 S. Ct. 775 (2001). Applying the *Barton Doctrine*, the Circuit held trustees and other appointed officials may not be sued for acts done in official capacity absent permission by the bankruptcy court. Doctrine applies for either state or federal law claims. Debtor sued the Chapter 7 trustee for breach of official duties in the sale of property of the estate. Because the debtor's causes of action against the former Chapter

7 trustee related to sale of property, they were "related to" and "within the scope" of the bankruptcy proceeding. Because the claims were related to the bankruptcy proceeding, bankruptcy court approval was required before the debtor could bring suit against the trustee. Statutory exception to the *Barton Doctrine* found in 28 U.S.C. § 959 was not applicable as the trustee was not "carrying on the business" of the debtor.

Continental Nat'l Bank of Miami v. Sanchez (*In re* Toledo), 170 F.3d 1340 (11th Cir. 1999). Debtor was a partner in a real estate development. Another partner sued to challenge the validity of a mortgage on partnership property. The estate only had an interest in the partnership, but not the realty, so there was some question as to jurisdiction. Circuit explained the three types of jurisdiction: arising under (matters invoking a substantive right created by the Bankruptcy Code), arising in (administrative-type matters), and related to (whether the outcome of the proceeding could conceivably have an effect on the estate being administered). Because the validity of the lien in question would determine the scope of the estate's assets, there was related to jurisdiction.

Munford v. Valuation Research Corp. (*In re* Munford), 97 F.3d 449 (11th Cir. 1996). Bankruptcy court has jurisdiction to approve settlement which enjoins non-settling defendants from pursuing indemnity and contribution. For the bankruptcy court to exercise subject matter jurisdiction over a dispute, some nexus between the civil proceeding and the title 11 case must exist. There is no requirement that the related action be against the debtor or against debtor's property. Instead, the test for related to jurisdiction is whether the outcome of the proceeding could conceivably have an effect on the bankruptcy estate. Here, the proceeding is related to the bankruptcy case because the settlement produced assets for the estate and settlement depended upon a protective order and injunction. This impact on the administration of the estate was sufficient to satisfy jurisdiction.

Community Bank of Homestead v. Boone (*In re* Boone), 52 F.3d 958 (11th Cir. 1995). Bankruptcy court has no jurisdiction over a post-petition state law action of tortious interference with the sale of a house. Homeowners filed a Chapter 7 petition. Prior to a sale of their house, the mortgagee claimed a balance including an unsecured debt under a dragnet clause in the mortgage, and the sale did not close. The debtors sued for tortious interference and for a determination of the extent of the lien. 28 U.S.C. § 1334(b) related-to jurisdiction requires the outcome of the litigation to have an effect on the administration of the estate. A post-petition claim does not affect a liquidation case, contrasted with a reorganization case.

Carver v. Carver, 954 F.2d 1573 (11th Cir. 1992). The state court held a debtor in contempt for default on support obligations after the petition for relief was filed. The debtor's ex-wife and her attorney were aware of the bankruptcy case, and the debtor obtained an award for damages against them for violation of the automatic stay. The court of appeals reversed, holding that although the automatic stay applies, the court should have abstained from entering an award of damages. Section 362(a) is usually not an exception in Chapter 13 because almost all property is property of the estate. Even though the defendants violated the automatic stay, the bankruptcy court should not have awarded damages and should have abstained from hearing the case

because of the interest of comity with the state. Domestic law is a special category for determination by state courts and the bankruptcy court should avoid being involved. Stay violations should only be considered if the court is not required to delve too deeply into domestic law. Note that Ankenbrandt v. Richards effectively overrules or at least limits the application of Carver.

Morris, *In re*, 950 F.2d 1531 (11th Cir. 1992). Dismissal of a bankruptcy case does not automatically destroy jurisdiction of a related adversary proceeding. The bankruptcy court retains discretion whether to retain jurisdiction over the adversary proceeding. Factors to consider in determining whether to retain jurisdiction include: (1) judicial economy; (2) fairness and convenience to the litigants; and (3) the degree of difficulty of the related legal issues involved.

Lemco Gypsum, Inc., *Matter of*, 910 F.2d 784 (11th Cir. 1990). In order for a case to be related under 28 U.S.C. § 1334(b) the outcome of the civil proceeding must conceivably have an effect on the estate being administered in bankruptcy. There must be some nexus between the related civil proceeding and the bankruptcy case. In this case, the court of appeals determined that the litigation between third parties would have no effect on the estate and therefore jurisdiction was denied.

Davis, *In re*, 899 F.2d 1136 (11th Cir. 1990). Bankruptcy court lacked jurisdiction to award attorney fees to Chapter 7 Trustee under the Equal Access to Justice Act (EAJA) 28 U.S.C. § 2412(d)(2)(B). Only Article III courts can award attorney fees under the EAJA. In any event, Trustee was not an eligible party under the EAJA. Therefore, trustee was not entitled to award of attorney's fees for services rendered in action to set aside preferential transfers to the FMHA.

Furlong, *In re*, 885 F.2d 815 (11th Cir. 1989). Bankruptcy court retained jurisdiction over cause settled by the trustee and debtor. The court's approval of the settlement did not cause the case to be dismissed under Fed. R. Civ. P. 41(a)(A)(ii). Order approving settlement made no mention of dismissing case. Because case was not dismissed, bankruptcy court could entertain motion for entry of judgment.

National Developers, Inc., *In re*, 803 F.2d 616 (11th Cir. 1986). Chapter 11 debtor removed New York state court action directly to Alabama bankruptcy court. Bankruptcy court recommended action not be remanded and district court denied motion to remand. Circuit reversed. While a decision to remand or not to remand a case removed to bankruptcy court is non-reviewable, an appellate court may review the case to determine whether the bankruptcy court had jurisdiction over the removed action. Rather than remove New York state civil action to Alabama bankruptcy court, proper procedure would have been to remove action to New York bankruptcy court and request transfer to Alabama bankruptcy court.

United States v. Huckabee Auto Co., 783 F.2d 1546 (11th Cir. 1986). The jurisdiction of the

bankruptcy courts encompasses determinations of the tax liabilities of debtors who file petitions for relief under the bankruptcy laws. Jurisdiction does not extend to the separate liabilities of taxpayers who are not debtors under the Bankruptcy Code. This determination is true even if a penalty, if assessed, will adversely affect the corporate debtor's reorganization. Here, bankruptcy court erred in enjoining the Internal Revenue Service from pursuing withholding tax claim against responsible party of corporate debtor, since that party had not filed a petition for relief.

Christo v. Padgett, 223 F.3d 1324 (11th Cir. 2000). The Christo family had several investments in Bay Bank & Trust, which was owned by Florida Bay Banks ("FBB"). FBB defaulted on a $4.5 million loan that had been secured by FBB's stock in Bay Bank and individually guaranteed by Christo, Jr., and in a settlement agreement, the court ordered the sale of the Bay Bank stock. Because the Christos family could not purchase the stock because of its dealings with Union Planters Corporation, Christo, Jr. contacted his friend Kenneth Earl Padgett to purchase the Bay Bank stock. Christo, Jr. gave Padgett $250,000, and Christo, Jr. claims that Padgett was to assign his bid to Union Planters if he was successful. Padgett denied such an agreement and said he only purchased the stock for his own profit. SouthTrust, who was the original loan company to FBB, was outbid by Padgett and filed an action to set aside the sale to Padgett because he was a 'strawman' for Christo, Jr. While these matters were pending, Christo, Jr. filed for Chapter 7 on February 16, 1994, not listing any interest in Bay Bank as property of the estate.

The Trustee, William Miller, filed a complaint against Padgett for breach of contract, and on November 14, 1997, the Christo family sued Padgett in Florida state court for alleged breach of oral contract with Christo, Jr. to purchase Bay Bank on their behalf. The case was removed to federal court and the Christo family asked for remand and recusal by the judge, but the request for recusal was denied, and the court later denied the motion to remand. In a July 13, 1998 Order, the district court found that there was no enforceable agreement, and the case was referred to the bankruptcy court to determine whether the proposed settlement in both the Christo and Miller cases were in the best interest of Christo, Jr.'s estate. The settlement was approved, the family's case was dismissed. Debtor and the Christo family both filed appeals to the Eleventh Circuit.

The Court of Appeals held that mandatory abstention is required when state law claims are removed to federal court because of the bankruptcy court's jurisdiction under the plain language of Section 1334(c)(2). In reviewing the district court's decision to remand, the court concluded that the determinative factor of whether 11 U.S.C. § 1334(d) applies is the date on which the original bankruptcy case was filed, and because the petition was filed on February 16, 1994, before the effective date of the 1994 Act, section 1334(d) should not apply. As a result, the Eleventh Circuit did not have jurisdiction to review the district court's decision not to remand under Section 1334(c)(2). The Court also affirmed the district court's decision denying the recusal on grounds of alleged bias and found that the court did not abuse its discretion by approving the settlement between the Trustee and the buyer since the factual findings did not meet the 'clearly erroneous' standard. Due to the approval of the settlement, dismissal of the family's claim on grounds of issue preclusion was proper.

28 U.S.C. § 1441 Removal

Grupo Dataflux v. Atlas Global Group, L.P., 124 S. Ct. 1920 (May 17, 2004). In an action premised on diversity of citizenship, a party's post-filing change of citizenship cannot cure a lack of subject-matter jurisdiction that existed at the time the complaint was filed. When Atlas filed suit in federal court, based on diversity, against Grupo Dataflux, Grupo Dataflux was a Mexican corporation and Atlas claimed citizenship in Texas. After trial it was discovered that at the time the suit was filed two of Atlas's partners were Mexican citizens. These two partners left the partnership shortly after the suit was filed. Their post-filing departure from the partnership did not cure the defect. The partners were not themselves parties — Atlas, the partnership, was the party. Although post-filing *removal* of a *party* may cure a defect in diversity, a change in the citizenship of a party will not do so. The departure of the Mexican partners merely had the effect of changing the citizenship of the party Atlas. No appropriate exception to the general rule applies, and diversity, and therefore jurisdiction, was lacking.

28 U.S.C. § 1447 Remand.

Yusefzadeh v. Nelson, Mullins, 365 F.3d 1244 (11th Cir. 2004). The trial court may not remand, *sua sponte*, following removal, a diversity action for any procedural defect other than lack of subject matter jurisdiction. Following removal, the plaintiff may seek remand. One ground to support remand is when the defendant has waived the right to remove by taking substantial offensive or defensive action in the state court. Such waiver cannot be based on filing a motion to dismiss, which often must be filed before the deadline for removing, and must be determined by the facts. Thus, waiver must be raised by a party and not *sua sponte* by the court.

Anderson v. H & R Block, Inc., 287 F.3d 1038 (11th Cir. 2002), *cert. granted* Beneficial Nat'l Bank v. Anderson, 537 U.S. 1169, 123 S. Ct. 990 (2003). Under the "complete preemption" doctrine, a defendant may remove a case asserting only state law claims only when federal law converts a state claim into a federal claim. The National Bank Act (NBA) did not completely preempt state usury laws against a national bank. The Circuit found that removal jurisdiction did not exist when NBA was passed in 1864, thus there is not Congressional intent to preempt state law. Before this decision, there were splits within this Circuit and now there are splits among the circuits. The Supreme Court will give us the answer whether national banks must answer to usury violations in state court.

Quackenbush v. Allstate Insurance Co., 517 U.S. 706, 116 S. Ct. 1712 (1996). An appellate court may not review remands based on a defect in removal procedure or on a lack of subject matter jurisdiction. A remand under Burford doctrine which is based on an important state interest is best decided in state court, and may be appealed. Federal courts have a strict duty to exercise granted jurisdiction, but may decline to exercise jurisdiction in exceptional circumstances, such as proper Constitutional adjudication, federal-state relations, or prudent judicial administration. Abstention arises from deference to paramount interest of another sovereign.

Snapper, Inc. v. Redan, 171 F.3d 1249 (11th Cir. 1999). A secured creditor filed a state court action to recover from guarantors and the guarantors removed the action based upon diversity

of citizenship. The district court granted the creditor's motion to remand based on a forum selection clause in the security agreements. The Circuit Court considered whether the district court's order was final and concluded it was. Next, it addressed the issue of whether the order fell within the scope of 28 U.S.C. § 1447(c). Section 1447(d) bars review of remand orders where the remand order is based on grounds specified in Section 1447(c). Under § 1447(c), a motion to remand may be made within 30 days after filing of the notice of removal if the basis of the motion is any "defect" other than subject matter jurisdiction. Adopting a narrow definition of "defect," the Court of Appeals concluded that the term referred only to defects in the removal process. After determining that it had jurisdiction, the court considered whether the forum selection clause granted the creditor the absolute right to choose the forum for litigation. Applying ordinary principles of contract waiver, the Circuit Court concluded the guarantors waived the right to remove the case to federal court.

28 U.S.C. § 1452 Removal of Claims Related to Bankruptcy Cases.

Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 119 S. Ct. 1322 (1999). Under 28 U.S.C. § 1446(b), the 30-day removal period begins when the defendant is brought under a court's authority by formal process. Delivery of a "courtesy copy" of the complaint by fax does not trigger the 30-day period. The tradition in our system of justice is for service of process to initiate any jurisdiction or authority over an entity. Service of a summons and access to the complaint is the normal procedure. This case provides some guidance to the jurisdictional issues in bankruptcy procedure for substantive relief from motions.

Rivet v. Regions Bank, 522 U.S. 470, 118 S. Ct. 921 (1998). The Bankruptcy court approved the sale of real estate free of all liens, including second mortgage. Second mortgagees filed state action to enforce mortgage and purchaser removed. Remand denied. The Supreme Court reversed. Federal question jurisdiction governed by "well-pleaded complaint rule." A defense based on a federal question creates no jurisdiction. A case may not be removed on the basis of a federal defense. There is no claim preclusion exception to this rule. The state court should resolve the defense of claim preclusion.

Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 116 S. Ct. 494 (1995). State court action was removed the action to federal court under the bankruptcy removal statute 28 U.S.C. § 1452(a), and the general federal removal statute, § 1441(a). The bankruptcy court held that the removal was timely and proper, and that it had jurisdiction. The district court reversed and, in effect, remanded the case to state court, holding that the removal was untimely under §§ 1441(a) and 1452(a) and that the bankruptcy court lacked jurisdiction. The Sixth Circuit dismissed petitioner's appeal for lack of jurisdiction, holding that §§ 1447(d) and 1452(b) barred appellate review of the District Court's remand order. Appeal was taken to the Supreme Court which affirmed the Sixth Circuit. Sections 1447(d) and 1452(b)'s prohibition upon review of remand decisions applies regardless of whether the case was removed under § 1441(a) or § 1452(a).

University of South Alabama v. American Tobacco, 168 F.3d 405 (11th Cir. 1999). Federal Court must always determine its jurisdiction before exercising authority. A removed case must be remanded if the court determines it lacks jurisdiction. Removal is to be construed strictly and all doubts about jurisdiction are to be resolved in favor of remand. A State, or an agency, arm,

or alter ego of the State, is not a citizen of a state to support diversity.

Ariail Drug Co. v. Recomm International Display, Inc., 122 F.3d 930 (11th Cir. 1997). Fraud and violations of securities and racketeering laws removed to district court pursuant to 28 U.S.C. § 1452, based on related to jurisdiction. The district court determined that there was no related to jurisdiction as the claims were not "related" to the bankruptcy proceedings and ordered remand. Circuit court could not review remand order pursuant to prohibition in 28 U.S.C. § 1447(d). There is no appellate jurisdiction when remand is based on either lack of subject matter jurisdiction or procedural defects in removal.

National Developers, Inc., *In re*, 803 F.2d 616 (11th Cir. 1986). Chapter 11 debtor removed New York state court action directly to Alabama bankruptcy court. Bankruptcy court recommended action not be remanded and district court denied motion to remand. Circuit reversed. While a decision to remand or not to remand a case removed to bankruptcy court is non-reviewable, an appellate court may review the case to determine whether the bankruptcy court had jurisdiction over the removed action. Rather than remove New York state civil action to Alabama bankruptcy court, proper procedure would have been to remove action to New York bankruptcy court and request transfer to Alabama bankruptcy court.

28 U.S.C. § 1930 Bankruptcy Fees.

Cash Cow Serv. of Fla., LLC v. U.S. Trustee (In re Cash Cow Serv. of Fla., LLC), 296 F.3d 1261 (11th Cir. 2002). Chapter 11 debtor's business provided consumer loans to customers, and U.S. Trustee sought to compel debtor to pay quarterly fees based on calculation that included these loans as "disbursements." When the district court reversed the bankruptcy court's grant of motion to compel, U.S. Trustee appealed. The Eleventh Circuit, addressing an issue of first impression, found that the limited case law defining disbursements did not work to limit trustee fee calculations only to "payments." Thus, reversing the district court, the Circuit held that because the loans were made from property of the debtor's Chapter 11 estate, they were disbursements to be included in the trustee's fee calculation.

Walton, Trustee v. Jamko, Inc., (In re Jamko), 240 F.3d 1312 (11th Cir. 2001). In a case of first impression, the Circuit held that post-confirmation UST quarterly fees paid by a reorganized debtor in Chapter 11 pursuant to 28 U.S.C. § 1930(a)(6) are computed on the total sum of all disbursements, including ordinary and necessary business operating expenses. Congress imposed a tax in 28 U.S.C. § 1930(a)(6) on all post-confirmation disbursements. The statute does not define "disbursements." The Circuit held Congress intended the UST fee to apply to all disbursements made during the entire bankruptcy case, including ordinary operating expenses, before and after confirmation, as a type of user tax on those who benefit the most from the program. Thus, it applied to all payments and not just to disbursements to creditors pursuant to a confirmed plan. Note that these fees also now apply in Alabama and North Carolina.

28 U.S.C. § 1961 Interest.

Claremont McKenna College v. Asbestos Settlement Trust (In re The Celotex Corp.), 613 F.3d 1318 (11th Cir. 2010). Colleges were not entitled to judgment-rate interest on their allowed asbestos-related property damage claims against the Chapter 11 debtor's asbestos settlement trust. The colleges argued that they were entitled to post-judgment interest on their claims at the federal judgment rate prescribed by 28 U.S.C. § 1961. The court held that the colleges were not entitled to judgment-rate interest, reasoning that express provisions in the debtor's Chapter 11 plan documents stated that no interest was to be paid on *"any [c]laim."* In addition, the fundamental purpose of the trust was to ensure that funds would be available to pay future claims in substantially the same manner. To require the trust to pay judgment-rate interest when the rate of return for the trust's investments was below the judgment-rate could potentially deplete the limited pool of money set aside to pay future claims.

29 U.S.C. § 1341 Termination of Single-Employer Plans.

Beck v. Pace Inter. Union, 127 S.Ct. 2310 (2007). Merger is not a permissible method of terminating a single-employer defined pension plan under ERISA. An employer that sponsored and administered such a plan did not have a fiduciary obligation under ERISA to consider a merger with a multiemployer plan as a method of terminating the plan. The employer could instead satisfy its obligations to plan participants and beneficiaries by purchasing annuities.

CASES UNDER THE BANKRUPTCY RULES

Fed. R. Bankr. P. 1009 Amendments of Petition, Lists, Schedules and Statements.

Doan, Matter of, 672 F.2d 831 (11th Cir. 1982). Bankruptcy court has no discretion to deny leave to amend schedule of exemptions absent bad faith or prejudice to creditors. (Applying former Rule 110).

Fed. R. Bankr. P. 2002 Notice to Creditors.

Dusenbery v. United States, 534 U.S. 161, 122 S.Ct. 694 (2002). Due process requires a notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652 (1950). In a 5-4 opinion, the majority held certified letter received in mail room and routed to delivery of prisoner was sufficient notice. Minority wanted proof of handling from mail room to the prisoner.

Gordon v. Alcatel Contracting Inc. (*In re* Slaughter Co. & Associates), 219 F.3d 1279 (11th Cir. 2000), *reh'g denied*, 234 F.3d 713, *cert. denied,* 121 S.Ct. 1217. Circuit affirmed district court's reversal of bankruptcy court, which had denied request for allowance of untimely proof of claim. Chapter 7 case was originally noticed as "no asset" case in which no proofs of claim had to be filed. Creditor's attorney filed request for notices. Eighteen months later, after discovery of assets, Clerk failed to send notice of new bar date to creditor's attorney. Because Bankruptcy Court Clerk had failed to meet its duty, proof of claim had to be treated as timely filed. Creditor had right to rely upon Bankruptcy Court Clerk to send notice.

Fed. R. Bankr. P. 2004 Examination.

Younger, *In re*, 986 F.2d 1376 (11th Cir. 1993). Involuntary Chapter 7 Debtor failed to testify at his Fed. R. Bankr. P. 2004 examination. District Court found him in contempt of court for refusing to testify at the 2004 examination and ordered him incarcerated indefinitely until he fully complies with the 2004 order. Debtor appealed. Circuit held civil contempt under 28 U.S.C. § 1826 applies in bankruptcy cases when a debtor refuses to testify at 2004 examination, after receiving use and derivative use immunity. Confinement is limited to the lesser of the length of the case or eighteen months from the confinement order.

Fed. R. Bankr. P. 2014 Employment of Professional Persons.

Quarles and Brady LLP v. Maxfield (In re Jennings), 199 Fed.Appx. 845 (11th Cir. 2006). Failure of Chapter 11 debtor's law firm to make full disclosure of the numerous connections between its many clients in application for employment and accompanying affidavit was not excused by firm's disclosure to the bankruptcy court of the connections in other filings and pleadings. The law firm argued that although it failed to include all of its connections in its application and affidavit, the connections were actually disclosed to the bankruptcy court in other filings and pleadings. The Eleventh Circuit held that bankruptcy courts are not obligated to hunt around and ferret through thousands of pages in search of the basic disclosures required by Rule 2014.

Under Rule 2014 the applicant must disclose all connections, not merely those which rise to the level of conflicts.

Fed. R. Bankr. P. 2016 Fee Applications.

Beverly Manufacturing Corp., *In re*, 841 F.2d 365 (11th Cir. 1988). Fed. R. Bankr. P. 2016 requires that persons seeking compensation for service from an estate "shall file with the court a detailed statement of the (1) services rendered, time expended and expenses incurred and (2) the amounts requested. Here, the fee application was inadequate. Although some of the items in the petition listed the name of an interested party in the proceedings or the general task, there was no indication of the specific nature of each service performed and its relation to the bankruptcy proceeding. In addition, several entries "lumped" together different services in one time frame. The burden is on the attorney claiming a fee in a bankruptcy proceeding to establish the value of his services.

Fed. R. Bankr. P. 3003(c) Filing Proof of Claim.

The Charter Co., *In re*, 876 F.2d 861 (11th Cir. 1989). Claims filed after bar date in Chapter 11 case cannot participate in the reorganization unless claimant establishes sufficient grounds for its failure to timely file a proof of claim. Under some circumstances, some documents filed by claimant may constitute an informal proof of claim. The question is whether the document: 1) apprizes the court of the existence, nature, and amount of the claim, and 2) makes clear the claimant's intention to hold the debtor liable for the claim. The mere knowledge by debtor of the creditor's claim will not suffice to establish existence of valid proof of claim prior to claim bar date. Here, claimants' motion for relief from stay to proceed with civil actions alleging tort injury constituted informal proof of claim filed prior to claim bar date. The motion apprized bankruptcy court of existence and nature of claims and clearly stated that claimants sought to hold debtors liable in tort for injuries. Claimants' lack of participation in reorganization plan did not preclude finding that they intended to hold debtors liable.

Fed. R. Bankr. P. 3007 Objections to Claims.

Army Aviation Center Fed. Credit Union v. Yelverton (In re Yelverton), 298 Fed. Appx. 941 (11th Cir. 2008). In Alabama, a future advance clause is enforceable if the clause is clear and unambiguous and extends security to cover a debt that is "between the same parties." Multiple loan agreements can be "between the same parties" for cross-collateralization purposes even when only one of the parties signs both of the agreements.

Universal American Mortgage Co. v. Bateman (*In re* Bateman), 331 F.3d 821 (11th Cir. 2003). This is a most important Chapter 13 case of first impression in this Circuit, reviewing the vague language of bankruptcy procedure and the interrelations of claims allowance and plan confirmation, §§ 502(a), 1322, 1325 and 1327, and Rule 3007. The Circuit denied a collateral attack on an improperly confirmed plan, but held an unchallenged residential mortgage lien and claim survived the plan provisions and discharge. Because of its importance, a lengthy review of this case is given.

The plan provided for a residential mortgage arrearage of $21,600, payable in fixed payments during the plan payments. The creditor timely filed a proof of a secured claim of $49,178.80 for the arrearage. No objection to the proof of claim was filed. Without objection, the plan was confirmed after the bar date for filing claims, sometimes called a late confirmation hearing. No appeal was filed. Over a year after confirmation, the debtor filed an objection to the proof of claim and the creditor responded with a motion to dismiss on the ground that the plan did not conform to the provisions of the Code, §§ 1322(b) and 1325(a). The bankruptcy court sustained the objection and denied the motion to dismiss, holding the creditor was bound by the confirmed plan provisions under §1327.

Before specifically addressing the issues, the Circuit gave a most helpful review of the confirmation and claims process. The debtor files a petition and proposed plan, which contains the treatment to be afforded each creditor. Before a plan is confirmed, the parties in interest have an opportunity to file claims and litigate any dispute over the claim. All parties have a responsibility to assure the confirmed plan results in a synthesis of the interests of all parties, consistent with the Code and Rules. The debtor has a special duty to ensure that the plan provides an accurate and thorough treatment of all claims. The bankruptcy court has an independent duty to ensure that the proposed plan comports with the requirements of the Code. Once the plan is confirmed and the plan provisions are satisfied, the debtor receives a discharge.

The first issue is the objection to the claim and whether the creditor is bound by the claim amount provided for in the confirmed plan. Section 1322 states the mandatory contents of a plan. The holder of a secured claim is protected to the extent of the value of the collateral, § 506(a); however, § 1322(b)(2) prohibits any modification of a claim secured only by a homestead, even if the claim is undersecured. Nobelman v. Am. Savs. Bank, 508 U.S. 324 (1993). Often the mortgage is in default which can be cured, § 1322(b)(5), without an improper modification. Sections 1322(b)(2) and (5) permit the mortgage secured claim to be split into the current payments and the arrearage, but this does not compromise the amount of the arrearage. The debtor must provide treatment for the mortgage in the plan. If the creditor wants to receive payments under the confirmed plan, it must timely file a proof of claim. However, the creditor is not required to file a proof of claim as the unchallenged lien survives the discharge. Folendore, *In re*, 862 F.2d 1537 (11th Cir. 1989). The timely filing of a proof of claim constitutes prima facie evidence of the validity and amount of the claim, which is rebutted by an objection, § 502(a). Although § 502(a) does not provide for a time limit to file an objection, it must be filed prior to plan confirmation. Justice Oaks II, Ltd., *In re*, 898 F.2d 1544, 1553 (11th Cir. 1990). This time limitation is a primary key to the holding of this case. Thus, the confirmation of the plan without an objection to the timely filed proof of claim makes the claim deemed allowed and is prima facie evidence of the validity and amount of the mortgage arrearage, § 502(a). The objection to the claim should have been overruled. The bankruptcy court holding that the creditor should have protected its rights by objecting to the plan and confirmation and is thereafter bound by the terms of the confirmed plan is wrong and is reversed. The burden was on the debtor to have objected to the claim before confirmation to resolve the conflict between the proof of claim and the plan provision. The circuit refused to permit a plan provision to constitute a constructive objection to the claim, and refused to permit the failure to object to confirmation to act as acceptance to the plan treatment, which § 1325(a)(5)(A) permits an otherwise impermissible provision.

On the second issue of the denial of the motion to dismiss, the creditor argues that a confirmed plan with improper claim treatments is not entitled to res judicata under § 1327. The res judicata

refers to claim preclusion, which is harsher than common law issue preclusion. It has the same finality and effect as any federal court final judgment on the merits. The terms of the confirmed plan on the treatment of a claim, however improper, fit within claim preclusion because it should have been presented prior to confirmation. If an objection to confirmation had been filed or the confirmation appealed, it would have prevailed. Absent such action, the confirmed plan is binding. The motion to dismiss was properly denied as a collateral attack.

Nevertheless, the Circuit follows the reasoning in Simmons v. Savell, 765 F.2d 547, 559 (5th Cir. 1985) that a secured creditor's lien survives a contrary plan confirmation. If the lien survives, so must any corresponding arrearage claim. Section 502(a) is the applicable provision for claims allowance and, consequently, should control over the more general policy considerations embodied in § 1327(a). Hobdy, *In re*, 130 B.R. 318, 321 (9th Cir. BAP 1991). The arrearage claim provided in the unchallenged timely filed proof of claim is unaffected by the terms of the confirmed plan. The creditor retains its rights under the mortgage, subject to the automatic stay, until the allowed claim is satisfied in full.

Old Naples Securities, Inc., In re, 223 F.3d 1296 (11th Cir. 2000). Claimants in brokerage liquidation proceeding under Securities Investor Protection Act (SIPA) objected to SIPA trustee's denial of their claims on ground that they were not customers of debtor-brokerage. The Bankruptcy Court sustained objections and allowed claims, which was affirmed. The Court of Appeals affirmed holding that: (1) claimants deposited funds with brokerage; (2) funds were deposited for purpose of purchasing securities; and (3) claimants were not required to show that funds were deposited in normal course of brokerage's business.

OB/GYN Solutions, L.C. v. Six (*In re* Six), 80 F.3d 452 (11th Cir. 1996). Judgment assignee filed proof of claim. Under Florida law, judgment erroneously failed to credit the higher of the foreclosure bid price or the fair market value as of the date of foreclosure sale against the debt. Acknowledging the judgment defect, the claimholder sought the full amount on the ground the debtor should have raised the problem prior to entry of judgment, and the debtor was thereafter barred by res judicata to challenge the amount. Florida does not rigidly enforce res judicata when it results in manifest injustice. Bankruptcy court and district court disallowed claim to prevent injustice. Court of appeals affirmed by emphasizing that proof of claim conceded the need to credit the value against the debt. Without admitting it, the court of appeals upheld the broad equitable powers of the bankruptcy court to inquire into the validity of claims.

White, *In re*, 908 F.2d 691 (11th Cir. 1990). Pursuant to § 506(a), bankruptcy court *sua sponte* ruled on a creditor's claim in the absence of an objection to the claim by a party in interest. Circuit held the bankruptcy court should not have ruled on claim in the absence of a claim objection. Such action violated Fed. R. Bankr. P. 3007.

Fed. R. Bankr. P. 3012 Valuation of Security.

Calvert, *In re*, 907 F.2d 1069 (11th Cir. 1990). Bankruptcy court erred in holding a hearing on value of creditor's security in conjunction with hearing on debtor's proposed Chapter 13 plan, without giving notice that the court would determine the extent to which claim was secured. Fed.

R. Bankr. P. 3012 requires that specific notice be given that the bankruptcy court will determine the extent to which a claim is secured. Mere notice that the bankruptcy court will hold a confirmation hearing on a proposed bankruptcy plan, without including notice specifically directed at the security valuation process, does not satisfy the requirement of Rule 3012.

Fed. R. Bankr. P. 3020 Objection to Confirmation.

Justice Oaks II, Ltd., *In re*, 898 F.2d 1544 (11th Cir. 1990). Equitable subordination should have been raised in the objection to confirmation. Thereafter, they are barred by claim preclusion. As claims could have been raised in guarantors' objection to confirmation of Chapter 11 plan, doctrine of claim preclusion barred guarantors from relitigating claims in adversarial proceeding post confirmation.

A & B Heating & Air Conditioning, Matter of, 861 F.2d 1538 (11th Cir. 1988). Payment of "trust fund" employment taxes by individual officer of debtor corporation does not moot objection to confirmation by IRS to plan's allocation of payments to those taxes first. Not until the bar date for a tax refund suit expires is the objection moot. (On remand after the original opinion at 823 F.2d 462 was vacated by United States Supreme Court.)

Fed. R. Bankr. P. 4003(b) Objection to Exemptions.

Taylor v. Freeland & Kronz, 503 U.S. 638, 112 S. Ct. 1644 (1992). A trustee may not contest the validity of a claimed exemption under § 522(1) after the 30-day period of time under Fed. R. Bankr. P. 4003(b) has expired. This deadline for filing a contest of the exemption applies even though the debtor has no basis for claiming the exemption and it is not claimed in good faith.

Levine v. Weissing, Trustee (*In re* Levine), 134 F.3d 1046 (11th Cir. 1998). A Chapter 7 debtor transferred non-exempt assets into exempt annuities. Trustee brought action to recover assets. Debtors argued the trustee's action was barred as outside 30 day window to object to exemptions allowed under Fed. R. Bankr. P. 4003(b). Circuit held the trustee's fraudulent transfer complaint, contesting debtors' transfer of non-exempt assets into exempt annuities, was not subject to 30 day limitations period governing objections to claimed exemptions. Rather, the action was subject to the 2 year statute of limitations governing adversary proceedings under trustee's avoidance powers. Trustee was not contesting exemptions per se, but was seeking to avoid an allegedly fraudulent transfer.

Allen v. Green (*In re* Green), 31 F.3d 1098 (11th Cir. 1994). A claimed exemption of a cause of action for nominal value successfully exempts the entire value, if no timely objection is filed. Fed. R. Bankr. P. 4003. The trustee may not wait until the value of the contingent asset is established before contesting the exemption.

Fed. R. Bankr. P. 4004(a) Time to File Complaint Objecting to Discharge.

Kontrick v. Ryan, 540 U.S. 443, 124 S. Ct. 906 (2004). Are the time limitations in Rule 4004(a)

jurisdictional or waivable affirmative defenses? The plaintiff timely filed the complaint objecting to discharge. Later, he amended the complaint with leave of court, but he did not seek any extension of the time limitations for the claims in the amended complaint. The debtor filed an answer to the amended complaint, which did not challenge the late filing. Summary judgment was granted to the plaintiff. Debtor raised the untimeliness of the complaint for the first time in a motion for reconsideration. Rule 4004(a) sets a 60 day from the first date set for the meeting of creditors deadline for filing a complaint objecting to discharge. Rules 4004(b) and 9006(b)(3) include limited abilities to extend the deadline. The Supreme Court held the times to be affirmative defenses. Only Congress may determine subject matter jurisdiction. The Courts adopt rules of procedure, which may not extend or limit jurisdiction. Rule 9030. Rules of procedure establish "claim-processing rules". Unfortunately, courts have loosely used the term jurisdiction, and the Court encouraged the use of jurisdiction only to refer to cases a court may adjudicate with subject matter jurisdiction and to refer to persons subject to personal jurisdiction. These issues may be raised at any time. Claim-processing rules for time limitations, such as these, serve three purposes: (1) to inform the pleader of a deadline; (2) to instruct the court on its discretionary limits to enlarge that time; and (3) to afford an affirmative defense, which may be waived. Normally, affirmative defenses must be raised in an answer or responsive pleading. Certainly, it is waived after a ruling on the merits. In the facts of this case, no equitable grounds were raised to permit the late filing and the Court declined to rule if equitable exceptions apply. The holding of this case should extend to the deadline in Rule 4007(c), filing objections to dischargeability of a claim.

Fed. R. Bankr. P. 4004(b) Extension of Time to File Complaint Objecting to Discharge.

Marshall v. Demos (*In re* Demos), 57 F.3d 1037 (11th Cir. 1995). Due to debtor's attorney's failure to attend Rule 2004 examination, Trustee moved for extension of time to file complaints to object to discharge and to determine the dischargeability of debts. Motion was made pursuant to § 105(a) and not Rules 4004(b) or 4007(c). Motion was granted by the bankruptcy court. A creditor, not a party to the motion for extension, filed a complaint after the original deadline. Debtor moved for dismissal of the complaint as untimely. Circuit held the creditor could rely upon the order extending the time to file complaints to determine dischargeability and objecting to discharge. Since the motion was filed under § 105, and not Rules 4004(b) and 4007(c), and it referred to all creditors, creditor's complaint was timely. A different result may have been reached if the motion had been made under the Rules, since normally a motion for extension inures only to the benefit of the movant.

Coggin v. Coggin (*In re* Coggin), 30 F.3d 1443 (11th Cir. 1994). Circuit held that a motion to extend the bar date under Rule 4004(b) is "made" when filed. Circuit rejected the argument that the motion was "made" when served upon the opposing party. Failure to timely file under Rule 4004(b) is a jurisdictional bar.

Fed. R. Bankr. P. 4005 Burden of Proof in Objecting to Discharge.

Wines v. Wines, 997 F.2d 852 (11th Cir. 1993). In order to deny a bankruptcy discharge, evidence of actual intent to defraud creditors must be shown. Under Fed. R. Bankr. P. 4005, the creditor has the initial burden of proof to establish that debtor has an actual, wrongful intent to defraud

creditors.

Fed. R. Bankr. P. 4007(c) Time for Filing Dischargeability Action.

Alabama Dept. of Econ. and Cmty. Affairs v. Lett (In re Lett), 368 Fed. Appx. 975 (11th Cir. 2010). Debtor preserved statute of limitations defense under Bankruptcy Rule 4007(c) even though inartfully plead where debtor plead the "statute of limitations" generally as an affirmative defense without citing Rule 4007(c) until debtor filed a post-trial brief. Had the debtor failed to raise the Rule 4007(c) defense before litigation on the merits, the defense would have been forfeited, but by raising same in his answer, pretrial statement of issues, at the close of evidence, and in a post-trial brief the debtor preserved the defense.

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Durham Ritz, Inc. v. Williamson (*In re* Williamson), 15 F.3d 1037 (11th Cir. 1994). Section 523 complaint to determine dischargeability of a debt must be filed before the deadline fixed by Fed. R. Bankr. P. 4007(c). When a creditor has actual notice of the bankruptcy petition in time to timely file under Rule 4007(c), the 60 day deadline applies, despite an incomplete or inaccurate notice of the deadline given by the clerk of court. Due process is satisfied by timely notice of the petition, without any additional notice of the deadline fixed by the federal rules.

Alton, *In re*, 837 F.2d 457 (11th Cir. 1988). Creditor with actual notice of bankruptcy proceeding filed motion to extend deadline to file dischargeability complaint. Under Rule 4007(c), any motion to extend the time period for filing a dischargeability complaint must be made before the running of that period. The provisions of Rule 4007(c) are mandatory and do not allow a court any discretion to grant a late filed motion to extend time to file a dischargeability complaint. Even if an unlisted creditor did not receive notice of the bar date for filing a dischargeability complaint as required in Fed. R. Bankr. P. 4007, actual notice of bankruptcy case (not necessarily notice of bar date) provides sufficient notice.

Fed. R. Bankr. P. 5004 Disqualification.

Colony Square Co., *In re*, 819 F.2d 272 (11th Cir. 1987). In action concerning ownership of property, after hearing, bankruptcy court contacted counsel for one side and requested counsel

prepare order. Bankruptcy judge gave instructions on what order should say. Bankruptcy judge did not give opposing side opportunity to review proposed order. Opposing party moved for disqualification of bankruptcy judge and for order to be vacated. Circuit held that while the ghostwriting of judicial opinions by litigants is condemned, especially where no notice is given to the opposing party, such an order is not automatically invalid. Rather, the objecting party must show fundamental unfairness and denial of due process.

Fed. R. Bankr. P. 7001 Scope of Rules of Part VII.

Christopher v. Cox (In re Cox), 493 F.3d 1336 (11th Cir. 2007). Debtor filed adversary proceeding to determine the extent of the bankruptcy estate's interest in property against an individual who claimed to have purchased the property before the debtor filed bankruptcy. Under Georgia law, parties may create a mortgage even though the document they use provides for the conveyance of title rather than the creation of a lien. It is black letter law that a transaction that is on its face an absolute conveyance of title may in actuality convey title only as security for a loan. A court may look beyond the four corners of the conveyance to parole evidence to determine whether the parties intended to create a conveyance or a mortgage which creates a question of fact. Not infrequently lenders try to disguise mortgages as conveyances to avoid the pro-mortgagor regime of law.

Fed. R. Bankr. P. 7001(2) Adversary Proceeding to Determine the Validity, Priority, or Extent of a Lien.

United States v. McDermott, 507 U.S. 447, 113 S. Ct. 1526 (1993). A federal tax lien filed before taxpayer acquired title in real property primes a judgment lien filed before tax lien. Judgment lien is perfected when it attaches to property, but tax lien is perfected on date of filing.

Textron Fin. Corp. v. United Fin. Group, Inc. (In re Alphatech Systems, Inc.), 317 F.3d 1267 (11th Cir. 2003). Creditor who provided financing for equipment purchased by debtor filed an adversary proceeding against creditor holding blanket security interest in all, including after-acquired, debtor's goods, equipment, etc. to determine priority of the competing liens. After granting blanket security interest to one creditor, debtor accepted delivery of equipment without having necessary financing. Then, over a month later, debtor negotiated financing with second creditor. Financing creditor argued that its purchase money security interest placed it ahead of blanket creditor in terms of priority payment. Both the bankruptcy and district courts rejected financing creditor's argument, finding that financing creditor had failed to properly perfect, via filing a UCC-1 financing statement, its security interest within 15 days of delivery of the collateral as proscribed by Florida UCC law. On further appeal to the Eleventh Circuit, financing creditor argued that the 15-day time period did not begin to toll until debtor had accepted delivery *and* signed the financing agreement. The Circuit, affirming blanket creditor's priority over financing creditor, rejected this argument as opening the door for debtors and creditors to manipulate perfection and priority laws.

National City Bank of Ky., f.k.a. Nat'l City Bank, Ky. v. Toffel, Trustee (In re Alabama Land & Mineral Corp.), 292 F.3d 1319 (11th Cir. 2002). Subsidiary and parent company had entered into

agreements prepetition with bank under which bank would extend $1 million line of credit to subsidiary to be held in escrow, which would be invested in CD at subsidiary's direction, until drawn on by third-party corporation and for which subsidiary and parent company would indemnify bank. Subsidiary and parent company then filed for bankruptcy, ultimately converting from Chapter 11 to Chapter 7. Two years postpetition, the third-party corporation presented a $1 million draft to Bank, which issued payment and then demanded indemnification and fee from Chapter 7 trustee. When trustee refused, bank moved for relief from the automatic stay. After the bankruptcy court denied the motion, the district court, facing cross-motions for summary judgment on appeal, denied the bank's motion and affirmed judgment for the trustee. On further appeal, however, the Eleventh Circuit admonished the bankruptcy and district courts as elevating form over substance by holding that the bank had not properly perfected, via sole method of possession, the CD and, therefore, could not be secured. The Circuit found that the substance of the agreements was the creation of the $1 million letter of credit, that UCC Revised Article 9 defined funds of this type as deposit accounts, and that, as such, perfection of bank's security interest was governed by common law of pledge, which was satisfied here. Accordingly, the Circuit reversed denial of summary judgment for the bank and remanded the case for a determination of interest.

Haas v. Internal Revenue Service (*In re* Haas), 31 F.3d 1081 (11th Cir. 1994). A tax lien primes a prior real estate mortgage, when the mortgage is erroneously satisfied and then reinstated after the tax lien is filed. Even though Alabama law relates the reinstated mortgage back to the original filing date, the Internal Revenue Code controls and does not accept a relation back priority.

Continental National Bank of Miami v. Tavormina (*In re* Masvidal), 10 F.3d 761 (11th Cir. 1993). Chapter 7 trustee filed complaint under Fed. R. Bankr. P. 7001(2) seeking an order declaring validity and priority of parties' interest in garnished funds. Circuit held service of a writ of garnishment under Florida law does not create a lien. Perfection of the lien requires a judgment on the garnishee and delivery of the writ of execution on the sheriff.

Rush v. JLJ Inc. (*In re* JLJ Inc.), 988 F.2d 1112 (11th Cir. 1993). Chapter 11 debtor brought adversary proceeding for determination as to whether debtor should make payments on promissory notes to mortgagee or alleged assignee. Circuit held case had to be remanded as neither district courts nor courts of appeals may make independent factual findings, including inferences from the facts. If determinative factual question is unresolved, it must be remanded to bankruptcy court. Here, factual question remained as to whether principal had orally revoked power-of-attorney.

Utility Contractors Financial Services, Inc. v. AmSouth Bank, N.A. (*In re* Joe Morgan, Inc.), 985 F.2d 1554 (11th Cir. 1993). Factor brought adversary proceeding, seeking determination of priority of its claim in proceeds from collection of Chapter 7 debtor's accounts receivable. Circuit held a holder in due course of negotiated instruments primes a perfected security interest in accounts receivable. Holder in due course requirement of good faith, as well as without notice of claim or defense requirement, involves both an objective and subjective component. "Alabama law incorporates the objective good faith requirement which does not countenance turning a

blind eye, however empty the head and white the heart."

Washington, *In re*, 837 F.2d 455 (11th Cir. 1988). Bankruptcy Trustee challenged lien on mobile home arguing it was not effective under the Georgia Motor Vehicle Certificate of Title Act. Circuit held Georgia Motor Vehicle Certificate of Title Act was inapplicable; once double wide mobile home became permanently attached to land it ceased to be a vehicle for title purposes.

Atchison, *In re*, 832 F.2d 1236 (11th Cir. 1987). In a good case about the creation of security interests, the Circuit repeated the well established law that a security interest arises when 1) debtor signs an agreement describing the collateral; 2) value is given; and 3) debtor has acquired rights in the collateral. Absent evidence of fraud or ambiguity in mortgage, parol evidence rule excludes testimony of debtor that he did not intend to grant security interest.

Fed. R. Bankr. P. 7004 Process; Service of Summons, Complaint.

Vega v. McKay, 351 F.3d 1334 (11th Cir. 2003). Can an attorney be liable under the Fair Debt Collection Practices Act (FDCPA) for serving a summons and complaint on a consumer debtor? The issue is whether this act is an "initial communication" under FDCPA which requires additional notice requirements. The Circuit affirmed dismissal of the consumer's complaint and held that service is not such a communication.

Fed. R. Bankr. P. 7005 Service and Filing Pleadings.

Barnett v. Okeechobee Hospital, 283 F.3d 1232 (11th Cir. 2002). There is a rebuttable presumption that when an item is (1) properly addressed, (2) stamped, and (3) mailed, then it is received by the addressee. (This presumption does not apply to clerks of courts when documents are filed.) When the addressee is an individual, the presumption is rebutted by a denial of receipt. When the addressee is an office, an affidavit by one person denying receipt is insufficient to rebut the presumption. The denial must be supported by the office's practice and procedure for receiving and processing incoming mail in order to draw an inference that the mail was or was not received. All evidence must be based on personal knowledge and cannot be hearsay. Here, the presumption of receipt attached and the dismissal reversed.

Fed.R.Bankr.P. 7008 General Rules of Pleading.

Lubin v. Cincinnati Ins. Co. (In re Integrity Bancshares, Inc.), 677 F.3d 1039 (11th Cir. 2012). Trustee filed breach of contract suit against insurer to recover under bond for which both the debtor and its wholly owned subsidiary were named insureds after insurer denied subsidiary's claim for loss allegedly resulting directly from fraudulent acts of the subsidiary's employees. The Eleventh Circuit affirmed the dismissal of the complaint finding that the trustee had no right to pursue the claim against the insurer premised on the subsidiary's proof of loss.

Fed. R. Bankr. P. 7012 Defenses and Dismissals.

Mukamal v. Bakes (In re Far & Wide Corp.), 378 Fed. Appx. 890 (11th Cir. 2010). Under Delaware law directors and officers of the debtor owe their fiduciary obligations to the corporation, not to the debtor's creditors. Allegations of injury to creditors, rather than the debtor, were insufficient to state a claim for breach of fiduciary duty of loyalty against former directors and officers where the only injury alleged was to creditors as a result of debtor staying in business longer and deepening its insolvency when it would have been in best interest of creditors for debtor to cease business and liquidate, but officers owed no duty to liquidate to creditors.

Medsker v. Feingold, 307 Fed. Appx. 262 (11th Cir. 2008). Shareholders filed suit alleging that investment advisors and hedge fund managers engaged in fraud and civil conspiracy to induce investment in a hedge fund resulting in significant losses The defendants moved for judgment on the pleadings and argued that the plaintiffs' claims were derivative in nature because their allegations were common to all shareholders and were, thus, improperly brought in a direct action. In traditional derivative suits, shareholders sue to enforce a right belonging to the corporation which the corporation itself could have brought suit. A claim may be brought, however, in a direct action where the injury was sustained directly by the plaintiff bringing the suit and is separate and distinct from injuries sustained by the corporation and all other shareholders equally. Here the securities fraud claims constituted direct injuries sustained by the plaintiffs. This was not an injury to the corporation, but to the investors so the Eleventh Circuit concluded that the suit could be brought as a direct action. Plaintiffs' civil conspiracy claims were derivative claims where plaintiffs alleged that the defendants used their positions as managers and directors of the entities to abscond with funds invested in another corporation. This claim was indistinguishable from the claims of self-dealing and mismanagement that courts have held may only be brought as derivative claims.

Gunn v. TitleMax of Alabama, Inc. (In re Gunn), 317 Fed. Appx. 883 (11th Cir. 2008). The issue before the court of appeals in this case was whether each of the prepetition monthly pawnshop transactions between the debtor and TitleMax constituted a subsequent loan agreement requiring new TILA disclosures or whether same were mere extensions of the original pawn agreement that did not require new TILA disclosures. The court found that no refinancing occurred requiring the lender to make new TILA disclosures to the debtor.

Barnett v. Okeechobee Hospital, 283 F.3d 1232 (11th Cir. 2002). This medical malpractice action against the VA reviews standards and burdens on motions to dismiss. The action was dismissed because the statute requires that a prior claim have been presented to the VA. Plaintiff said claim was mailed with sufficient postage to correct address and submitted a copy of claim. Defendant said VA never received it. A rule 12(b)(6) motion has a presumption that the allegations in the complaint are true. A rule 12(b)(1) motion on a facial attack on jurisdiction also has a presumption of truth. A rule 12(b)(1) motion on a factual attack on jurisdiction has no presumption and the trial court must conduct a mini-trial in the facts that establish subject matter jurisdiction.

Garcia v. Copenhaver, Bell & Associates, M.D.'s, P.A., 104 F.3d 1256 (11th Cir. 1996). ADEA claim dismissed for lack of subject matter jurisdiction. Reversed. Attacks on subject matter jurisdiction are either facial attacks or factual attacks. Fed. R. Civ. P. 12(b)(1). Facial attacks assume the facts alleged are true and then determine sufficiency of jurisdiction. Factual attacks challenge the pleadings and evidence is considered. There is no presumption if the attack does not address the merits. If the elements of a cause of action are considered, the trial court should find jurisdiction and treat the motion under Fed. R. Civ. P. 12(b)(6) and 56. It should be extremely difficult to dismiss a claim for lack of subject matter jurisdiction.

Fed. R. Bankr. P. 7017 Real Party in Interest.

Steger v. General Electric Co., 318 F.3d 1066 (11th Cir. 2003). Employee who was laid off during company reduction in force brought suit for age and sex discrimination against employer. Shortly before trial on these claims, employee filed bankruptcy and, just weeks before trial, sought to amend her complaint to add the trustee in bankruptcy as a necessary party, though she claimed to retain an interest in the value of the case which she expected to exceed her indebtedness. The district court denied employee's motion, finding that the bankruptcy estate was adequately protected in that employee and trustee were represented by the same counsel, and, at trial, also denied employee's motion for judgment as a matter of law. On appeal to the Eleventh Circuit, employee argued that it was an abuse of discretion by the district court to not allow the addition of the bankruptcy trustee. The Circuit, agreeing that the estate was adequately protected, found that because the bankruptcy estate appointed the employee's counsel to also represent the trustee, there was no need to add the trustee as a necessary party. Acknowledging that the trustee would typically be the legal representative of the debtor in such a cause of action, unless trustee had previously abandoned the cause, the Circuit found that where the trustee participates in the action the debtor may maintain standing.

Greer, Max Flow Corp., Becket, Barnes, & Becket & Lee, LLC v. O'Dell, 305 F.3d 1297 (11th Cir. 2002). Chapter 13 debtors, whose credit card account was in the process of being purchased from the issuing bank by a servicing agent when debtors filed their petition, objected to the claim that the servicing agent filed on behalf of the issuer. The bankruptcy court sustained the objection, disallowed the claim, and found that the servicing agent lacked actual or legal authority to act on behalf of issuer and, therefore, had engaged in sanctionable unauthorized practice of law. The district court reversed the bankruptcy court, finding that the agent could file a claim on behalf of the issuer, that the agent had standing to defend that claim, and that the agent and its counsel had not engaged in the unauthorized practice of law. Debtors' appealed and the Eleventh Circuit, applying the principle of "real party in interest," affirmed the district court. Citing the "liberal standing provisions" of the bankruptcy code and rules of procedure and analogous case law holding mortgage servicers as real parties in interest, the Circuit found that the servicing agent had a practical stake and economic interest in the outcome of the debtors' bankruptcy and claim objection.

Fed. R. Bankr. P. 7022 Interpleader.

Manhattan Bank v. Mandalay Shores Cooperative Housing Ass'n, Inc., 21 F.3d 380 (11th Cir. 1994). In an interpleader action, the trial court has discretion to award attorneys' fees and costs

to the innocent stakeholder who pays the funds to the registry of the court. Fees are not generally to be awarded to a stakeholder whose interest in the funds arise out of the normal course of business, *e.g.*, an insurance company or a bank serving as a trustee of an estate.

Fed. R. Bankr. P. 7023 Class Proceedings.

Chrysler Fin. Corp. v. Powe, First Union Mtg. Corp. v. Dean, PNC Mtg. Corp. v. Smith, 312 F.3d 1241 (11th Cir. 2002). Three separate bankruptcy debtors brought suits, respectively, against three financial corporations alleging violations of bankruptcy code for collecting attorneys' fees from debtors. In each case, the bankruptcy court granted class certification. Financial corporations then petitioned the Eleventh Circuit for review of those class certifications. The financial corporations briefed and argued that Federal Rule of Civil Procedure 23(f) was incorporated into Federal Rule of Bankruptcy Procedure 7023 and that Fed. R. Bankr. P. 9002(4) provided for the substitution of "bankruptcy court" in place of "district court." Thus, petitioners urged that Fed. R. Civ. P. 23(f) allowed a court of appeals to directly review on interlocutory appeal the class certification of a bankruptcy court, bypassing the district court. The Circuit, however, dismissed the corporations' petitions, holding that the permissive appeal provision in Fed. R. Civ. P. 23(f) was limited by statute, namely 28 U.S.C. §§ 1292(e) and 2072, to rules made pursuant to Supreme Court's power over practice and procedure in magistrate, district, and courts of appeal. As it was 28 U.S.C. § 2075 that expressly authorized the Supreme Court to prescribe rules regarding practice and procedure in bankruptcy proceedings, the Circuit found that to read subsection (f) of Fed. R. Civ. P. 23 as incorporated into Fed. R. Bankr. P. 7023 would render 28 U.S.C. § 2075 "wholly superfluous" and foster uncertainty through multiple avenues of simultaneous appeal. The Court noted litigants already had an avenue for appeal to the district court for review of class certifications in 28 U.S.C. § 158(a). Thus, finding that subsection (f) was not incorporated into Fed. R. Bankr. P. 7023 or otherwise applicable to bankruptcy proceedings, the Circuit declined to find jurisdiction to review the bankruptcy court's class certifications.

Cliff v. Payco General American Credits, Inc., 363 F.3d 1113 (11th Cir. 2004). This is a case under Fed. R. Civil P. 23. The issue involves class certification for violations of the Fair Debt Collection Practices Act (FDCPA). The trial court denied class certification for failure to satisfy the numerosity requirement of Rule 23(a)(1). Plaintiff was a lawyer who defaulted on a repayment plan for student loans. He claimed the debt collector failed to follow the procedure provided in the Higher Education Act (HEA), and thus was liable under the FDCPA and state consumer laws. While HEA does not create a private right of action for enforcement, a violation of HEA can give rise to a cause of action under FDCPA. Rejecting the analysis in Brannan v. United Student Aid Funds, Inc., 94 F.3d 1260 (9th Cir. 1996), the Circuit held that HEA does not preempt enforcement of state consumer laws, regulating debt collection of student loans. Thus, the denial of class certification was remanded.

Another case under FDCPA is Vega v. McKay, 351 F.3d 1334 (11th Cir. 2003).

Fed. R. Bankr. P. 7037 Failure to Make Discovery: Sanctions.

Chase & Sanborn Corp., *In re*, 872 F.2d 397 (11th Cir. 1989). Trustee brought motion for sanctions for alleged transferees of fraudulent transfers to provide discovery. After trustee had made prima facie showing that transferees violated bankruptcy court's order for discovery, the

burden shifted to the transferees to defend their failure to do so on grounds that they were unable to comply. Here, transferees did not sufficiently demonstrate impossibility of complying with trustee's requests for discovery. Civil contempt sanctions must be imposed for either or both of two distinct purposes, namely to coerce compliance with court order or to compensate complainant for failure to comply. If fine is for coercion, it is paid into court registry. If fine is for compensation, it is paid to complainant. Here, bankruptcy court's imposition of $1,000 per day sanction payable to trustee against transferees for their refusal to comply with bankruptcy court's discovery orders had to be vacated since bankruptcy court did not specify if fine was meant to be coercive, compensatory or a hybrid of both. In any event, there was no evidentiary predicate to support imposition of fine of $1,000 per day.

Fed.R.Bankr.P. 7041 Dismissal of Adversary Proceedings.

Wieckiewicz v. Educ. Credit Mgmt. Corp. (In re Wieckiewicz), 443 Fed. Appx. 449 (11th Cir. 2011). Bankruptcy court did not abuse its discretion by dismissing debtor's complaint with prejudice after the debtor persistently refused to comply with court orders directing him to apply for a federal loan consolidation program under which his student loan payments could have eventually been forgiven.

Fed. R. Bankr. P. 7041(b) Involuntary Dismissal.

Brickell v. Brickell (In re Brickell), 160 Fed.Appx. 969 (11th Cir. 2006)(not selected for publication). Res judicata barred relitigation of former wife's challenge to dischargeability of debtor's marital obligations. The bankruptcy court's judgment dismissing the former wife's prior dischargeability complaint for failure to prosecute served as an adjudication on the merits. The parties were identical and both actions involved the same issues.

Beck v. Bassett (In re Southeast Banking Corp.), 204 F.3d 1322 (11th Cir. 1999). Chapter 7 Trustee sued Debtor's former officers and directors. Trustee violated several discovery orders. The trial court dismissed the action as a sanction and court of appeals reversed. It is appropriate to dismiss an action as a sanction, but the trial court must first consider alternatives which do not penalize innocent parties. Here, the creditors of the bankruptcy estate were innocent parties and should not have been penalized for the actions of the Trustee and his counsel. Less harsh sanctions should have been considered including removal of the Trustee or revocation of the Trustee's counsel *pro hac vice* status.

Fed. R. Bankr. P. 7055(c) Setting Aside Default Judgment.

Valdez v. Feltman (*In re* Worldwide Web Systems, Inc.), 328 F.3d 1291 (11th Cir. 2003). Defendant was served with a summons and complaint at his last known business address, filed with the Florida Secretary of State, by first class mail and certified mail, return receipt requested. He failed to respond and a default and default judgment were entered. Nine days later, he learned of the judgment and almost two months later filed a motion to set aside the default judgment. He failed to attend the scheduled hearing and the motion was denied. On appeal, he argued excusable neglect, Rule 60 (b)(1), and insufficient service of process, Rule 60 (b)(4). Excusable neglect requires that: (1) a meritorious defense that might have affected the outcome;

(2) lack of prejudice on the non-defaulting party; (3) good reason existed for failing to reply. The defendant filed an answer with a general denial which does not establish a meritorious defense. The prejudice results from the delay if the default were set aside. This second prong is of primary importance in the analysis, but all three must be considered. The good reason fails for delay in filing this motion for nearly two months after learning of the default judgment.

Insufficient service of process, Rule 60 (b)(4), is a more difficult analysis because it may result in the court not having personal jurisdiction and the judgment being void. However, objections to personal jurisdiction may be waived. Where the ground is not argued to the trial court, as here, in the motion to set aside the default judgment, the issue is waived and may not be raised for the first time on appeal. The bankruptcy court is affirmed.

Morris Communications Corp. v. PGA Tour, Inc., 364 F.3d 1288 (11th Cir. 2004). Relief under Rule 60(b) is only available if the movant presents newly discovered evidence that could alter the outcome of the trial. If the valid business justification of the defendant justifies its regulations even in light of the new evidence, the motion fails.

Knight, *In re*, 833 F.2d 1515 (11th Cir. 1987). Trustee obtained default judgment against debtor. Nine days later, debtor moved to set aside default judgment, which the bankruptcy court granted. The district court reversed. On appeal to the Circuit, the Eleventh Circuit affirmed the district court's decision. The setting aside of a default judgment where no good reason has been offered for the default constitutes an abuse of discretion. Debtor's counsel did not attempt to show excusable neglect. The interests of justice would be better served by enforcing the rule of procedure than by allowing the case to proceed on the merits. Strange conclusion considering the disfavor default judgments have.

Fed.R.Bankr.P. 7056 Summary Judgment.

Shuler v. Ingram & Assocs., 441 Fed. Appx. 712 (11th Cir. 2011). District court did not commit an error in plaintiffs' action against a debt collector and a debt collection law firm alleging violations of the Fair Debt Collection Practices Act (FDCPA) by granting summary judgment in favor of the defendants despite the plaintiffs' argument that the court failed to hold a hearing before ruling on the summary judgment motions. It is well settled in this circuit that Rule 56(c) does not require an oral hearing. Nor did the district court prematurely grant the motions while discovery issues remained unresolved. Rule 56(f) [now 56(d)] provides that if a party opposing summary judgment shows by affidavit that it cannot present facts essential to justify is position, the court may order a continuance to enable further discovery. "Because '[c]ourts cannot read minds, . . . 'the party opposing the motion for summary judgment bears the burden of calling to the district court's attention any outstanding discovery.'"

Fed. R. Bankr. P. 7068 Offer of Judgment.

Menchise v. Akerman Senterfitt (In re Steffen), 532 F.3d 1146 (11th Cir. 2008). The debtor filed a complaint for legal malpractice against his former attorney. The attorney served the debtor

with an offer to settle in the amount of $10,000 under Florida Statute, § 768.79 which the debtor did not accept. After the court entered summary judgment in favor of debtor's counsel, counsel moved for attorney fees under the statute. The court awarded counsel $223,158.97 in fees. On appeal, the debtor argued that the plain language of the statute precluded its application to actions filed in federal courts because the statute applies to "any civil action for damages filed in the courts of" Florida. The court of appeals found that the statute applies to actions filed in federal courts located in Florida, as such courts are "courts of Florida" because they adjudicate claims under Florida law and are a part of the judicial system in that state. Further, under the Supremacy Clause of the United States Constitution, a state cannot discriminate against either a federal cause of action or against a party's resort to a federal forum.

Fed. R. Bankr. P. 8001(a) Appeals.

Waczewski v. Weatherford (In re Waczewski), 241 Fed. Appx. 647 (11th Cir. 2007). Chapter 7 debtor moved to convert case to Chapter 13. The bankruptcy court denied the conversion motion and approved the trustee's settlement of the debtor's claims against her former employer. The district court affirmed and the debtor appealed. The Eleventh Circuit affirmed the approval of the settlement and remanded the conversion motion "for the bankruptcy court to consider the factual question of whether or not the request for conversion was made in bad faith." On remand, the bankruptcy court granted the conversion motion and denied debtor's motion to set aside the settlement. The district court affirmed and the debtor again appealed. The Eleventh Circuit held that on remand the bankruptcy court was precluded under the law of the case doctrine and the mandate rule from setting aside the appellate court's prior order approving the settlement. The law of the case doctrine bars relitigation of issues that were decided, either explicitly or by necessary implication, in an earlier appeal of the same case. Also under the mandate rule a district court when acting under an appellate court's mandate, cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon a matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.

Walden v. Walker (In re Walker), 515 F.3d 1204 (11th Cir. 2008). A trial court has jurisdiction to reduce its oral findings to writing even after a notice of appeal has been filed. While the filing of a notice of appeal generally divests a court of its control over those aspects of the case involved in the appeal, an exception exists when a trial court reduces its oral findings to writing and cites relevant case law.

Educational Credit Mgmt. Corp. v. Mosley (In re Mosley), 494 F.3d 1320 (11th Cir. 2007). While the filing of a notice of appeal generally confers jurisdiction on the court of appeals and divests the lower court of its control over those aspects of the case involved in the appeal, a lower court retains jurisdiction to reduce its oral findings to writing even if a party has filed a notice of appeal in the interim in the aid of appellate review.

Weisgram v. Marley Co., 528 U.S. 440, 120 S. Ct. 1011 (2000). When evidence is erroneously admitted at trial, an appellate court may review the remaining evidence to determine if judgment should be entered as a matter of law. If there is insufficient evidence to support a verdict, a

judgment by the appellate court, without remand, is appropriate.

Westwood Community Two Ass'n, Inc. v. Barbee (In re Westwood Community Two Ass'n, Inc.), 293 F.3d 1332 (11th Cir. 2002). Nonprofit homeowners association filed for Chapter 7 relief and a group of member homeowners appealed bankruptcy court decision approving trustee's assessments to be paid by all members. The group alleged that the assessments diminished their property and increased their burdens or impaired their rights. The district court dismissed for lack of standing, but the Eleventh Circuit reversed, adopting the "person aggrieved" rule as an exception to the general rule that only the Chapter 7 trustee may appeal on behalf of a debtor. The Circuit applied the "person aggrieved" rule, which affords standing to a person with direct and substantial interest, to allow the group to proceed based on the trustee's analysis impairing the group's property rights.

Randolph v. Green Tree Financial Corp., 178 F.3d 1149 (11th Cir. 1999), *cert. granted*, 120 S. Ct. 1552 (2000). Consumer of mobile home sued lender for Truth In Lending Act violations. Trial court ordered arbitration. Appellate court reversed. Appeal is proper when the trial court order leaves no remaining issues to be resolved. Facing a split among the circuits, the Eleventh Circuit simply considers whether the decision is final, or if other substantive issues remain.

Taiyo Corporation v. Sheraton Savannah Corp., 49 F.3d 1514 (11th Cir. 1995). A frivolous complaint was dismissed and Fed. R. Civ. P. 11 sanctions were entered. When the appeal is frivolous, a judgment is appropriate against the party and the attorney for the costs of the appeal, including attorneys' fees and expenses. Fed. R. App. P. 38.

Holywell Corp., *In re*, 901 F.2d 931 (11th Cir. 1990). Debtor's contention that contract interest rate used to calculate amount of bank's lien was excessive was moot where plan had been substantially consummated since the court was unable to fashion effective relief for all concerned.

Holywell Corp., *In re*, 874 F.2d 780 (11th Cir. 1989). After confirmation and substantial consummation of plan of reorganization, appeals were filed on the bankruptcy court's determination of title to property. Circuit held that passage of title of the property to the liquidating trustee was part of the confirmed plan of reorganization. No appeal could be taken when the plan has been substantially consummated as it would be legally and practically impossible to unwind the consummation of the plan or to restore the status quo before confirmation.

Miami Center Ltd. Partnership v. Bank of New York, 820 F.2d 376 (11th Cir. 1987). Debtor appealed confirmation order calling for sale of property. Creditor moved to dismiss appeal arguing mootness since the reorganization plan was substantially consummated. Thus, the issue was whether the reorganization plan had been so substantially consummated that effective relief could no longer be provided to the debtor. Here, the plan or reorganization was so substantially consummated, as that term is defined in § 1101(2), that no relief could be accorded to the debtor.

Borg-Warner Acceptance Corp. v. Hall, 685 F.2d 1306 (11th Cir. 1982). Order on motion for relief from stay is a final appealable order.

Fed. R. Bankr. P. 8002 Time for Filing Notice of Appeal.

Cannabis Action Network, Inc. v. Gainesville, City of, 231 F.3d 761 (11th Cir. 2000). Whenever movant seeks extension of time within which to file notice of appeal prior to expiration of original 30-day deadline, his/her motion is evaluated under "good cause" standard, whereas motion for extension that is not filed until after original 30-day deadline expires is evaluated for "excusable neglect." In deciding whether to grant out-of-time request for extension of deadline for filing notice of appeal on "excusable neglect" theory, courts should take account of all relevant circumstances surrounding movant's omission, including danger of prejudice to nonmovant, length of delay and its potential impact on judicial proceedings, reason for delay, including whether it was within reasonable control of movant, and whether movant has acted in good faith. Decision to grant out-of-time request for extension of deadline for filing notice of appeal in lawsuit challenging municipal ordinances on First Amendment grounds was not abuse of district court's discretion, where municipality knew of movant's intent to prosecute appeal from its earlier, premature notice of appeal and thus was not prejudiced, where movant's tardiness in filing notice of appeal would have de minimis effect on judicial process particularly in light of the many years that litigation had been pending, where movant had legitimate reason for its delay based on confusing nature of post-judgment history of case, and where movant had been diligent and unwavering in its attempt to pursue appeal.

Williams, *In re*, 216 F.3d 1295 (11th Cir. 2000). Creditor moved to dismiss Chapter 12 case. The Bankruptcy Court granted motion, and debtor filed notice of appeal. The Bankruptcy Court dismissed appeal for untimeliness, and the dismissal was affirmed by the District Court and the Circuit Court of Appeals. Under Fed. R. Bankr. P. 8002(a), a notice of appeal must be filed within 10 days of the entry of the order and not the service of the order. Debtor further argued his Notice of Appeal should be treated as a Motion for Extension of Time due to Excusable Neglect under Fed. R. Bankr. P. 8002(c)(2). Circuit held there was no motion for extension ever filed. With respect to pro se appellants and notices of appeal, there are two rules: (1) in criminal cases, a late notice of appeal is treated as a motion for extension of time due to excusable neglect; and (2) in civil cases, a late notice of appeal is not treated as a motion for extension of time due to excusable neglect. Here, as this was not a criminal case, the debtor's late notice of appeal could not be construed as a motion for extension of time due to excusable neglect.

White, *In re*, 908 F.2d 691 (11th Cir. 1990). Bankruptcy court *sua sponte* ruled on a creditor's claim in the absence of an objection and failed to specifically rule on claim in confirmation order. Upon learning of its situation, creditor filed notice of appeal. Notice was filed more than 10 days after the entry of the confirmation order. District court dismissed the appeal as untimely. Circuit reversed holding the Doctrine of Unique Circumstances permitted creditor's appeal where the bankruptcy court's findings of fact effectively mislead the creditor. Even though creditor's appeal was filed more than ten days after confirmation of the debtor's amended Chapter 13 plan, the findings did not provide adequate notice to creditor so as to cut off its rights and start the time to appeal the court's ruling. The time to appeal for this creditor should begin to run from a

procedurally proper and specific adjudication of its claim.

Mike, *In re*, 796 F.2d 382 (11th Cir. 1986). Fed. R. Bankr. P. 8002(b) provides that a timely motion, to alter or amend or for a new trial, filed with the bankruptcy court under Rule 9023 tolls the time to appeal an order of the bankruptcy court until the entry of an order denying the motion. Further, a notice of appeal filed after the bankruptcy judge signed the order denying rehearing but before the order was entered was valid and should be treated as filed on the date the order was entered.

Johnson, *In re*, 747 F.2d 701 (11th Cir. 1984). Debtor's motion to alter or amend under Fed. R. Civ. P. 59 filed in the district court tolls the time to appeal to the court of appeals and a notice of appeal to the court of appeals is void if filed while a motion to alter or amend is still pending in the district court. Because debtor failed to file second notice of appeal after district court denied petition for rehearing, Court of Appeals lacked jurisdiction.

Fed. R. Bankr. P. 8005 Stay Pending Appeal.

Russo v. Seidler (*In re* Seidler), 44 F.3d 945 (11th Cir. 1995). Debtor filed declaratory judgment action against mortgagee to determine the validity or extent of the lien. Debtor's Chapter 13 plan made no provision for mortgagee and plan was confirmed. The confirmation order was not appealed. In the declaratory action, a judgment was entered in favor of the debtor that the mortgage lien was satisfied through the Chapter 13 plan. Mortgagee did not obtain a stay of judgment pending appeal. District court dismissed the appeal as moot pursuant to § 1327. The Court of Appeals reversed. Failure to obtain a stay of proceedings related to the bankruptcy does not automatically render an appeal moot. Even though the plan had been confirmed, and the trustee had started making payments under the plan, if the appellants were successful on the merits of their case, then they could still be able to enforce their lien against the property. Because relief was still available to appellants, the appeal was justiciable and not moot.

Club Associates, *In re*, 956 F.2d 1065 (11th Cir. 1992). Appeal of confirmation order is moot where no stay is entered pending the appeal and the plan is substantially consummated while the appeal is pending. Following consummation of the plan, new investors committed funds to the debtor with the expectation of receiving the benefits provided in the confirmed plan. On appeal, the court must consider all of the circumstances of the case to determine whether substantial consummation of the plan prevents any effective relief to be obtained on appeal.

Lashley, *In re*, 825 F.2d 362 (11th Cir. 1987). Bankruptcy court may not retroactively impose a stay. Where the court lifted the stay, the debtor requested no stay of the order, the foreclosure took place, and the debtor then requested stay pending appeal, the bankruptcy court could not make stay retroactive to date of original order.

Matos, *In re*, 790 F.2d 864 (11th Cir.1986). When a debtor fails to obtain a stay pending appeal of the bankruptcy court's or the district court's order setting aside an automatic stay and

allowing a creditor to foreclose on property, the subsequent foreclosure and sale of the property renders moot any appeal.

Sewanee Land, Coal & Cattle, Inc., *In re*, 735 F.2d 1294 (11th Cir. 1984). When the bankruptcy court sets aside an automatic stay, the debtor fails to obtain a stay pending appeal, and the property is sold at foreclosure, a court is powerless to rescind the sale on appeal.

Fed. R. Bankr. P. 8009 Briefs.

Beverly Manufacturing Corp. *In re*, 778 F.2d 666 (11th Cir. 1985). District court dismissed appeal from bankruptcy court for the failure of appellant to timely file brief. Circuit reversed. Dismissal of an appeal from bankruptcy court to district court for failure to file briefs is proper only upon a showing of bad faith, indifference or negligence.

Fed. R. Bankr. P. 8013 Weight Accorded Findings of Fact.

Cornelison, *In re*, 901 F.2d 1073 (11th Cir. 1990). Neither the district court nor the court of appeals may make independent factual findings. If the bankruptcy court is silent or ambiguous as to the necessary factual findings, the case must be remanded to the bankruptcy court for the necessary factual findings.

T & B General Contracting, Inc., *Matter of*, 833 F.2d 1455 (11th Cir. 1987). Clearly erroneous standard of review is particularly applicable when the district court has affirmed the bankruptcy court's findings of fact. However, bankruptcy court's legal conclusions are subject to complete review by the Court of Appeals.

Alchar Hardware Co., *In re*, 764 F.2d 1530 (11th Cir. 1985). Findings of fact made by a bankruptcy judge must be upheld unless clearly erroneous.

Fed. R. Bankr. P. 8015 Motion for Rehearing in District Court.

Sundale Associates, Ltd., *Matter of*, 786 F.2d 1456 (11th Cir. 1986). A motion for rehearing in the district court under Fed. R. Bankr. P. 8015 does not toll the thirty-day period for appealing to the court of appeals. Note that this case was superseded by the 1987 amendment to Rule 8015, which now provides that a timely motion for rehearing tolls the time for filing a notice of appeal.

Fed. R. Bankr. P. 9006(b) Excusable Neglect.

Kontrick v. Ryan, 540 U.S. 443, 124 S. Ct. 906 (2004). Are the time limitations in Rule 4004(a) jurisdictional or waivable affirmative defenses? The plaintiff timely filed the complaint objecting to discharge. Later, he amended the complaint with leave of court, but he did not seek any extension of the time limitations for the claims in the amended complaint. The debtor filed an answer to the amended complaint, which did not challenge the late filing. Summary judgment was granted to the plaintiff. Debtor raised the untimeliness of the claims for the first time in a

motion for reconsideration. Rule 4004(a) sets a 60 day from the first date set for the meeting of creditors deadline for filing a complaint objecting to discharge. Rules 4004(b) and 9006(b)(3) include limited abilities to extend the deadline. The Supreme Court held the times to be affirmative defenses. Only Congress may determine subject matter jurisdiction. The Courts adopt rules of procedure, which may not extend or limit jurisdiction. Rule 9030. Rules of procedure establish "claim-processing rules". Unfortunately, courts have loosely used the term jurisdiction, and the Court encouraged the use of jurisdiction only to refer to cases a court may adjudicate with subject matter jurisdiction and to refer to persons subject to personal jurisdiction. These issues may be raised at any time. Claim-processing rules for time limitations, such as these, serve three purposes: (1) to inform the pleader of a deadline; (2) to instruct the court on its discretionary limits to enlarge that time; and (3) to afford an affirmative defense, which may be waived. Normally, affirmative defenses must be raised in an answer or responsive pleading. Certainly, it is waived after a ruling on the merits. In the facts of this case, no equitable grounds were raised to permit the late filing and the Court declined to rule if equitable exceptions apply. The holding of this case should extend to the deadline in Rule 4007(c), filing objections to dischargeability of a claim.

Pioneer Investment Services Co. v. Brunswick Associates, Ltd., 507 U.S. 380, 113 S. Ct. 1489 (1993). In Chapter 11 cases, the bar date for filing proofs of claims is fixed by Fed. R. Bankr. P. 3003(c)(3), which may be extended by Rule 9006(b)(1) if delay was the result of excusable neglect. Neglect may be caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond party's control. Factors to consider in determining if neglect was excusable include: the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. Supreme Court rejected the narrow view of "excusable neglect" adopted by the Eleventh Circuit in Analytical Systems, Inc., *In re*, 933 F.2d 939 (11th Cir. 1991), requiring a showing that the delay be caused by circumstances beyond the movant's control.

Banco Latino Int'l v. Gomez-Lopez (In re Banco Latino Int'l), 2005 U.S. App. LEXIS 5259 (11th Cir. March 31, 2005). Banco Latino Int'l filed for Chapter 11 relief on January 19, 1994, and August 9, 1994 was set as the bar date for filing claims. Debtor's Chapter 11 plan was confirmed on November 19, 1994. Appellants were the former officers and directors of the debtor bank, and the plan and disclosure statement placed the appellants on notice that debtor might file civil claims against them for wrongful conduct in their capacity as officers and directors for debtor. Debtor filed these civil claims against appellants in 1995. Debtor was not successful in the actions and its corporate by-laws provided indemnification for appellants' costs and expenses in defending the lawsuit. Appellants filed their claims for indemnification after the adjudication of the lawsuits, which was more than five years after the claims bar date. The bankruptcy court granted appellants motion for allowance and payment of the untimely indemnification claims. The district court reversed in a reported opinion. Banco Latino Int'l v. Gomez-Lopez (In re Banco Latino Int'l), 310 B.R. 780 (S. D. Fla. 2004).

The district court noted that the bankruptcy court relied on "the equitable principles underlying the liquidation analysis and distribution scheme of 11 U.S.C. § 726," even though the bankruptcy court acknowledged that Section 726 does not apply in Chapter 11 cases. Banco

Latino Int'l, 310 B.R. at 783 (quoting the bankruptcy court's order). The district court relied on Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd P'ship, 507 U.S. 380 (1993), noting that it was the "seminal case on the issue." The district court summarized Pioneer as setting "out the requirements for filing proofs of claim . . . Chapter 11 Reorganization cases, and explicitly [holding] that Rule 9006(b)(1) must be construed to govern the permissibility of late filings in Chapter 11 bankruptcies." The district court held that appellants' untimely filing did not meet the Rule 9006(b)(1) standard for excusable neglect, because the appellants intentionally chose to wait until the lawsuits against them were complete before filing their claims.

In a short opinion, the Court of Appeals affirmed the "well-reasoned district court decision," stating that the "the bankruptcy court did not mention, let alone distinguish, the present case from Pioneer."

Analytical Systems, Inc., *In re*, 933 F.2d 939 (11th Cir. 1991). A creditor may rely upon the schedules and not file a proof of claim under § 1111(a). However, he makes this election at his jeopardy and is responsible to verify the scheduled amount. A late claim will not be allowed on general equitable grounds, including reasonable reliance by the creditor. In order to file a late claim for excusable neglect, the creditor must establish that the failure to timely perform a duty was due to circumstances which were beyond the reasonable control of the person whose duty it was to perform. This case is limited by Pioneer Investment Services Co. v. Brunswick Associates, Ltd., 507 U.S. 380, 113 S. Ct. 1489 (1993).

Fed. R. Bankr. P. Rule 9011 Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers.

Gwynn v. Walker (In re Walker), 532 F.3d 1304 (11th Cir. 2008). The bankruptcy court entered an order imposing Rule 9011 sanctions on a creditor's attorney for filing a frivolous motion to disqualify debtor's counsel. The bankruptcy court's denial of the motion to disqualify debtor's counsel after the attorney served a motion for Rule 9011 sanctions on creditor's attorney prior to the expiration of Rule 9011's 21-day "safe harbor" during which the offending motion could be withdraw, prevented the award of sanctions against creditor's attorney once the 21-day period expired. The bankruptcy court did not abuse its discretion to the extent it denied creditor's requests for fees and expenses as the prevailing party under Rule 9011. The motion for sanctions and the corresponding expenses incurred by creditor's counsel could have been avoided if creditor's counsel had not filed the frivolous motion to disqualify in the first instance. The bankruptcy court acted properly when it imposed sanctions of $14,000 against creditor's counsel. The allegations asserted by creditor's counsel required multiple hearings and the seriousness of the allegations combined with the lack of any evidence supported a finding of bad faith.

Willy v. Coastal Corp., 503 U.S. 131, 112 S. Ct. 1076 (1992). Even if a federal judge does not have subject matter jurisdiction, sanctions may be imposed under Fed. R. Civ. P. 11.

Anderson v. Smithfield Foods, 353 F.3d 912 (11th Cir. 2003). Environmental action against a hog farm was dismissed for failure to state a claim. Sanctions were awarded for filing an amended

complaint in the amount of $128,563.43 to defray the costs and fees incurred to attack the amended complaint. The Circuit reversed. The amended complaint restated the same claims but added expanded allegations. The standard for Rule 11 sanctions is reasonableness under the circumstances, applying these factors: (1) when a party files a pleading that has no reasonable factual basis; (2) when the party files a pleading that is based on a legal theory that has no reasonable chance of success and that cannot be advanced to change existing law; or (3) when the party files a pleading in bad faith for an improper purpose. It was not unreasonable to make the claims in the amended complaint based on the existing lack of clarity of substantive law and the circumstances of the dismissal of the original complaint could lead a reasonable attorney to believe that a better, more detailed pleaded claim could suffice.

Business Guides v. Chromatic Communications Enterprises, Inc., 498 U.S. 533, 111 S. Ct. 922 (1991). Non-lawyers who sign pleadings are held to the same standard of conduct under Fed. R. Civ. P. 11 as are lawyers.

Battles v. City of Ft. Myers, 127 F.3d 1298 (11th Cir. 1997). A trial attorney can be sanctioned for insufficiently preparing for trial. No evidence was presented on one claim, and supporting witnesses on another claim did not testify. Fed. R. Civ. P. 11(c) provides for sanctions when assertions are not supported by proper evidence. An attorney has a continuing obligation to make inquiries and she may not insist upon a position after it is no longer tenable. The Court should consider the time available for investigation, whether the attorney had to rely on information from a client, and the general plausibility of legal arguments.

Glatter v. Mroz (*In re* Mroz), 65 F.3d 1567 (11th Cir. 1995). Sanctions under Fed. R. Bankr. P. 9011 against counsel and firm are reversed. Signature on a pleading certifies that the allegations are well grounded, based upon reasonable belief at the time filed. Rule 9011 does not impose a continuing obligation on counsel to amend. However, there is an independent, inherent power in a federal court to manage cases and control and discipline attorneys who abuse the judicial process. Without resort to the more drastic sanction of contempt of court, a federal court may sanction and make the prevailing party whole. The sanctioned party is entitled to due process by a fair notice and an opportunity to respond. The case is remanded for a hearing to determine if counsel continued the litigation in bad faith.

Jones v. International Riding Helmets, Ltd., 49 F.3d 692 (11th Cir. 1995). An attorney is sanctioned under Fed. R. Civ. P. 11 for signing a complaint he should have known was frivolous. An attorney must make a reasonable inquiry, and reasonableness of inquiry includes available time for investigation, and plausible basis for legal view.

Fed. R. Bankr. P. 9014 Contested Matters.

Farris v. Walton (In re Farris),365 Fed. Appx. 198(11th Cir. 2010). Debtor's denial that he had received notice was not sufficient to rebut presumption that notice had been received.

Fed. R. Bankr. P. 9015 Jury Trials.

Langenkamp v. Culp, 498 U.S. 42, 111 S. Ct. 330 (1990). A creditor who files a proof of claim against the estate submits to the equitable jurisdiction and, therefore, loses the Seventh Amendment right to a trial by a jury in a subsequent action by the trustee for preferential transfer. By filing a claim against a bankruptcy estate the creditor triggers the process of "allowance and disallowance of claims," thereby subjecting himself to the bankruptcy court's equitable power. If a party does not submit a claim against the bankruptcy estate, however, the trustee can recover allegedly preferential transfers only by filing what amounts to a legal action to recover a monetary transfer. In those circumstances the preference defendant is entitled to a jury trial.

Granfinanciera v. Nordberg, 492 U.S. 33, 109 S. Ct. 2782 (1989). In Granfinanciera, the Supreme Court held that where a person who has not submitted a claim against the bankruptcy estate is sued by the trustee in bankruptcy to recover an allegedly fraudulent monetary transfer, the Seventh Amendment right to a jury trial exists. Seventh Amendment protects a litigant's right to jury trial only if cause of action is legal in nature and it involves matter of private right. Here, the nature of relief sought by bankruptcy trustee--recovery of money payments--conclusively demonstrated that cause of action was properly characterized as legal rather than equitable, such that creditors were prima facie entitled to jury trial under Seventh Amendment. The Court specifically declined to decide whether 28 U.S.C. § 1411 permits bankruptcy courts to conduct jury trials in fraudulent conveyance actions and, whether the Seventh Amendment or Article III allow jury trials in fraudulent conveyance actions to be held before non-Article III bankruptcy judges subject to the oversight provided by the district courts. Granfinanciera overruled the decision of the Eleventh Circuit Court of Appeals in Chase & Sanborn Corp., *In re*, 835 F.2d 1341 (11th Cir. 1988).

Graham, *In re*, 747 F.2d 1383 (11th Cir. 1984). Whether a jury trial is warranted under the Seventh Amendment depends on whether issue is legal or equitable. An action to set aside a conveyance is equitable, and thus, a trustee's § 544 action is equitable. Therefore, no jury trial is required in a § 544(b) action.

Fed. R. Bankr. P. 9019 Compromise.

Munford v. Valuation Research Corp. (*In re* Munford), 97 F.3d 449 (11th Cir. 1996). Bankruptcy court has jurisdiction to approve settlement which enjoins non-settling defendants from pursuing indemnity and contribution. For the bankruptcy court to exercise subject matter jurisdiction over a dispute, some nexus between the civil proceeding and the title 11 case must exist. There is no requirement that the related action be against the debtor or against debtor's property. Instead, the test for related to jurisdiction is whether the outcome of the proceeding could conceivably have an effect on the bankruptcy estate. Here, the proceeding is related to the bankruptcy case because the settlement produced assets for the estate and settlement depended upon a protective order and injunction. This impact on the administration of the estate was sufficient to satisfy jurisdiction.

Justice Oaks II, Ltd., *In re*, 898 F.2d 1544 (11th Cir. 1990). When a bankruptcy court decides whether to approve or disapprove a proposed settlement, it must consider: (1) The probability of success in the litigation; (2) the difficulties, if any, to be encountered in the matter of collection; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; (4) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.

Fed. R. Bankr. P. 9020 Contempt.

Cunningham v. Hamilton Co., Ohio, 527 U.S. 198, 119 S. Ct. 1915 (1999). Sanctions imposed against an attorney for discovery abuses are not final, appealable orders. Immediate appeals of such orders undermine the authority of a trial judge to mange a case and would result in piecemeal litigation.

International Union, United Mine Workers of America v. Bagwell, 512 U.S. 821, 114 S. Ct. 2552 (1994). Direct contempt that occur in the court's presence may be immediately adjudged and sanctioned summarily, without distinction between civil and criminal contempt, unless a serious criminal penalty is imposed. Indirect contempt may not be summarily adjudged. Criminal contempt requires full criminal process. Civil contempt requires due process. Civil contempt imposes compensation for a complainant, or it coerces compliance with penalties that the contemnor may purge. Serious criminal penalties, imposed after elaborate fact-finding of disobedience to complex injunctions, require full criminal process.

Chambers v. NASCO, Inc., 501 U.S. 32, 111 S.Ct. 2123 (1991). Federal judges have an inherent power to punish parties in addition to those sanctions provided in Fed. R. Civ. P. 11, 16, 26, and 37. This inherent power includes the right to find parties and attorneys in contempt and the right to discipline. There is no requirement that the offensive action occur in the presence of the judge.

Lawrence v. Goldberg (*In re* Lawrence), 279 F.3d 1294 (11th Cir. 2002). Chapter 7 trustee sought to compel turnover of offshore trust's assets. Bankruptcy Court entered order compelling turnover. When debtor failed to turnover property, Bankruptcy Court entered order holding debtor in civil contempt for violating turnover order and directing that he be incarcerated if he failed to comply by specified date. Circuit held a bankruptcy court has the power to imprison a debtor for civil contempt of court when the debtor fails to comply with a Turn Over Order. Civil contempt sanctions are intended to coerce compliance with a court order. If coercion is not successful, incarceration must end as it would no longer serve the civil purpose of coercion. Consequently, the trial court must review the incarceration at reasonable intervals to assure the incarceration's purpose in coercion. There must be a reasonable possibility that the contemnor will comply. Although the impossibility or inability defense was available, debtor failed to establish he made good faith effort to take all reasonable efforts to meet the terms of the court order. Trial court determined the debtor retained de facto control over the trust. The limitations of control over the trust were self-imposed.

McGregor v. Chierico, 206 F.3d 1378 (11th Cir. 2000). Civil contempt order for violation of

stipulated judgment or consent decree is only appropriate upon clear and convincing proof of defendant's contempt. In civil contempt proceedings, party guilty of contempt may be required to compensate those injured by its contempt. Contempt sanctions may serve to either (1) coerce contemnor to comply with court order, or (2) compensate party for losses suffered as result of contemnor's act. In civil contempt action, damages must be proven by preponderance of evidence, rather than by clear and convincing evidence. Inherent equitable powers of federal courts authorized the court to order payment of consumer redress for injury caused by contemnor's contumacious conduct in violation of stipulated final judgment resolving civil complaint.

Southeast Banking Corp., *In re*, 204 F.3d 1322 (11th Cir. 2000). Upon dismissal of adversary proceeding for failure to comply with discovery orders, the Eleventh Circuit held that the court could issue sanctions for such failure, but abused its discretion in dismissing the action rather than considering a lesser sanction. A finding that a litigant's failure to comply with a court order was willful is inappropriate where the litigant's violation was caused by simple negligence, misunderstanding, or inability to comply; sanctions, like a finding of contempt, for violation of an order are only appropriate if the order stated in specific and clear terms what acts were required or prohibited. Although there is no per se rule against dismissing an action due to failure of bankruptcy trustee or other representative party to comply with court orders, court should consider whether represented parties had any personal responsibility for wrongdoing and whether there are lesser sanctions, such as removal of representative party, that could remedy misconduct without injuring represented parties. District court abused its discretion in dismissing bankruptcy trustee's adversary proceeding against Chapter 7 debtor's former officers and directors based on trustee's issuance of subpoenas in violation of district court's discovery orders. There was no evidence that creditors represented by trustee were involved in misconduct, court should have considered lesser sanctions, including removal of trustee and/or his attorney.

Glatter v. Mroz (*In re* Mroz), 65 F.3d 1567 (11th Cir. 1995). Trustee's counsel brought a preference avoidance action against debtor's ex-wife. Bankruptcy Court imposed sanctions against trustee's law firm in favor of debtor's ex-wife for filing complaint and continuing lawsuit without making adequate investigation into debtor's allegations. Circuit held sanctions were inappropriate. Signature on a pleading certifies that the allegations are well grounded, based upon reasonable belief at the time filed. Reasonableness of belief may depend on following factors: time available to signer for investigation; whether signer had to rely on client for information as to underlying facts; whether paper was based on plausible view of law; and extent to which factual development necessitates discovery. Additionally, Rule 9011 does not impose a continuing obligation on counsel to amend. However, there is an independent, inherent power in a federal court to manage cases and control and discipline attorneys who abuse the judicial process. Without resort to the more drastic sanction of contempt of court, a federal court may sanction and make the prevailing party whole. The sanctioned party is entitled to due process by a fair notice and an opportunity to respond. The case is remanded for a hearing to determine if counsel continued the litigation in bad faith.

Yanks, *In re*, 882 F.2d 497 (11th Cir. 1989). Numerous actions of the debtor led the bankruptcy judge to certify to the district court the question of whether the actions of the debtor warranted

punishment as criminal contempt. The attorney for the trustee was appointed to prosecute the criminal contempt charges in the district court. Debtor was convicted of criminal contempt and sentenced. Relying upon the Supreme Court decision in Young v. United States ex rel. Vuitton et Fils, S.A., 481 U.S. 787, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987), the Circuit reversed. As held in Young, ordinarily a court should first request that the appropriate prosecuting authority undertake prosecution of the contempt action. If that request is denied, then a disinterested private prosecutor should be appointed. Here, the attorney for the Trustee, the beneficiary of the bankruptcy court order, was not a "disinterested private prosecutor."

Chase & Sanborn Corp., *In re*, 872 F.2d 397 (11th Cir. 1989). Trustee brought motion for sanctions for alleged transferees of fraudulent transfers to provide discovery. Civil contempt sanctions must be imposed for either or both of two distinct purposes, namely to coerce compliance with court order or to compensate complainant for failure to comply. If fine is for coercion, it is paid into court registry. If fine is for compensation, it is paid to complainant. Here, bankruptcy court's imposition of $1,000 per day sanction payable to trustee against transferees for their refusal to comply with bankruptcy court's discovery orders had to be vacated since bankruptcy court did not specify if fine was meant to be coercive, compensatory or a hybrid of both. In any event, there was no evidentiary predicate to support imposition of fine of $1,000 per day.

Fed. R. Bankr. P. 9023 New Trials.

U.S. Bancorp Mtg. Co. v. Bonner Mall Partnership, 513 U.S. 18, 115 S. Ct. 386 (1994). The parties do not have a right to vacate a judgment by settlement. The courts control final judgments, and decide whether circumstances justify a vacatur.

Kellogg v. Schreiber (*In re* Kellogg), 197 F.3d 1116 (11th Cir. 1999). Judgment creditor and trustee objected to exemptions in Chapter 7 case. Debtor failed to comply with several discovery orders. One day before the hearing, the Debtor moved to continue and the attorney moved to withdraw. Motions were denied and objections to exemptions were sustained. Motion for reconsideration was denied. Court of Appeals held denials of motions for continuance, motions to withdraw, and motions for rehearing are reviewed for abuse of discretion. Denial of continuance is reversed only in extreme cases in which it clearly appears moving party is free of negligence. Motion for reconsideration and rehearing is a motion for new trial under Fed. R. Bankr. P. 9023. The only grounds are newly discovered evidence or manifest errors of law or fact. It does not apply to arguments or evidence available but not advanced at the original hearing. Movant has the burden to show that the evidence was unavailable.

State of Florida, Dept. Of Revenue v. Brandt (*In re* Southeast Bank Corp.), 97 F.3d 476 (11th Cir. 1996). A motion for rehearing is untimely when filed one day after the ten day deadline. Consequently, court is without jurisdiction to consider the motion. A later filed memorandum of opinion does not extend the deadline that begins to run from the date the judgment is entered. The bankruptcy court order granting the motion and entering judgment for the moving party is reversed.

Fed. R. Bankr. P. 9024 Relief from Judgment or Order.

Rhino Cellular, Inc. v. Greenberg (In re Greenberg), 2006 WL 1594202 (11th Cir. 2006). The bankruptcy court dismissed a complaint for failure to prosecute after counsel for plaintiff failed to comply with the court's pretrial order directing all discovery be completed by the pretrial conference date, and counsel failed to appear at the pre-trial conference. The Eleventh Circuit reversed and remanded instructing the bankruptcy court to consider alternative and less drastic sanctions for plaintiff's negligence and to proceed with the case on the merits. Dismissal with prejudice is appropriate "*only* when: (1) a party engaged in a clear pattern of delay or willful contempt (contumacious conduct); and (2) the district court specifically finds that lesser sanctions would not suffice." The bankruptcy court should have considered lesser sanctions or made findings explaining why such lesser sanctions would not suffice due to the severity of the sanction of dismissal with prejudice.

Greenfield v. BFP Invs., Ltd. (In re BFP Invs., Ltd.), 150 Fed.Appx. 978 (11th Cir. 2005)(*not selected for publication)*. Motion to vacate bankruptcy court's order confirming debtor's plan of reorganization had to be filed within 180 days of the entry of the confirmation order. Creditor argued that time limits provided in Rule 9024 are inapplicable to Rule 60(b)(6) complaints pursuant to which a court may relieve a party from a final judgment for fraud. Pursuant to § 1144 an order of confirmation procured by fraud may be revoked on request by a party in interest at any time before 180 days after the entry of the order. Rule 9024 makes it clear that the time period established by 1144 "may not be circumvented by the invocation" of Rule 60(b). Federal Rule of Bankruptcy Procedure 9024 provides that Rule 60 applies in cases under the Code except that ". . . . a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144 . . . ." The expiration of the 180-day limitations period for challenging confirmation of a plan bars a motion to set aside, even if the fraud is not discovered until the period has passed. The limitations period strikes a balance between the need for finality and the interest in affording parties in interest a reasonable opportunity to discover and assert fraud.

Valdez v. Feltman (*In re* Worldwide Web Systems, Inc.), 328 F.3d 1291 (11th Cir. 2003). Defendant was served with a summons and complaint at his last known business address, filed with the Florida Secretary of State, by first class mail and certified mail, return receipt requested. He failed to respond and a default and default judgment were entered. Nine days later, he learned of the judgment and almost two months later filed a motion to set aside the default judgment. He failed to attend the scheduled hearing and the motion was denied. On appeal, he argued excusable neglect, Rule 60 (b)(1), and insufficient service of process, Rule 60 (b)(4). Excusable neglect requires that: (1) a meritorious defense that might have affected the outcome; (2) lack of prejudice on the non-defaulting party; (3) good reason existed for failing to reply. The defendant filed an answer with a general denial which does not establish a meritorious defense. The prejudice results from the delay if the default were set aside. This second prong is of primary importance in the analysis, but all three must be considered. The good reason fails for delay in filing this motion for nearly two months after learning of the default judgment.

Insufficient service of process, Rule 60 (b)(4), is a more difficult analysis because it may result

in the court not having personal jurisdiction and the judgment being void. However, objections to personal jurisdiction may be waived. Where the ground is not argued to the trial court, as here, in the motion to set aside the default judgment, the issue is waived and may not be raised for the first time on appeal. The bankruptcy court is affirmed.

Morris Communications Corp. v. PGA Tour, Inc., 364 F.3d 1288 (11th Cir. 2004). Relief under Rule 60(b) is only available if the movant presents newly discovered evidence that could alter the outcome of the trial. If the valid business justification of the defendant justifies its regulations even in light of the new evidence, the motion fails.

U.S.C. Const. Art. 3, § 1

Avenue CLO Fund Ltd. v. Bank of America, 709 F.3d 1072 (11th Cir. 2013). Debtors alleged that "revolving lenders" breached a credit agreement by failing to honor debtors' $670 million revolving loan request. In a separate action, the term lenders also sued the revolving lenders for breach of contract. To establish standing for Article III, the term lenders had to show that they held a legally protected interest in the credit agreement which was injured by the revolving lenders. That term lenders may have indirectly benefitted from a promise between the revolving lenders and debtor made them at most "incidental beneficiaries," not "intended beneficiaries." As incidental beneficiaries, the term lenders were not in a position to require performance.

ALA. CODE § 6-5-248 Who May Redeem; Priorities.

Commonwealth Land Title Ins. Co. v. Poe (In re Poe), 477 F.3d 1317 (11th Cir. 2007). Agent of a third party to whom mortgagors had assigned their statutory right of redemption brought adversary proceeding in Chapter 7 case filed by foreclosure sale purchasers for determination that it was entitled to redeem from foreclosure the entire one-acre tract of law owned by the debtor-purchasers. The Court of Appeals held that under Alabama law, mortgagors that sold one of the two parcels subject to the mortgage remained liable on the mortgage debt, as required for them to qualify as debtors with a right of redemption as to this parcel following the sale even though the mortgagee had executed a release in connection with the parcel sold. Alabama statute § 6-5-248(a) provides that there may be redemption from a foreclosure sale by "any transferee of the debtor . . . either before or after the sale." Under Alabama law, a person is a debtor under § 6-5-248(a)(1) notwithstanding the fact that he sold the property prior to the foreclosure sale if he previously owned the property subject to the mortgage that was foreclosed, retained the liability associated with the property after selling the property, and retained the liability associated with the property at the time of the foreclosure sale. This meant that the mortgagors could remain debtors as to the sold parcel notwithstanding the sale, if they remained liable on the debt associated with the parcel.

Bankruptcy Court Authority to Enter Orders and Res Judicata Effect of Same

Romagosa v. Thomas (In re Van Diepen, P.A.), 236 Fed. Appx. 498 (11th Cir. 2007). The bankruptcy court had authority to approve an agreement that would enjoin a creditor from pursuing claims against third-party nondebtors in a state court action. The creditor argued that the bankruptcy court did not have authority to include a release of third-party nondebtors where

the property was not property of the bankruptcy estate. The Eleventh Circuit found that any money recovered from the third-party nondebtors would be property of the estate, therefore, the bankruptcy court had jurisdiction over claims which would recover such property and it had authority to enjoin other creditors from pursing those claims.

Martin v. Pahiakos (In re Martin), 490 F.3d 1272 (11th Cir. 2007). An order approving a settlement between a Chapter 7 trustee and a creditor asserting a prepetition cause of action constituted res judicata and prevented the debtor from subsequently relitigating defenses waived by the trustee in entering into the settlement even though the trustee later abandoned the cause of action. Although the trustee later abandoned any claim to the proceeds from the state court action, the case and the issues concerning the services of process were settled while the trustee was in the debtor's shoes and was, thus, res judicata as to the debtor even after abandonment. The trustee's later abandonment of the remaining interest in the state court litigation in no way affected the bankruptcy court's order approving the settlement.

Matthews, Wilson & Matthews, Inc. v. Capital City Bank (In re Matthews, Wilson & Matthews, Inc.), 2008 WL 901919 (11th Cir. 2008). A bankruptcy court's order approving the sale of estate property precluded plaintiff's state law fraud claims against a bank that loaned the debtor money secured by the property. The plaintiff had already raised the fraud claims in the bankruptcy court on objection to sale and the bankruptcy court had overruled the objection. Over a year later, the debtor amended its schedule of personal property to include the state law claims of fraud, conversion and misapplication of funds in connection with the loans secured by the property. After the trustee abandoned the state law claims pursuant to § 554(a), the debtor filed a civil action against the bank in federal district court asserting the claims. The Eleventh Circuit concluded that the bankruptcy trustee's abandonment under § 554(a) was merely a ministerial act pursuant to the Bankruptcy Code which divested the trustee and the debtor's estate of any *remaining* interest in the claims. After the trustee abandoned his interest in same, what reverted back to the debtor was "any remaining interest" in the claims after the bankruptcy court approved the sale. Abandonment did not re-vest the debtor with the ability to relitigate the claims overruled by the bankruptcy court.

12 C.F.R. § 226.9 Subsequent Disclosure Requirements

Chase Bank USA, N.A. v. McCoy, 131 S. Ct. 871 (2011). At the time of the transaction at issue, Regulation Z of the Truth in Lending Act did not require the issuer to provide the cardholder with a change-in-terms notice before it implemented the agreement term allowing it to raise his interest rate following delinquency or default.

Rule 9024. Relief from Judgment or Order.

In re Physicians Reliance Ass'n, Inc.,415 Fed. Appx. 140 (11th Cir. 2011). Despite the liberal pleading standard for *pro se* litigants, the court of appeals explained that the failure of a *pro se* litigant to brief an issue on appeal still amounts to an abandonment of the issue. Nor will the court consider an argument raised for the first time on appeal. Accordingly, the court refused to consider defendant's selective prosecution claim because it was not raised before the district

court.

Bankruptcy Rule 9011 Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers.

Miller v. Felix (In re Miller), 414 Fed. Appx. 214 (11th Cir. 2011). Purchasers mere simultaneous filing of motion to dismiss bankruptcy trustee's claims, in adversary proceeding seeking to recover real property conveyed to purchaser by debtor, did not cure deficiencies as to notice in purchaser's motion for sanctions against bankruptcy trustee's attorney, under bankruptcy sanctions rule's safe harbor provision, requiring sanctions motion to be made separately from other motions and to describe specific conduct alleged to violate rule, since motions served different purposes and were governed by different standards, so that motion to dismiss did not provide specific notice as to which factual or legal claims allegedly violated sanctions rule.

Bankruptcy Rule 9024 Relief from Judgment or Order.

Georgia Dept. of Rev. v. Mouzon Enters., Inc. (In re Mouzon Enters., Inc.), 610 F.3d 1329 (11th Cir. 2010). An order allowing or disallowing any claim to which objection has been filed is not "entered without a contest," and party seeking relief from order on basis of alleged mistake must file motion for relief within one-year period specified in Fed. R. Civ. Proc. 9024 governing motions for relief from judgment, though claim objection is settled before being considered on merits by bankruptcy court.

FED. R. CIV. PROC. 11 Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions.

Peer v. Lewis, 606 F.3d 1306 (11th Cir. 2010). Defendant was not entitled to Rule 11 sanctions against attorney who represented plaintiff in Fair Credit Reporting Act (FCRA) action, alleging suspicious activity on plaintiff's credit report was caused by defendant accessing it. Although the FCRA claim was objectively frivolous, because it was based on unsubstantiated speculation, the motion for sanctions was untimely, since defendant waited almost one year after he had convincing proof in the form of plaintiff's credit report that the FCRA claim was frivolous before filing motion for sanctions.

FED. R. CIV. P. 12(b)(6) Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing.

American Dental Assoc. v. Cigna Corp., 605 F.3d 1283 (11th Cir. 2010). Following *Twombly* "a complaint must now contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" The *Twombly* standard "'calls for enough facts to raise a reasonable expectation that discovery will reveal evidence' of the claim." Courts may infer from the factual allegations in the complaint 'obvious alternative explanation[s],' which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer." However, claims for fraud or mistake require a heightened pleading standard. When alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.

Lubin v. Skow (In re Integrity Bancshares, Inc.), 382 Fed. Appx. 866 (11th Cir. 2010). The Eleventh Circuit affirmed the district court's dismissal of a complaint against the officers of both the debtor and the debtor's failed subsidiary bank. The court explained that a simple recitation of the elements of a cause of action in a complaint will not suffice.

Fed.R.Civ.P. 41 Dismissal of Actions.

Anago Franchising, Inc. v. Shaz, LLC, 677 F.3d 1272 (11th Cir. 2012). A stipulation of dismissal, signed by all parties who have appeared, is self-executing and dismisses the case upon filing. After stipulation of dismissal has been filed, district court cannot retain jurisdiction by issuing post-dismissal order to that effect. Provision in stipulation of dismissal that the "court shall retain jurisdiction," was insufficient to retain jurisdiction since stipulation made no request of court, rather parties sought to extend jurisdiction by agreement.

Fed. R. Civ. Proc. 69 Execution.

Ziino v. Baker ex rel. Estate of Wellman, 613 F.3d 1326 (11th Cir. 2010) An allowed claim in bankruptcy serves a different objective from that of a money judgment. It permits the claimant to participate in the distribution of the bankruptcy estate under 11 U.S.C. § 507. The assertion of a claim in bankruptcy is not an attempt to recover a judgment against the debtor, but to obtain a distribution from the debtor's bankruptcy estate.

Florida's LLC ACT, Fla. Stat. § 606.433 Right of Assignee to Become Member.

Federal Trade Comm'n v. Peoples Credit First, LLC, 621 F.3d 1327 (11th Cir. 2010). Florida law permits a court to order a judgment-debtor to surrender all right, title, and interest in a debtor's single-member LLC to satisfy an outstanding judgment.

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