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

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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.

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

11 U.S.C. § 522 Exemptions.

5. Clark v. Rameker (In re Clark), 714 F.3d 559 (7th Cir. 2013), *cert. granted,* 133 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 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."
- 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.

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[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.

- 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*.

PRESENTATION EXHIBIT
BANKRUPTCY AT THE BEACH

1. <u>Law v. Siegel</u>, 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) made homestead exemption "not liable for payment of any administrative expense."
- 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.
- Other meaningful sanctions: (1) § 727(a)(2)-(6) - denial of discharge; (2) Rule 9011(c)(2) sanctions for bad-faith litigation; (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. <u>United States v. Quality Stores, Inc.</u>, 2014 WL 1168968 (2014)(unanimous, with Justice Kagan not participating). Severance payments constituted "wages" for which debtor/employer was required to withhold FICA tax.

  - 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.
- Debtor could not rely on IRC provision relating to income-tax withhold to limit the meaning of "wages."
  - Debtor argued that 26 U.S.C. § 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 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,* 133 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) 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.

- § 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.
- 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) 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).
- 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. <u>Piazza v. Nueterra Healthcare Physical Therapy, LLC (In re Piazza)</u>, 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. <u>Kulakowski v. Walton (In re Kulakowski)</u>, 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. <u>Brown v. Gore (In re Brown)</u>, 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. <u>Hope v. Acorn Financial (In re Fluellen)</u>, 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. <u>Heatherwood Holdings, LLC v. HGC, Inc. (In re Heatherwood Holdings, LLC)</u>, 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.
- 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. <u>Fernandez v. Havana Gardens, LLC (In re Fernandez)</u>, 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. <u>Sears v. United States (In re Sears)</u>, 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. <u>Torrens v. Hood (In re Hood)</u>, 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. <u>Dunn v. Advanced Medical Specialties, Inc. (In re Tronge-Knoepffler)</u>, 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. <u>In re Zumbro</u>, 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. <u>Disciplinary Board of the Supreme Court of Pennsylvania v. Feingold (In re Feingold)</u>, 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.
- Fees and costs for disciplinary proceedings are nondischargeable fines or penalties under § 523(a)(7).
- Nondischargeability alone is not sufficient cause for relief from stay under § 362(d)(1).
- "[O]therwise the statutory exceptions for the enumerated nondischargeability debts– like domestic support obligations– found in§ 362(b) would be meaningless."
- Nondischargeability may be a factor, even a weighty factor, but without more nondischargeability does not constitute cause.
- Courts must look at the totality of the circumstances to determine if stay relief is 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." 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. <u>Macias v. Dillworth (In re Macias)</u>, 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*.