# 11TH CIRCUIT CASES UPDATE
# June 2016-April 2017

James J. Robinson
Chief United States Bankruptcy Judge
Northern District of Alabama[1]

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[1] Chief Judge Robinson thanks his law clerk, Alyssa Ross, for her assistance in preparing this update.

***Tucker v. Mukamal (In re Tucker)***, 650 Fed. Appx. 662, Case No. 14-15245 (11th Cir. May 24, 2016) (per curiam) (William Pryor, Julie Carnes, and Jill Pryor, JJ.).

**Code § / Rule**: jurisdiction of the bankruptcy court

**Held:** Bankruptcy court had authority to adjudicate a motion to ratify sale, which motion was filed before the case was closed.

**History:** 11th Circuit affirms the District Court for the Southern District of Florida, which affirmed the Bankruptcy Court for the Southern District of Florida.

**Facts**: Tucker, a chapter 7 debtor, entered into a court-approved agreement that if he did not remit $700,000 to the bankruptcy trustee within a certain time, the trustee could revoke Tucker's discharge and claim a particular parcel of real property for the estate. The debtor did not pay as agreed, and so the bankruptcy court revoked the discharge and the trustee claimed and liquidated the parcel of real property. The buyer filed suit in state court to quiet title, and the debtor cross-claimed against the trustee, asserting that the trustee fraudulently obtained the real property at issue. While those claims were pending in state court, the trustee moved to finalize the bankruptcy case, and the bankruptcy court entered an order directing that the trustee take steps to close the case and issue a final report. Before either of those actions was taken, however, the purchaser moved in the still-open bankruptcy case for the bankruptcy court to ratify the sale of the real property and for a ruling that the debtor could not pursue the trustee in a separate adversary proceeding. The bankruptcy court adjudicated the motion, and ruled that the sale was ratified and that the *Barton* doctrine barred the debtor's claims against the trustee. The debtor appealed, on grounds that the bankruptcy court had no jurisdiction because the case was "closed," that the proceeding should have been reopened before the sale could be ratified, and that the *Barton* doctrine did not apply to the trustee. The district court affirmed as to all issues, and the 11th Circuit agreed. The 11th Circuit discussed with particularity the "case closing" issue. The circuit court noted that although the trustee had been ordered to take steps toward case closing, the case had not in fact been closed when the purchaser filed the motion to ratify the sale. The bankruptcy court's ruling on the sale motion was entered many months prior to the actual closing of the case, and the debtor's own actions (filing motions and responsive pleadings directed to the sale motion) also show the debtor's understanding that the bankruptcy court continued to have jurisdiction over that matter.

***Johnson v. Midland Funding, LLC,*** 823 F.3d 1334, Case No. 15-11240 (11th Cir. May 24, 2016) (Wilson, Martin, and Higginbothom, JJ.) (opinion by Martin, J.), *reversed,* 581 U.S.--- (May 15, 2017) (opinion by Breyer, J., joined by Roberts, C.J., and Kennedy, Thomas, and Alito, JJ.) (dissent by Sotomayor, J., joined by Ginsburg and Kagan, JJ.) (Gorsuch, J., took no part).

**Code §/ Rule**: Fair Debt Collection Practices Act ("FDCPA") and the Bankruptcy Code—consequences of debt collectors filing obviously stale claims

**Held**: The 11th Circuit held there is no irreconcilable conflict between the provisions of the Bankruptcy Code that allow the filing of proofs of claim for time-barred debts and the provisions of the FDCPA that impose liability on debt collectors for attempting to collect a debt through any false, deceptive, or misleading representation or means (which means include filing a proof of claim for a time-barred debt under the ruling in *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014)).

The Supreme Court reversed, without addressing the preclusion issue, on grounds that filing a proof of claim that is obviously time-barred is not a false, deceptive, misleading, unfair, or unconscionable debt collection activity under the FDCPA.

**History**: Supreme Court reverses the 11th Circuit, which reversed the District Court for the Southern District of Alabama

**Facts**: The debt-collector creditor filed a proof of claim in each of the class-members' chapter 13 cases, which claim was based on a debt that was beyond the statute of limitations under Alabama law. Taking the opening left in the *Crawford* opinion, the district court ruled that the provisions of the Bankruptcy Code that expressly authorize the filing of a proof of claim for such debts are in irreconcilable conflict with the provisions of the FDCPA that provide liability for taking collection actions that are unconscionable, unfair, deceptive, or misleading (such as collecting on an account that is stale under state law). The 11th Circuit disagreed and held that, even though such debts remain owing and are not extinguished under state law, a debt collector is nonetheless liable for filing proofs of claim for stale debts under the least-sophisticated-consumer standard of the FDCPA. The circuit court stated, "[W]hile we recognize that creditors can file proofs of claim they know to be barred by the statute of limitations, those creditors are not free from all consequences of filing these claims." The circuit court found the FDCPA to be an extra layer of protection for debtors in bankruptcy against debt collectors, and saw no positive repugnancy in the FDCPA bringing sanctions to bear against debt collectors for taking actions that are otherwise allowed by the Code. The court said its holding did not infringe on any debt collector's right to file a claim otherwise allowed under the Code; it simply meant that the debt collector would suffer the consequences should it choose to exercise that right as to a stale debt.

The Supreme Court granted *certiorari*, and heard oral argument on January 17, 2017. The *Johnson* case stands in contrast to *Owens v. LVNV Funding, LLC*, 832 F.3d 726 (7th Cir. 2016), *cert. granted* (U.S. Sept. 12, 2016) (No. 16-315), in which the Seventh Circuit reached the opposite conclusion and held that the term "claim" in the Bankruptcy Code is broader than only legally enforceable obligations, and also held that filing a proof of claim on a stale debt in bankruptcy was not a misleading, deceptive, unfair, or otherwise inappropriate act under the FDCPA.

On May 15, 2017, the Court issued its opinion reversing the 11th Circuit. The Court held that "claim" did not mean "enforceable claim" and pointed out that the Code itself makes this clear: lack of enforceability means a claim may be subject to disallowance; it does not mean a claim is no longer a claim. Further, the word "claim" is intended to broadly encompass rights to payment even if they are contingent or disputed. *See* Code §§ 502(b)(1) and101(5)(A). Enforceability has long been an affirmative defense. Considering that the audience in chapter 13 includes always a trustee and almost always an attorney, there is nothing deceptive or misleading in filing a claim on a time-barred debt, which may be disallowed upon objection. The Court further found the filing of a claim on a stale debt was neither "unfair" nor "unconscionable" although that was a closer question. Assuming without deciding that cases holding that filing a civil suit on a stale debt is "unfair" or "unconscionable" are correct, the rationale of those cases is not determinative in the bankruptcy claim context, primarily because the consumer is the party who initiates the chapter 13 proceeding in the first place, and a knowledgeable trustee is also at work.

It is also not unfair for a debt buyer to buy stale debts cheaply and then file claims hoping to slip by a less-than-diligent trustee. The system treats untimeliness as an affirmative defense, and the filing and disallowance of stale claims allows for their discharge. Significantly, changing the treatment of untimeliness so that it is no longer an affirmative defense but instead an exception would lead to a multitude of issues in carving out the parameters of such an exception (would it apply only when the staleness appears on the face of the claim, or anytime a claim is found to be stale even if the creditor had a good faith argument that it was not such as a dispute over the timing of payments made on the underlying obligation). The impact of such an exception on other affirmative defenses would also be an issue—would filing a claim subject to any affirmative defense that later proved successful result in FDCPA liability? Neither the FDCPA nor the Code indicate that Congress intended to force those issues into an FDCPA action. In fact, the FDCPA was designed to help consumers avoid bankruptcy altogether, and the Code in contrast is a "delicate balance of a debtor's protections and obligations." Further, Rule 9011 does not address the statute of limitations issue, but simply means that whatever information the creditor provides must be accurate, so it provides no support for the debtor's argument.

***Tacoronte v. Cohen***, 654 Fed. Appx. 445, Case No. 14-15334 (11th Cir. June 23, 2016) (per curiam) (Martin, Julie Carnes, and Anderson, JJ.).

**Code § / Rule**: Rule 11

**Held:** Rule 11 sanctions for filing pleadings that were not warranted based on existing law nor a nonfrivolous extension of existing law should have been made against the attorney, as the person primarily responsible for the violation, rather than against the party.

**History**: 11th Circuit vacates and remands to the District Court for the Middle District of Florida

**Facts**: Taraconte defaulted on a line of credit from Wells Fargo Bank, and Wells Fargo sued in state court to recover the balance. One of the defendants before the 11th Circuit (Greenspoon Marder) represented Wells Fargo in the state court litigation. The other defendant, Cohen, was a shareholder of Greenspoon Marder and took the lead in the state court case, securing a judgment of $129,000 against Taraconte. Taraconte then sued the defendants in federal district court, asserting claims under the Fair Debt Collection Practices Act, the Fair Credit Reporting Act, and Florida state consumer protection laws, all premised upon the failure of Cohen to file a notice of appearance until a year after he was retained by Wells Fargo, and upon an inquiry being placed upon Taraconte's Equifax credit report in the name of Cohen's former employer, when Cohen pulled the credit report. Final judgment was entered in favor of the defendants, and they moved for the imposition of Rule 11 sanctions, which the district court granted to the extent of an award of attorney fees and costs, and imposed that award against Taraconte, based upon the R & R of the magistrate judge. The district court also found that Taraconte's counsel failed to conduct even a basic inquiry into the law before filing the complaint, and that Taraconte prosecuted the case solely to retaliate against Wells Fargo and its attorneys.

Taraconte appealed, the defendants cross-appealed, and Taraconte then filed chapter 7 and discharged the debt. Pointing out that district courts cannot impose Rule 11 sanctions against a represented party for a pleading that advances an unwarranted legal theory, but must instead award those sanctions against the offending party's attorney, the 11th Circuit vacated and remanded the sanctions orders so that the district court could reconsider what portion of the sanctions (those attorney fees and costs incurred defending against an unwarranted legal theory) should have been assessed against Taraconte's counsel rather than against Taraconte. Neither side disputed that the sanctions as to Taraconte personally had been discharged; the real issue was that at least some of the sanctions award should have been made against counsel, which part would be unaffected by the client's discharge.

***Bazemore v. Jefferson Capital Systems, LLC***, 827 F.3d 1325, Case No. 15-12607 (11th Cir. July 5, 2016) (Tjoflat, Rosenbaum, and Kaplan, JJ.) (opinion by Kaplan, USDJ for SDNY sitting by designation).

**Code § / Rule**: Arbitration of claims under the Fair Debt Collection Practices Act ("FDCPA") for a credit card issued via internet application.

**Held**: Debt collector failed to establish the existence of any agreement (including any agreement to arbitrate) other than the agreement to repay charges incurred in the use of a credit card.

**History**: 11th Circuit affirms the District Court for the Southern District of Georgia, but on different grounds

**Facts**: The plaintiff applied online for a credit card issued by First Bank of Delaware. She used the card and failed to pay the account. Jefferson Capital bought the delinquent account, and, after filing chapter 13 bankruptcy, the plaintiff sued Jefferson Capital for alleged violations of the FDCPA for filing a proof of claim on a time-barred debt. Jefferson Capital moved to compel arbitration, which the district court denied on grounds that the plaintiff's claims were beyond the scope of the arbitration agreement. The 11th Circuit affirmed the denial, but on different grounds. The circuit court found that Jefferson Capital's evidence did not establish that the plaintiff had ever accepted the terms and conditions of the arbitration agreement. The affidavit of the employee who attempted to prove the acceptance of those terms did not do so, but established only that in the normal course, a welcome kit containing the terms would have been sent to the plaintiff following her online acceptance of the terms via "clickwrap agreement" whereby plaintiff would have accepted the terms and conditions by checking a dialogue box before completing the application. He declared that the plaintiff accepted the terms governing her account, but did not aver that he had any personal knowledge of that, and attached no documents to support that. There was no evidence that the website she visited actually contained the dialogue box, or the terms and conditions. Further, the declarant never stated that the welcome kit was actually sent to the plaintiff, only that one "would have been" in the company's ordinary course. The case is, at core, an indictment of the attorney who prepared the affidavit.

The 11th Circuit also declined to remand the case for a trial on whether the arbitration agreement existed, saying the standard for determining whether a trial is necessary to determine the existence of an arbitration agreement is akin to the standard for summary judgment, and Jefferson Capital put forth no competent evidence that an arbitration agreement was ever accepted by the plaintiff. It was the defendant's burden under Georgia law to prove the existence of the agreement, and saying one "would have been sent" to plaintiff was nothing more than a "scintilla" of evidence, insufficient to create a genuine issue.

***Soderstrom v. J. Thompson Investments, LLC (In re Soderstrom)***, 654 Fed. Appx. 987, Case No. 15-14922 (11th Cir. July 6, 2016) (per curiam) (Wilson, Rosenbaum, and Black, JJ.).

**Code § / Rule**: § 523(a)(2)(A)

**Held**: The bankruptcy court did not err in believing one party's testimony more than another's in resolving a true "he-said-she-said" factual dispute.

**History**: 11th Circuit affirms District Court for the Middle District of Florida, which affirmed the Bankruptcy Court for the Middle District of Florida.

**Facts**: Thompson alleged that the debtor, Soderstrom, fraudulently misrepresented that Thompson's investment was needed to build out office space. Soderstrom denied making any such statement or misrepresenation, but the court found Thompson to be more credible. The court also found that Thompson's reliance on the statement was justifiable despite the fact that she had also entered into an agreement to be repaid only to the extent the money was not used for the build-out, and despite the fact that it would have been more prudent for her to inquire further before investing. The standard is one of justifiable reliance, not objectively reasonable reliance, and is satisfied so long as the "plaintiff's conduct [is not so] utterly unreasonable, in light of the information apparent to him, that the law may properly say that his loss is his own responsibility." In re Vann, 67 F.3d 277, 283 (11th Cir. 1995). Finally, the court did not err in finding that Thompson would not have made the investment but-for the misrepresentation, so that causation was established.

***Florida Agency for Health Care Admin. v. Bayou Shores SNF, LLC (In re Bayou Shores SNF, LLC),*** 828 F.3d 1297, Case No. 15-13731 (11th Cir. July 11, 2016) (Hull, Julie Carnes, Clevenger, JJ.) (opinion by Clevenger, J.), *petition for cert. filed* (U.S. Feb. 2, 2017) (No. 16-967).

**Code § / Rule**: jurisdiction under 28 U.S.C. § 1334, affected by 42 U.S.C. § 405(h); Medicare provider agreements

**Held:** "Because we are persuaded that the 1984 amendments to § 405(h) were a codification and not a substantive change, we align ourselves with the Seventh, Eighth, and Third Circuits and hold that § 405(h) bars § 1334 jurisdiction over claims that 'arise under [the Medicare Act].'"

**History:** 11th Circuit affirms District Court for the Middle District of Florida, which reversed the Bankruptcy Court for the Middle District of Florida

**Facts:** The debtor operates a skilled nursing facility in Florida, and over 90% of its revenue comes from Medicare and Medicaid patients, pursuant to its provider agreements with the federal and state governments. Continuing under its provider agreement requires that the debtor be in compliance with qualifications for its type of facility, as established by the Department of Health and Human Services. Based on noncompliance regarding the condition of the debtor's facility, DHHS notified debtor that its Medicare provider agreement would terminate at a specified date and time, which termination would then trigger termination of its Medicaid provider agreement also. In an attempt to prevent termination of its provider agreements, the debtor filed bankruptcy prior to the termination date. The bankruptcy court rejected DHHS's challenge to jurisdiction, assumed control over the provider agreements as property of the estate, and enjoined their termination, determining that the debtor was qualified to participate and requiring DHHS to maintain a stream of payments to the debtor's estate, with a chapter 11 plan then confirmed that assumed the provider agreements. On appeal, the district court reversed the bankruptcy court and found no jurisdiction to deal with the debtor's provider agreements. The 11th Circuit, in a lengthy opinion, agreed with the district court. The central issue was whether the recodification of the statute that had previously barred bankruptcy jurisdiction over Medicare claims demonstrated a clear intent by Congress to change the law and vest bankruptcy courts with such jurisdiction. The circuit court found it "abundantly clear that Congress expressed no such intention." The circuit court declined to address whether the result would be different if only Medicaid claims were presented; and also declined to rule on whether the provider agreements terminated before or after the bankruptcy filing.

***Hinkle v. Midland Credit Management, Inc.***, 827 F.3d 1295, Case No. 15-10398 (11th Cir. July 11, 2016) (Hull, Black, and Moreno, JJ.) (opinion by Black, J.).

**Code § / Rule**: Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681s-2(b)

**Held**: The court emphasizes a reasonableness standard for determining whether a debt buyer, reporting to a CRA, has fulfilled its duty to investigate a consumer's dispute of a reported debt, and declines to shift the burden to the consumer.

**History:** 11th Circuit reverses and remands (as to FCRA claims) to District Court for the Southern District of Georgia

**Facts**: Midland, a debt buyer, bought a down-the-line consumer "junk debt" without account-level documentation, which was purportedly owed by Terri Hinkle. Midland sent collection letters to the address on file stating the amount owed, and offering to settle for a smaller amount. The smaller amount was received and the debt marked "paid" in December 2008. Midland reported the debt to credit reporting agencies ("CRAs") as "paid" in December 2008, but also had reported the debt "assigned to internal or external collections" since November 2008. Hinkle claimed that she did not pay the debt, never received correspondence regarding the debt, and was not even aware the debt existed until she ordered her credit report in May 2011 and saw the entry. Hinkle disputed the debt with the CRAs saying that the account did not belong to her, and the CRAs notified Midland of the dispute. Hinkle also sent Midland a demand for validation of the debt, but Midland did not respond because the debt was already paid on its records and no longer reported to CRAs at that time. Midland acquired another down-the-line consumer junk debt without account-level documentation, purportedly owed by Terri Hinkle, in December 2011 and again sent a collection letter to the address on file with an offer to settle. Hinkle informed Midland via phone call that the debt was not hers, and Midland began an investigation. Unfortunately, the investigation consisted only of sending Hinkle a letter asking her to send any documentation she had that supported her dispute. Midland took no further action and continued to work the account, including reporting to CRAs that the debt was assigned to collections, although it did flag the debt as "disputed" when reported. Hinkle then disputed the debt with the CRAs, who in turn notified Midland. In response, Midland double checked what it had reported to the CRAs against Midland's internal records (which notably did not contain any account level documentation, but only electronically stored information about name, address, and date of birth of the consumer). Midland did not request account-level documentation from the entities that sold it the debts, despite having this ability. Hinkle sued under the FDCPA and the FCRA, and the district court granted summary judgment to Midland on all counts, finding that no reasonable jury could find that either statute had been violated. While affirming as to all other counts, the 11th Circuit reversed as to the FCRA count.

The FCRA requires that upon receipt of a dispute, the CRA must notify the reporting entity (Midland), and that entity must then (1) conduct an investigation of the disputed information; (2) review all relevant information provided by the CRA; and (3) report the results to the CRA. The problem in this case is that comparing the information it reported against its own internal records, and asking Hinkle to send any documentation she had (which was, of course, none since she claimed to have no account) was not a "reasonable" investigation under the FCRA. What is reasonable will vary under the circumstances, but in this case, Midland's paltry investigation could be found by a reasonable jury to fall short of the "reasonableness" standard, so summary judgment in Midland's favor was inappropriate.

***Dimaria Properties, LLC v. 3400 Atlantic, LLC (In re Dimaria Properties, LLC)***, 654 Fed. Appx. 1018, Case No. 15-11763 (11th Cir. July 12, 2016) (per curiam) (Hull, Marcus, and Anderson, JJ.).

**Code § / Rule**: Rule 9023 (applying Rule 59(e) of the F.R. Civ. P.)

**Held**: Motions to amend under Rule 59(e) are properly granted only in the case of newly-discovered evidence or manifest errors of law or fact; such motions should not be used to raise arguments that could, and should, have been raised before the entry of the order at issue.

**History**: 11th Circuit affirms the District Court for the Southern District of Florida, which affirmed the Bankruptcy Court for the Southern District of Florida

**Facts**: The debtor was operating under a confirmed chapter 11 plan, which required payments to secured creditor 3400 Atlantic by dates certain, with a warranty deed having been executed and delivered to an escrow agent, to be released and recorded upon an event of default. One month into the plan, 3400 Atlantic declared an event of default, and the warranty deed was released from escrow and recorded. The debtor moved for an emergency hearing to enforce the terms of the confirmation order, on grounds that the creditor had declared default prematurely (with no mention of a 10-day cure period being required but not given). The bankruptcy court found that a default had indeed occurred and denied the emergency motion. In response, the debtor moved the bankruptcy court to reconsider its order denying the emergency motion and for the first time, raised the argument that a 10-day cure period was required but not given before the default could be declared. The bankruptcy court denied the motion to reconsider (made under Rule 9023, which provides that Rule 59 of the Fed. R. Civ. P. applies in bankruptcy cases) on grounds that the arguments raised by the debtor were raised for the first time in the motion to reconsider but could, and should, have been raised at the hearing on the emergency motion. The district court and circuit court affirmed. The only grounds for relief under a 59(e) motion are newly-discovered evidence, or manifest errors of law or fact. "Motions to amend should be used to raise arguments which could, and should, have been made before the judgment was issued. Denial of a motion to amend is 'especially soundly exercised when the party has failed to articulate any reason for the failure to raise the issue at an earlier stage in the litigation.'" (citing *Lussier v. Dugger*, 904 F.2d 661, 667 (11th Cir. 1990)). Because the debtor could, and should, have raised the 10-day cure period issue in its emergency motion to enforce, but failed to do so, it could not then rely on that argument in a motion to reconsider.

***JMC Memphis, LLC v. Soneet R. Kapila (In re JMC Memphis, LLC)***, 655 Fed. Appx. 802, Case No. 15-15370 (11th Cir. July 21, 2016) (per curiam) (Wilson, Rosenbaum, and Edmonodson, JJ.).

**Code § / Rule**: equitable mootness

**Held**: Considering all the circumstances, the appeal of the bankruptcy court's settlement agreement order was equitably moot as effective relief could not be afforded to the movant.

**History**: 11th Circuit affirms the District Court for the Southern District of Florida, which found the appeal of the bankruptcy court's order to be equitably moot.

**Facts**: In August 2012, JMC Memphis, LLC ("JMC") contracted with Investments Australia, LLC to purchase an apartment complex, which complex had suffered fire damage prior to the contract with another fire occurring after the contract date but prior to closing. Following the last fire, JMC and Investments Australia amended the purchase contract to provide that the seller assigned all its rights, title, and interest in fire insurance proceeds in connection with the last of the fires to JMC, and further providing that JMC was responsible for pursuing the claim, and that the seller would pay JMC $85,000 if no insurance proceeds were paid. Investments Australia then sued its insurer based on claims made related to all of the fires, including the one for which assignment had been made to JMC. Thereafter, a member of Investments Australia filed bankruptcy and as part of the bankruptcy case, participated along with the other two members of Investments Australia in a mediation of the insurance issues, which ultimately settled with the insurer agreeing to pay $750,000 to the member's bankruptcy trustee in exchange for a full release and a bar order against any future claims by any party under the policies at issue. JMC objected to the settlement agreement and argued that it, rather than the individual members of Investments Australia, was entitled to all of the settlement proceeds, based on the amendment to the purchase agreement. The bankruptcy court approved the settlement, but required $100,000 of the proceeds be held in escrow as protection for JMC, subject to resolution of its claim against the proceeds (this figure was based on the $85,000 figure in the amendment to the purchase agreement, and included a cushion above that value). JMC did not object to the order and did not seek a stay of the order pending appeal. JMC then appealed the order, and the district court dismissed the appeal as equitably moot.

The 11th Circuit agreed. Equitable mootness allows a court to dismiss a challenge to an order of the bankruptcy court if effective relief would be impossible. *See In re Nica Holdings, Inc.*, 810 F.3d 781, 786 (11th Cir. 2015). All circumstances of the case must be considered in making this determination. Important here were the facts that JMC did nothing to protect its own interests, never seeking coverage itself despite the assignment of that right as it related to the last fire. Further, JMC did nothing to participate in or assist with the lengthy civil suit and negotiations that took place leading up to the settlement agreement. Finally, JMC did not seek a stay of the order approving the settlement agreement (and escrowing only $100,000 of the total). Other parties relied on the finality of the order in the absence of a stay and consummated the agreement, including the trustee beginning disbursements of the funds. Even though approximately half of the funds were still on hand, the circuit court found that unwinding the settlement agreement would nevertheless result in consequences that no parties intended or contemplated. It would be inequitable to allow JMC to undo the agreement now after taking no action in the interim to protect its own interests.

***State of Florida Dept. of Rev. v. Gonzalez (In re Gonzalez)***, 832 F.3d 1251, Case No. 15-14804 (11th Cir. Aug. 11, 2016) (Jordan, Rosenbaum, and Siler, JJ.) (opinion by Siler, J.), *petition for cert. filed (*U.S. Feb. 16, 2017) (No. 16-1013).

**Code § / Rule**: § 1327(a) binding effect of confirmed plan, § 362(b)(2)(C) exception to the automatic stay for withholding income to pay for domestic support obligation under order or statute

**Held**: Section 1327(a) and § 362(b)(2)(C) are independent, and even though an action may not violate the stay, the action may nonetheless put the actor in contempt for violation of the terms of the confirmed plan.

**History:** 11th Circuit affirms the District Court for the Southern District of Florida, which affirmed the Bankruptcy Court for the Southern District of Florida.

**Facts:** The confirmed chapter 13 plan provided that the DSO arrears would be paid through the plan in monthly installments. Postconfirmation, the Florida Department of Revenue ("DOR") intercepted the debtor's travel reimbursement and applied it to the prepetition arrears. The debtor argued that this was contempt and violated the terms of the confirmed plan, while the DOR countered that it was permitted as an exception to the automatic stay. The bankruptcy court agreed with the debtor, and awarded damages plus attorney fees, and the district court affirmed. The circuit court examined Congressional intent and the language of the stay exception that was added as part of BAPCPA. The court ruled that § 1327(a) and § 362(b)(2)(C) are independent, and even though an action may not violate the stay (as the intercept admittedly did not), the action may nonetheless put the actor in violation of the terms of the confirmed plan (which the intercept certainly did). Nothing in the language of either subsection indicates that § 362(b)(2)(C) was intended to trump § 1327(a). The court also used this opportunity to reiterate that the confirmed plan is binding not only as to issues actually litigated, but as to any issues that could have been litigated prior to confirmation.

***Gowdy v. Mitchell (In re Ocean Warrior, Inc.)***, 835 F.3d 1310, Case No. 15-11891 (11th Cir. Aug. 26, 2016) (Marcus, Dubina, and Melloy, JJ.) (opinion by Melloy, J.).

**Code § / Rule**: civil contempt and compensatory sanctions

**Held**: Bankruptcy court had the power to impose coercive compensatory civil contempt sanctions, and the imposition of those sanctions was a core matter.

**History**: 11th Circuit affirms in part, reverses in part, and remands in part to the District Court for the Southern District of Florida, which had affirmed in all respects the Bankruptcy Court for the Southern District of Florida.

**Facts**: Mitchell was a commercial fisherman who sued the debtor and a related corporation in United States District Court in the State of Washington for claims related to injuries he sustained while working on the corporations' commercial shrimping boat. He also filed an in rem maritime claim against the shrimping boat, naming the debtor as its owner. The vessel was arrested and sold pursuant to court order. On the same day as the arrest and sale of the shrimping boat, the debtor filed chapter 11. The bankruptcy court then voided the sale, determined there was equity in the boat, and ordered the president of the debtor (Gowdy) to maintain insurance on the vessel and to keep the vessel located in U.S. waters off the state of Washington pending the outcome of Mitchell's claim, in addition to requiring the debtor to deposit $38,000 into the registry of the court as security. None of those things actually happened, and the ship disappeared, as did Gowdy. The Florida bankruptcy court and the district court in Washington each issued warrants for Gowdy's arrest, the Washington court doing so as a matter of criminal contempt. The bankruptcy case eventually converted to one under chapter 7, with the case closing order providing that the court retained jurisdiction to reopen the case in the event the shrimping boat or Gowdy were ever located. Nearly twenty years later, Gowdy was arrested by U.S. Marshals in Texas. He was brought before the Washington court, who released him on his own recognizance and deferred to the Florida bankruptcy court's civil contempt proceedings. Gowdy appeared pro se at the civil contempt show-cause hearing in bankruptcy court, and the bankruptcy judge informed him that he was not in danger of incarceration, with the only issues being the location of the boat and the payment of damages to Mitchell if the boat was not produced. Gowdy refused to answer questions or explain what happened to the boat, and was found in civil contempt and ordered to produce the boat or pay the amount of the money judgment. He was given 90 days to purge the contempt by either producing the boat or paying the money, or risk further sanctions that might include incarceration.

In response, Gowdy filed an affidavit showing he had no assets, to avoid having to pay the fee for an appeal. He neglected to mention his interest in a pending personal injury suit, that settled for over \$449,000; and also omitted his interest in a home valued at \$120,000. Soon thereafter, the chapter 7 trustee filed an AP against Gowdy seeking damages for conversion of the boat, turnover of the boat, and injunctive relief regarding the settlement funds from the personal injury suit. The personal injury funds were interpleaded in Texas, and the trustee received over \$224,000 from those funds. The bankruptcy court awarded attorney fees and costs to the trustee, and also sanctioned Gowdy for failing to purge the civil contempt, awarded a final judgment in favor of the trustee, and Gowdy appealed.

On appeal, the circuit court agreed with the district court that no separate evidentiary hearing on the contempt was required because the bankruptcy court's show-cause hearing satisfied due process. Gowdy had notice of the contempt charges and had an opportunity to present his evidence at that show-cause hearing. Second, because the court explained to Gowdy at the hearing that the court was not going to incarcerate him for the contempt, it was not a violation of due process to conduct the show-cause hearing without Gowdy having a court-appointed attorney. Finally, the civil contempt proceeding was "core" as it concerned the administration of the estate and as it concerned the turning over of property of the estate, and the sanction was not punitive but was instead compensatory and coercive. However, the circuit court did reverse the fee award for a determination of whether it included fees beyond those "reasonably related to litigation and asset recovery efforts surrounding contempt litigation."

***Land Ventures for 2, LLC v. Fritz***, 668 Fed. Appx. 862, Case No. 15-15303 (11th Cir. Aug. 29, 2016) (per curiam) (William Pryor, Martin, and Anderson, JJ.).

**Code § / Rule**: legal malpractice

**Held**: It was not error to grant summary judgment when there was no genuine factual dispute as to whether the attorney breached the standard of care.

**History**: 11th Circuit affirms the District Court for the Middle District of Alabama, which had conducted de novo review of proposed findings and conclusions by the Bankruptcy Court for the Middle District of Alabama

**Facts**: The LLC sued its attorney and his law firm for malpractice related to services provided in connection with its bankruptcy filing. The case began as a voluntary chapter 11, but was involuntarily converted to chapter 7 and assets were liquidated. The malpractice adversary proceeding was not core, but only related to the case under 28 U.S.C. § 157(c)(1). Accordingly, the circuit court refused the invitation of the appellant to review the bankruptcy court's proposed findings and conclusions, but looked only at the district court's *de novo* review of the proposed findings and conclusions. The LLC failed to prove the element of causation, because its expert's testimony was stricken by the district court (which ruling was not appealed), leaving only the uncontradicted affidavit testimony of the attorney's expert, which established that he did meet the applicable standard of care. Therefore, the attorney was entitled to summary judgment.

***Steffen v. Menchise (In re Steffen)***, 660 Fed. Appx. 843, Case No. 14-15093 (11th Cir. Sept. 6, 2016) (per curiam) (Hull, Marcus, and Black, JJ.).

**Code § / Rule**: Rule 37discovery sanctions

**Held**: Default judgment, denying the debtor's discharge under § 727, is a permissible discovery sanction when the debtor has demonstrated a lack of good faith and unjustified discovery delays, so that no lesser sanction would suffice.

**History**: 11th Circuit affirms the District Court for the Middle District of Florida, which affirmed the Bankruptcy Court for the Middle District of Florida.

**Facts**: The Government and the chapter 7 trustee each filed separate APs objecting to the debtor's discharge under § 727(a)(2)(B), for postpetition transfers of estate property. The bankruptcy court consolidated the APs and entered a discovery sanctions order that required the debtor to appear and be deposed, answering all questions. The debtor appeared, without her attorney, but refused to answer questions. The bankruptcy court granted default judgment against the debtor in favor of the Government and trustee as a sanction, resulting in a final judgment of denial of discharge in main bankruptcy case. On appeal, the district court affirmed the default judgment in the Government's AP, and dismissed the appeal of the trustee's AP and in the underlying bankruptcy case for failure to pay filing fees, file briefs, submit issues, and designate the record. The 11th Circuit affirmed the entry of default judgment as a sanction for failure to comply with the bankruptcy court's discovery order. Throughout the cases, the debtor had displayed a pattern of not acting in good faith and delaying discovery without grounds to do so, and had established that a lesser sanction would not suffice to cure her behavior. The debtor's appeal of the order in the trustee's AP, on the same grounds as the Government's, was moot, as was the appeal of the order in the bankruptcy case that closed the case without a discharge, given that the discharge denial order in the Government's AP was upheld.

***Morrison v. Morrison (In re Morrison)***, 661 Fed. Appx. 573, Case No. 15-14890 (11th Cir. Sept. 8, 2016) (per curiam) (William Pryor, Jordan, and Julie Carnes, JJ.).

**Code § / Rule**: Rule 8009

**Held**: Appellant bore the burden of designating the appellate record (including which filings, orders, and hearings were to be included) but she failed to provide a transcript of the hearing, so she could not argue on appeal that the bankruptcy court's findings or conclusions were contrary to the evidence, in light of her failure to provide the transcript.

**History**: 11th Circuit affirms the District Court for the Southern District of Florida, which affirmed the Bankruptcy Court for the Southern District of Florida.

**Facts**: The appellant was compelled to turn over property of the estate to the trustee for her sister's bankruptcy case. Following the initial evidentiary hearing, and after the appellant appealed to the district court, it was discovered that the court reporter could not produce a transcript due to an apparent malfunction in the recording equipment. The district court dismissed the appeal without prejudice with leave to refile the appeal at the conclusion of a second evidentiary hearing, which the bankruptcy court then conducted. Following the second hearing, the bankruptcy court invited the parties to submit case law or new evidence (with either a stipulation of authenticity or a request for further evidentiary hearing). The appellant in response filed only the affidavit of a realtor who averred that the property at issue had been purchased jointly by the appellant and her debtor-sister, but without a stipulation of authenticity or a motion for appropriate relief. The sister responded that the evidence had been available to the appellant at the time of the first evidentiary hearing. The bankruptcy court denied the appellant's request for further evidentiary hearing, and the district court affirmed because the appellant showed no legal basis for the bankruptcy court to set aside its prior ruling. On appeal to the circuit court, the appellant only challenged the order that denied her request for further evidentiary hearings. She claimed on appeal that the district court denied her due process by dismissing her appeal on a record that did not contain her testimony, but the burden of providing the record of that testimony was on her and she failed to provide the transcript of the second evidentiary hearing, during which the equipment was functioning properly.

***Arencibia v. Mortgage Guaranty Ins. Corp***., 659 Fed. Appx. 564, Case No. 15-15387 (11th Cir. Sept. 12, 2016) (per curiam) (Martin, Rosenbaum, and Anderson, JJ.), *petition for cert. filed,* (U.S. Mar. 20, 2017) (No. 16-1169).

**Code § / Rule**: definition of "debt collector" under the Fair Debt Collection Practices Act

**Held**: The unambiguous language of the statute limits the definition of "debt collectors" to persons who regularly attempt to collect debts owed to another, so that summary judgment in favor of the creditor was appropriate.

**History**: 11th Circuit affirms district court for the Middle District of Florida

**Facts**: Plaintiff filed a class-action lawsuit under the FDCPA against Mortgage Guaranty Insurance Corporation, alleging that Mortgage Guaranty failed to provide prior notice as required under Florida law prior to filing a deficiency collection action. Mortgage Guaranty had acquired the debt from the original lender after the original lender had obtained a judgment of foreclosure. However, the plaintiff could not prove that Mortgage Guaranty was a "debt collector" under 15 U.S.C. § 1692e and § 1692a(6). Although Mortgage Guaranty did attempt to collect debts that were *originally* owed to others and acquired after default, it had taken an assignment before collection efforts began and was therefore, *at the time of collection*, collecting debts owed to it and not to another. The outcome was controlled by the recent decision in *Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309 (11th Cir. 2015) which settled the definitional issue. "[A] person must regularly collect or attempt to collect debts *for others* in order to qualify as a 'debt collector' under the second definition of the term." *Id.* at 1316 (emphasis in original). The unambiguous language of the statute limited "debt collectors" to persons who regularly attempt to collect debts owed to another.

***Arnold v. Bayview Loan Servicing, LLC***, 659 Fed. Appx. 568, Case No. 16-10742 (11th Cir. Sept. 13, 2016) (per curiam) (Wilson, Rosenbaum, and Anderson, JJ.).

**Code § / Rule**: Fair Debt Collection Practices Act ("FDCPA") bona fide error defense, 15 U.S.C. § 1692k(c)

**Held**: Summary judgment was appropriate where the undisputed facts showed the violation was unintentional

**History**: 11th Circuit affirms District Court for the Southern District of Alabama

**Facts**: The debtor received a chapter 7 discharge, and a year later, received two statements from Bayview (the foreclosure of the property having only recently taken place). "A debt collector asserting the bona fide error defense must show by a preponderance of the evidence that its violation of the Act: (1) was not intentional; (2) was a bona fide error; and (3) occurred despite the maintenance of procedures reasonably adapted to avoid any such error." *Edwards v. Niagara Credit Solutions, Inc.*, 584 F.3d 1350, 1352 (11th Cir. 2009). The "ample evidence" showed that the statements sent to Arnold were sent by mistake, so that there was no specific intent to violate the FDCPA. The letters were triggered by an employee mistakenly entering the wrong code during a routine pre-foreclosure review, despite the fact that the account had previously been coded to stop the notices from being sent. The debtor argued that the case was not about the fact that the statements had been sent, but was rather about the content of the statements. The circuit court dismissed this argument as "difficult to understand" when the debtor did not contest that the two statements at issue were not intended to be sent, which means as a matter of law that the act of sending the statements "was not intentional." The second prong, that of a bona fide error, required Bayview to show that the mistake was objectively reasonable. Because the coding system worked when users input the codes correctly, and Bayview had no reason to know that the employee, who was trained in the requirements of the FDCPA and who routinely worked under a compliant checklist, would mistakenly input the wrong code, the mistake was objectively reasonable. Further, there were training procedures in place to avoid the sending of statements post-discharge, including the detailed checklist, which were adapted to avoid the type of error that occurred here. No statement would have been sent but-for the employee mistakenly inputting the wrong letter in the computer system. Therefore, adequate procedures were maintained and the debtor's claims failed as a matter of law.

***Ray v. McCullough Payne & Haan, LLC***, 838 F.3d 1107, Case No. 16-11518 (11th Cir. Sept. 29, 2016) (Ed Carnes, Martin, and Anderson, JJ.) (opinion by Ed Carnes, Chief Judge).

**Code § / Rule**: venue provision of the Fair Debt Collection Practices Act ("FDCPA") at 15 U.S.C. § 1692i(a)(2)

**Held:** The FDCPA's venue provision does not apply to post-judgment garnishment proceedings.

**History**: 11th Circuit affirms District Court for the Northern District of Georgia

**Facts:** The venue provision of the FDCPA, 15 U.S.C. 1692i(a)(2), provides that any debt collector who brings a legal action against a consumer "shall . . . bring such action only in the judicial district or similar legal entity—(A) in which such consumer signed the contract sued upon; or (B) in which such consumer resides at the commencement of the action." The debt collector in this case sued the consumer in the jurisdiction where the consumer resided, and obtained a judgment. The debt collector then initiated a garnishment action against the consumer's bank in order to collect the judgment, and the bank was located in a district that was neither where the contract was entered into nor where the consumer resided. The consumer sued, claiming the debt collector violated the venue provision of the FDCPA by filing the garnishment action in an inappropriate venue. The district court dismissed the complaint, ruling that the venue provision does not apply to a garnishment action, which, by its very nature, is an action against the bank and was not an action against the plaintiff. The 11th Circuit agreed. Post-judgment garnishment proceedings, at least under Georgia law, are unequivocally not actions against the consumer but against the garnishee. In addition, the Federal Trade Commission has issued an interpretation that supports the ruling: "If a judgment has been obtained from a forum that satisfies the requirements of this section, a debt collector may bring suit to enforce it in another jurisdiction." *Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act*, 53 Fed. Reg. 50,097,50,101 (Dec. 13, 1988).

***Failla v. Citibank, N.A. (In re Failla)***, 838 F.3d 1170, Case No. 15-15626 (11th Cir. Oct. 4, 2016) (Marcus, William Pryor, and Lawson, JJ.) (opinion by William Pryor, J.).

**Code § / Rule**: § 521(a) "surrender"; power of bankruptcy court under § 105

**Held**: A debtor who agrees to surrender a house in bankruptcy may not oppose a foreclosure action in state court, and the bankruptcy court may compel the debtor to stop opposing foreclosure in state court by ordering that the discharge will be vacated if the debtor does not comply.

**History:** 11th Circuit affirms District Court for the Southern District of Florida, which affirmed the Bankruptcy Court for the Southern District of Florida.

**Facts:** The debtors filed bankruptcy under chapter7 and their statement of intent showed they would surrender their mortgaged home. The house was underwater, and so the trustee abandoned it back to the debtors. The debtors continued to live in the house, while opposing a state court foreclosure action. Citibank moved the bankruptcy court to compel the debtors to comply with their stated intent of "surrender" and to cease opposition of foreclosure in state court as being contradictory to their stated intent. The bankruptcy court granted the motion and ordered the debtors to stop resisting the foreclosure action, or risk having their discharge vacated. The district court affirmed, as did the 11th Circuit. In rejecting the debtors' argument that they were required to surrender only to the trustee, the court pointed out that § 521(a)(2) requires debtors who state an intent to surrender to surrender to both the trustee and to the creditor. After abandonment, the debtor still has the duty to surrender to the creditor. The plain meaning as well as the context compelled that result. In assessing what is meant by "surrender," the court pointed out that it did not mean the giving of possession upon demand, which would instead be denoted by the word "deliver." Instead, as in the context of reaffirmation or redemption, the "surrender" required under §521 is the relinquishment of the right, privilege, or advantage in a legal sense rather than a physical sense. The debtor must cede his possessory rights in the collateral and make it available to the creditor. *See In re White*, 487 F.3d 199, 205 (4th Cir. 2007). Finally, the circuit court concluded that the bankruptcy court had broad authority to remedy the debtors' violations of statutory duties, such as the duty to surrender under § 521(a)(2), by virtue of § 105(a). "A debtor who promises to surrender property in bankruptcy court and then, once his debts are discharged, breaks that promise by opposing a foreclosure action in state court has abused the bankruptcy process." Further, "there is nothing strange about bankruptcy judges entering orders that command a party to do something in a nonbankruptcy proceeding."

***Rosen v. Abrams (In re The Fort Lauderdale Bridge Club, Inc.)***, 658 Fed. Appx. 549, Case No. 16-11352 (11th Cir. Oct. 17, 2016) (per curiam) (Tjoflat, William Pryor, and Jill Pryor, JJ.).

**Code § / Rule**: enforcing settlement agreement and plan of reorganization

**Held:** Enforcement of settlement agreement and plan provision prohibiting further litigation was proper, as was award of attorney fees against the party violating the settlement agreement and plan.

**History:** 11th Circuit affirms the District Court for the Southern District of Florida, which affirmed the Bankruptcy Court for the Southern District of Florida.

**Facts**: Plaintiff Rosen filed several actions against the debtor golf club that led to the chapter 11 petition. In May 2014, the bankruptcy court approved a settlement in which Rosen received $75,000 in exchange for a release of the debtor, its attorney Abrams, and its leadership from liability for all actions during the bankruptcy, as well as the dismissal of all pending actions against the club. The bankruptcy court later confirmed the chapter 11 plan that included a provision prohibiting further litigation against Abrams and closed the case. Rosen subsequently wrote the club and demanded that it sue Abrams, after which the bankruptcy court reopened the case and considered Abrams' motion for sanctions against Rosen for Rosen's violation of the settlement agreement and for enforcement of the confirmation order. The bankruptcy court granted both motions. The court awarded Abrams $5,320 in fees. On appeal the district court affirmed the bankruptcy court's orders and found that Rosen had no standing to appeal the order that enforced the plan because he had relinquished any right to pursue derivative actions in the settlement agreement. The clerk was also directed to not accept any further filings or appeals from Rosen without Rosen's first obtaining permission to file. The 11th Circuit affirmed, dismissing all of Rosen's arguments on appeal as either having not been raised below or unsupported.

***Daake v. C.D. Jones & Company, Inc. (In re C.D. Jones & Company, Inc.)***, 658 Fed. Appx. 1000, Case No. 16-11923 (11th Cir. Oct. 20, 2016) (per curiam) (Hull, Marcus, and Black, JJ.).

**Code § / Rule**: final judgment appealable under 28 U.S.C. § 158(a)(1)

**Held**: Settlement order that resolved all issues except for attorney fees was final and appealable.

**History**: 11th Circuit reverses and remands to the District Court for the Northern District of Florida, which had affirmed the Bankruptcy Court for the Northern District of Florida.

**Facts**: Daake and his wife are creditors of the debtor-defendant company. The Daakes filed the adversary proceeding on behalf of the estate (in light of no action being taken by the trustee) in order to determine whether a prepetition transfer of certain real property and cash from another large creditor to an insider of the company (Jones) in exchange for that insider's equity interest could be considered fraudulent transfers of estate property. The bankruptcy court granted partial summary judgment in favor of Jones with respect to the real property, thus leaving the cash as the only remaining issue. A settlement agreement was then reached in the main bankruptcy case, in which the defendants agreed to pay $250,000 cash to the estate in exchange for a release of all claims. That settlement was approved over the Daakes' objection, and left the possibility of attorney fees for misbehavior during the litigation as the only remaining issue in the AP. The Daakes appealed the settlement order in the bankruptcy case to the district court, which dismissed the appeal *sua sponte* for lack of jurisdiction on grounds that the order was not final, and was not properly appealable as an interlocutory order, citing 28 U.S.C. § 158(a)(1). The Daakes then appealed to the 11th Circuit, and the circuit court reversed. The circuit court found that the settlement order was final and appealable because it "end[ed] the litigation on the merits and [left] nothing for the court to do but execute the judgment." (quoting *In re The Charter Co.*, 778 F.2d 617, 621 (11th Cir. 1985)). The only matter pending was the attorney fee issue, which had no impact on the finality of the settlement order. The ruling was reversed and the issue remanded with instructions for the district court to hear the appeal.

***Jones v. CitiMortgage, Inc***., 666 Fed. Appx. 766, Case No. 15-14853 (11th Cir. Nov. 9, 2016) (per curiam) (Tjoflat, William Pryor, and Rosenbaum, JJ.).

**Code § / Rule**: contempt for violation of discharge injunction

**Held:** Only the bankruptcy court that issues a discharge order has jurisdiction to determine if that order and the discharge injunction have been violated.

**History**: 11th Circuit affirms in part, reverses and remands with instructions in part, to the District Court for the Northern District of Georgia.

**Facts:** The *pro se* plantiff appealed the district court's dismissal of his suit against the mortgage company, its attorneys, and the state court judge in a prior case filed by the plaintiff, challenging the scheduled foreclosure of his home. The state court judge had ruled against the plaintiff in an earlier suit in which Jones had challenged a 2010 foreclosure of the same home, all of which followed Jones's 2006 bankruptcy discharge. The district court dismissed the complaint, finding that the currently scheduled foreclosure could not be enjoined because the debt was in default, that the mortgagee and its attorneys did not violate the discharge injunction, and that the state court judge was entitled to judicial immunity. The 11th Circuit affirmed in part and reversed in part, vacating the dismissal of the discharge violation claims and remanding with instructions. Jones did not reaffirm the mortgage debt in his 2006 case, and so was no longer personally liable although he continued to make mortgage payments until sometime in 2010. Of particular interest is the circuit court's statement that the district court, as opposed to the bankruptcy court, had no jurisdiction to "entertain alleged violations of an order it did not issue." That was true despite the fact that the district court had original subject-matter jurisdiction. "The fact remains that the court that issued the discharge injunction, the bankruptcy court, is the court that alone possessed the power to enforce compliance with it." The discharge issue was thus remanded with instructions for the district court to transfer it to the bankruptcy court that issued the discharge. Consider the implications of this reasoning for class actions that allege discharge violations or automatic stay violations.

***Baumann v. PNC Bank, N.A. (In re Baumann)***, ---Fed. Appx.---, 2016 WL 6647743, Case No. 15-14203 (11th Cir. Nov. 10, 2016) (per curiam) (Wilson, Martin, and Anderson, JJ.).

**Code § / Rule**: *sua sponte* termination of the automatic stay, following notice of a hearing without mention of the automatic stay in the notice of hearing

**Held:** Section 105(a) allows a bankruptcy court to *sua sponte* terminate the automatic stay under these circumstances.

**History:** 11th Circuit affirms the District Court for the Middle District of Florida, which affirmed the Bankruptcy Court for the Middle District of Florida.

**Facts:** The debtor filed a chapter 7 petition and thereby stayed two banks' foreclosure proceedings. The bankruptcy court gave notice of a hearing in the case, and at the hearing, the court decided *sua sponte* to terminate the automatic stay (neither bank had filed a motion for relief from stay). The debtor argued that the court did not give him proper notice under § 362(d) and that the bank should have been required to file a paper motion through attorneys who had filed notices of appearance in the case. The circuit court disagreed and stated explicitly that the bankruptcy court has the authority to *sua sponte* terminate the stay under § 105, and further that the notice of hearing (although it was not a notice of a stay relief hearing, per se) was sufficient notice and opportunity under the circumstances, citing § 102(1).

***Monson v. Galaz (In re Monson)***, 661 Fed. Appx. 675, Case No. 15-14939 (11th Cir. Nov. 21, 2016) (per curiam) (Tjoflat, Hull, and Mendoza, JJ.).

**Code § / Rule**: willful and malicious injury under § 523(a)(6)

**Held:** A showing of tort-like actions are not required to establish nondischargeability under § 523(a)(6), given that the statute contains no such requirement.

**History:** 11th Circuit affirms the District Court for the Middle District of Florida, which affirmed the Bankruptcy Court for the Middle District of Florida.

**Facts:** The debtor and one of the plaintiffs met in federal prison and after their release, discussed partnering in a business venture involving Internet cafés (described as "fringe gambling" sites). The debtor and Segundo Suenos, LLC (wholly owned by the father of the plaintiff who knew the debtor in prison) entered into a letter agreement for Segundo to loan the debtor $130,000 to fund, create, and operate an Internet café, under the name "Internet Depot, LLC", which LLC was to be fully owned by the debtor. Segundo was to receive 40% of the center's profits, until the loan was paid in full. The agreement also provided that if the center were not profitable or if the parties agreed to terminate, all material assets would be liquidated and used first to pay back the loan to Segundo. Segundo filed UCC's to perfect its security interest in the center's assets, although the UCC's as filed did not bear any signatures. Not long after its opening, law enforcement raided the center and seized its assets. Segundo called the loan and demanded liquidation of all assets. The debtor struck a deal to retrieve the seized assets from law enforcement in exchange for his agreement to not engage in further computer gambling and to remove the equipment from Hillsborough County, Florida. Soon thereafter, the debtor and a new partner formed another entity to carry on the same type Internet café gambling center operation, and the debtor moved the equipment for use in his new venture without notice to the plaintiff, this time operating in Jacksonville, Florida.

Thereafter, Segundo sued the debtor in state court in Texas, alleging breach of contract and other claims. The state court entered an order for turnover of certain listed equipment. The debtor also filed chapter 7 bankruptcy during this time, several months after the Texas suit was filed. The state court action was then removed to federal court and transferred to the Florida bankruptcy court. The father purchased Segundo's claims against the debtor and was substituted as plaintiff, along with the son, in the A.P. that Segundo filed against the debtor. The complaint was amended to include three counts of nondischargeability grounds related to fraud or defalcation in a fiduciary capacity; embezzlement; and willful and malicious injury. The bankruptcy court denied summary judgment as to the first and second issues, but granted summary judgment in favor of the plaintiff as to the willful and malicious injury aspect. On appeal, the district court affirmed and pointed out that although the bankruptcy court erred in its statement that tortious conduct is a necessary element of a willful and malicious injury claim under § 523(a)(6), such conduct is certainly one of way of establishing such nondischargeability and the finding was supported by the undisputed fact findings of the bankruptcy court.

On further appeal, the circuit court affirmed, finding the bankruptcy court's findings were well supported by the evidence in the record. A willful injury is committed when one "commits an intentional act the purpose of which is to cause injury or which is substantially certain to cause injury." *In re Kane*, 755 F.3d 1285, 1293 (11th Cir. 2014). Further, malice can be implied, and malicious means "wrongful and without just cause or excessive even in the absence of hatred, spite or ill-will." *In re Jennings*, 670 F.3d 1329, 1334 (11th Cir. 2012). The circuit court reiterates that tort-like actions are not required for a showing of nondischargeability under this standard, given that the statute contains no such requirement. And despite his excuses, the very nature of the debtor's actions here implied a "malefic intent."

***United States v. Beane***, 841 F.3d 1273, Case No. 15-15444 (11th Cir. Nov. 23, 2016) (Tjoflat, Hull, and Mendoza, JJ.) (opinion by Hull, J.).

**Code § / Rule**: claim preclusion and issue preclusion; effect of Tax Court determination

**Held**: Because the tax court never addressed the issue of interest, the bankruptcy court erred in deferring to the tax court's figures in the bankruptcy court's calculation of the interest on the debtor's underpayment for 1998.

**History**: 11th Circuit reverses and remands to the Bankruptcy Court for the Middle District of Florida on direct appeal.

**Facts**: The debtor was battling with the IRS over a Notice of Deficiency for his income taxes for years 1998 and 1999 when he filed chapter 11 bankruptcy in 2002. The bankruptcy court lifted the stay to allow the tax court proceeding to continue, and ultimately the tax court determined the amount of the debtor's 1998 income and corresponding income tax liability. The tax court did not, however, determine the amount of interest the debtor owed as a result of the delay in payment of the 1998 income tax deficiency. The IRS presented an accounting to the bankruptcy court which credited his net operating loss for 2000 to prior years, effective as of April 15, 2001, which was when the year 2000 net operating loss was applied. The debtor also received refunds for over a million dollars in overpayment for years 1999 and 2000. The debtor objected to the IRS's accounting, saying it had ignored the tax court's determination of his 1998 tax deficiency and had impermissibly pushed the effective date of his year 2000 net operating loss back to April 16, 2001.

The bankruptcy court sustained the debtor's objection to the IRS's accounting as to the 1998 deficiency, noting a discrepancy in the amount of the deficiency as found by the tax court and the amount of deficiency asserted by the IRS. The government appealed and the district court affirmed, finding that the IRS's method of applying the carryback to the debtor's 1998 taxes was impermissible as it resulted in a figure that was contrary to the tax court's determination of the 1998 tax deficiency. The government then appealed to the 11th Circuit, which found the order of the district court was not a final appealable order. On remand, the bankruptcy court entered a consent order as to all issues except the correct way to treat the year 2000 loss carryback and consequently how to calculate interest on the 1998 taxes to which that carryback was eventually applied—should the net operating loss be treated as applied on April 15, 1999 (when the 1998 taxes were due) or as applied on April 16, 2001 (when the 2000 net operating loss carryback became effective)? A direct appeal of that issue ensued, which led to this opinion. The 11th Circuit ruled that 26 U.S.C. § 6601(d)(1) provides that "any net operating loss carryback accrued by [the debtor] would not affect the computation of interest [the debtor] would have owed on the 1998 underpayment from April 15, 1999 through April 15, 2001, when the net operating loss carryback became effective." Thus the higher deficiency amount espoused by the IRS would have been appropriate for calculating the interest amount, unless the tax court made a contrary ruling which, even though it would be wrong, would have preclusive effect.

In examining the res judicata doctrine in both its narrow sense (claim preclusion) and collateral estoppel (issue preclusion), the 11th Circuit explained:

> "For res judicata to bar a subsequent case, four elements must be present: (1) there is a final judgment on the merits; (2) the decision was rendered by a court of competent jurisdiction; (3) the parties, or those in privity with them, are identical in both suits; and (4) the same cause of action is involved in both cases." *Maldonado*, 664 F.3d at 1375 (quotation marks omitted). "For collateral estoppel to be invoked 1) the issue must be identical in the pending case to that decided in the prior proceeding; 2) the issue must necessarily have been decided in the prior proceeding; 3) the party to be estopped must have been a party or have been adequately represented by a party in the first proceeding; and 4) the precluded issue must actually have been litigated in the first proceeding." *Blohm v. Comm'r*, 994 F.2d 1542, 1553 (11th Cir. 1993).

*United States v. Beane*, 841 F.3d 1273, 1283 (11th Cir. 2016).

The tax court's jurisdiction was limited to determining the deficiency, which determination does not include interest on an underpayment. Therefore, claim preclusion did not apply because the tax court did not have jurisdiction over the interest calculation issue, and in fact did not purport to do anything other than determine the 1998 income and corresponding tax liability and resulting deficiency. Also, claim preclusion did not apply because the tax court "cause of action" was only the determination of tax liability for the 1998 taxes, and interest on a deficiency is not part of such a determination. Finally, the tax court limited its order to a determination of the debtor's 1998 deficiency, and did not discuss interest at all. Therefore, collateral estoppel (issue preclusion) would also not apply. Because the tax court never addressed the issue of interest, the bankruptcy court erred in deferring to the tax court's figures in the bankruptcy court's calculation of the interest on the debtor's underpayment for 1998.

***McSmith v. Bank of America, N.A. (In re McSmith)***, ---Fed. Appx.---, 2016 WL 6958193, Case No. 15-14754 (11th Cir. Nov. 29, 2016) (per curiam) (Julie Carnes, Jill Pryor, and Fay, JJ.).

**Code § / Rule**: § 362 and due process under U.S. Const. amend V, XIV.

**Held:** Due process is satisfied when a debtor receives notice of a motion to lift the stay, attends both hearings regarding that motion, and is given an opportunity to be heard.

**History**: 11th Circuit affirms the District Court for the Northern District of Georgia, which affirmed the Bankruptcy Court for the Northern District of Georgia.

**Facts:** The *pro se* debtor filed a chapter 13 case to stop the nonjudicial foreclosure scheduled for the following week. The mortgagee filed an emergency motion for relief from stay seeking relief to allow it to proceed with its foreclosure sale. The court scheduled the hearing on the motion for the next day, and the debtor received notice and appeared at the hearing. The court granted the motion for relief and allowed the sale to proceed, but ordered the mortgagee to not record a deed under power until further notice. The court then conducted a second hearing on the motion a little over a month later, which hearing the debtor also attended. At the second hearing, the debtor admitted he did not have sufficient funds to make a timely plan payment and the trustee noted that the debtor had failed to appear at the meeting of creditors. The court then issued an order validating the sale and permitting the recording of the deed. The debtor appealed, arguing his due process rights were violated because he had a prospective tenant for the property whose rental payments would have covered his monthly plan payments. The district court and circuit court agreed that where the debtor received notice of the hearings, and actually attended the hearings and participated by admitting he did not have the wherewithal to pay the plan payment at that time (and also had the opportunity in the interim between the two hearings to cure the arrears but failed to do so) due process had been satisfied.

***Zeltser v. Little Rest Twelve, Inc. (In re Little Rest Twelve, Inc.)***, 662 Fed. Appx. 887, Case No. 16-11354 (11th Cir. Dec. 8, 2016) (per curiam) (Wilson, Martin, and Rosenbaum, JJ.).

**Code § / Rule**: sanctions for bad faith conduct under the bankruptcy court's inherent powers

**Held:** A monetary sanction for bad faith litigation must be supported by specific findings as to the conduct that merits the sanctions.

**History**: 11th Circuit affirms the District Court for the Southern District of Florida, which affirmed the Bankruptcy Court for the Southern District of Florida.

**Facts**: This appeal dealt with one particular aspect of a group of cases that have been litigated for almost ten years, resulting in multiple published opinions dealing with other aspects of the cases.

While litigating the ownership of the debtor entity in New York state court as well as in bankruptcy court in a chapter 11 case of the debtor's in Florida, one of the disputants (Zeltser) filed a chapter 7 case for the debtor in New York. The opposing side sought and was awarded the transfer of the chapter 7 case to Florida, where the debtor's chapter 11 case was already pending. The Florida bankruptcy court dismissed the chapter 7 case and sua sponte reserved jurisdiction to consider an award of sanctions against Zeltser for filing the chapter 7 case. The other side moved for sanctions, and the court awarded sanctions finding bad faith in the improper filing of the chapter 7 case, filed for the purpose of delaying an imminent adverse ruling and forum shopping. After an evidentiary hearing, the court awarded sanctions of $100,586 in attorney fees and expenses to the debtor. The court noted the forum shopping and "jurisdictional morass" created by Zeltser's actions.

On appeal, Zeltser argued that the bankruptcy court was required to support its finding of bad faith by clear and convincing evidence. The circuit court found that the bankruptcy court's specific findings as to the conduct that led to the sanctions were sufficient, and did not adopt a "clear and convincing" standard. Zeltser also argued the amount of the award was grossly excessive, but the circuit court found no error in the bankruptcy court's findings as to the amount.

***Tucker v. JP Morgan Chase Bank, N.A. (In re Tucker)***, 665 Fed. Appx. 841, Case No. 16-10211 (11th Cir. Dec. 12, 2016) (per curiam) (Tjoflat, William Pryor, and Rosenbaum, JJ.).

**Code § / Rule**: Rule 8018

**Held**: The District Court abused its discretion in dismissing the *pro se* debtor's appeal for failure to timely file her brief, because it employed a rigid standard and did not apply a flexible approach to examine whether bad faith, negligence, or indifference were shown.

**History**: District Court for the Southern District of Florida dismissed the appeal from the Bankruptcy Court for the Southern District of Florida for failure of appellant to timely file her brief; 11th Circuit vacates and remands, finding abuse of discretion in the standard applied by the district court.

**Facts**: The bankruptcy court granted Chase's motion for relief from stay to proceed with foreclosure, and denied the debtor's motion to vacate the order granting relief from stay. The debtor filed notices of appeal, designated the record, and filed her statement of issues. Chase filed its designations, and the bankruptcy clerk forwarded the complete record to the district court in compliance with Rule 8010(b). The docket entry upon transmittal of the record notified the debtor that she had thirty days from the docketing date to file and serve her initial brief. Before the thirty-day deadline expired, the debtor moved for a stay pending appeal, or alternatively to reset the briefing schedule. The district court denied that request and stated that it expected the debtor to comply with the existing briefing deadline. On the day her brief was due, the debtor filed a motion seeking a thirty-day extension, based in part on her *pro se* status and the approaching December holidays. The district court denied that motion without explanation four days later, and another five days later, dismissed the appeal based on the failure to timely file the brief.

On appeal to the 11th Circuit, the court stated that the district court abused its discretion by dismissing the appeal based only on strict conformity with the briefing deadline set by Rule 8018 and without specific notice that dismissal of the appeal would be the consequence for not timely filing a brief. Instead, the district court should have considered whether there was a showing of bad faith, negligence, or indifference before dismissing the appeal on the basis of the missed briefing deadline. *See Brake v. Tavormina (In re Beverly Mfg. Corp.)*, 778 F.2d 666, 667 (11th Cir. 1985). In addition, the circuit court determined that the district court did not provide clear notice to the debtor that dismissal would be the consequence for failure to timely file a brief, so that the "after notice" requirement of Rule 8018(a)(4) was likely not met. The case was vacated and remanded to the district court for further proceedings.

***Wortley v. Bakst***, 844 F.3d 1313, Case No. 15-11923 (11th Cir. Jan. 5, 2017) (Marcus, Jordan, and Walker, JJ.) (opinion by Jordan, J.).

**Code § / Rule**: Jurisdiction over direct appeal under 28 U.S.C. § 158(d)(2)(A)

**Held:** Circuit court lacked jurisdiction over direct appeal of report and proposed conclusions in non-core matter.

**History**: 11th Circuit modifies the order of the Bankruptcy Court for the Southern District of Florida, and transfers to the District Court for the Southern District of Florida.

**Facts:** Adversary proceedings filed by a trustee, seeking recovery from the debtor entity's sole shareholder (Wortley), were prosecuted by an attorney (Bakst) whose law firm had recently hired the presiding bankruptcy judge's fiancé as a member of its bankruptcy practice group. The adversary proceedings ended with a judgment in favor of the plaintiff-trustee to the tune of over $2.5 million. The losing parties then sued the law firm and Bakst in state court, alleging that the hiring of the fiancé was part of a scheme to influence the bankruptcy judge. The state court case was removed to bankruptcy court, and was then dismissed by a different bankruptcy judge on four independent grounds. That bankruptcy judge then certified his decision for direct appeal to the 11th Circuit. Ultimately, the 11th Circuit found that it did not have jurisdiction over the direct appeal because the bankruptcy court upon removal had only "related to" jurisdiction over the Wortley parties' appeal (because it was non-core) and therefore did not have authority to enter a final order of dismissal given that all parties did not so consent, which means the order of dismissal must instead be construed as a report with proposed conclusions. The jurisdictional problem continues, because there can be no "direct appeal" under 28 U.S.C. § 158(d)(2)(A), due to the language of that statute limiting direct appeals to judgments, orders, or decrees—none of which would accurately describe the report and proposed conclusions. The circuit court transferred the order to the district court for review as a report with proposed conclusions.

***Mooney v. Webster (In re Mooney)***, ---F.3d---, 2017 WL 382663, Case No. 15-11229 (11th Cir. Jan. 27, 2017) (per curiam) (Hull, Jill Pryor, and Conway, JJ.).

**Code § / Rule**: exemptions under § 522(b)(2); O.C.G.A. § 44-13-100

**Held**: Because a health savings account is not exempt under Georgia law as a "disability, illness, or unemployment benefit," or as a "payment under a pension, annuity, or similar plan or contract on account of illness [or] disability," it is not exempt in bankruptcy.

**History**: 11th Circuit affirms the District Court for the Middle District of Georgia, which affirmed the Bankruptcy Court for the Middle District of Georgia.

**Facts**: Debtor filed bankruptcy and claimed a health savings account as exempt, under Georgia law (Georgia being an opt-out state). The chapter 7 trustee objected to the exemption, and the bankruptcy court sustained the objection. The district court affirmed. On appeal, the 11th Circuit certified questions to the Supreme Court of Georgia to determine whether the account was exempt under that state's law. The Supreme Court of Georgia answered that the health savings account was neither a "disability, illness, or unemployment benefit," nor a "payment under a pension, annuity, or similar plan or contract on account of illness [or] disability." The asset was therefore not exempt and the lower courts were affirmed.

***Thacker v. Venn (In re Thacker)***, ---Fed. Appx.---, 2017 WL 393681, Case No. 16-12079 (11th Cir. Jan. 30, 2017) (per curiam) (Wilson, Julie Carnes, and Hall, JJ.).

**Code § / Rule**: collateral estoppel effect of state court judgment

**Held**: State court findings and judgment that transfers were fraudulent was binding on the bankruptcy court and collaterally estopped the debtor from arguing otherwise.

**History**: 11th Circuit affirms District Court for the Northern District of Florida, which affirmed the Bankruptcy Court for the Northern District of Florida

**Facts**: A state court judgment found the debtor's transfers of property into a trust to be fraudulent. The state court made findings of multiple "badges of fraud" and avoided the transfers as fraudulent. When the debtor filed bankruptcy, the bankruptcy trustee sued the debtor as trustee of the revocable living trust into which the property had been transferred. The bankruptcy court gave collateral estoppel effect to the state court findings and judgment. The state court's ruling was binding.

In the related adversary proceeding of ***Thacker v. SE Property Holdings, LLC (In re Thacker)***, ---Fed. Appx.---, 2017 WL 393679, Case No. 16-11802 (11th Cir. Jan. 30, 2017) (per curiam) (Wilson, Julie Carnes, and Hall, JJ.), the circuit court also affirmed the denial of the debtor's discharge on grounds that he had continued to conceal the fraudulent transfers, which were made with actual intent to hinder, delay, and defraud the creditor, which held a million dollar judgment against the debtor. While recognizing that denying the discharge was an "extraordinary measure," the court agreed that the denial was clearly warranted under the facts of this case.

***Woodman v. U.S. Bank (In re Woodman)***, ---Fed. Appx.---, 2017 WL 603282, Case No. 15-14014 (11th Cir. Feb. 15, 2017) (per curiam) (William Pryor, Jordan, and Rosenbaum, JJ.).

**Code § / Rule**: mootness of appeal

**Held**: Appeal was moot, because the statute upon which the appellant-debtor relied had terminated, so that even if the bankruptcy court had erred, any decision to that effect would not entitle the debtor to relief because he could not claim the protections of the now-terminated Act on remand.

**History**: 11th Circuit affirms District Court for the Middle District of Florida, which dismissed as moot the appeal of an order granting stay relief entered by the Bankruptcy Court for the Middle District of Florida

**Facts**: U.S. Bank (the "Bank") foreclosed on property leased to the debtor, thereby acquiring title, approximately one year before the debtor filed bankruptcy. After the *pro se* debtor filed bankruptcy, the Bank moved for relief from the automatic stay to allow it to evict the debtor from the property. The debtor objected to the motion for relief, arguing that he was entitled to certain protections that he had not been provided, related to the foreclosure a year prior, under the Protecting Tenants at Foreclosure Act of 2009, Pub. L. No. 111-22, Div. A, Title VII, 123 Stat. 1632, 1660-62 (2009) (the "Act"). The Bank argued that the debtor did not fall under that Act's provisions, as his lease was not negotiated at arm's length and he had not paid fair market rent. The debtor attempted to show that his low rent was in exchange for his making repairs and "other agreements" but the lease language belied that assertion. The bankruptcy court ruled that it did not have jurisdiction to review the propriety of the foreclosure, and that the Bank had standing to seek stay relief. The bankruptcy court further found that the debtor was not a bona fide party entitled to protection under the Act, because his rent was below fair market value and his lease had terminated when the Bank foreclosed. The debtor had notice of the foreclosure and notice of the eviction, and was a tenant at sufferance whose tenancy could be terminated and who could be evicted. The stay was therefore lifted, and the debtor appealed.

The district court dismissed the appeal for lack of jurisdiction, citing as moot the debtor's challenges to the bankruptcy court's application of the Act, certain procedural rules of the bankruptcy court, and certain evidentiary rulings. Notably, the debtor never challenged the ruling that the Bank had standing to seek stay relief. On further appeal, the circuit court pointed out that the Act terminated on December 31, 2014, while the debtor's appeal was pending in district court. Because the statute upon which he relied had terminated, even if the bankruptcy court had erred, any decision to that effect would not entitle the debtor to relief because he could not claim the protections of the now-terminated Act on remand. All of the debtor's other arguments were either not perfected for appeal, or were raised for the first time on appeal.

***Lunsford v. Process Techs. Servs., LLC (In re Lunsford)***, 848 F.3d 963, Case No. 16-11578 (11th Cir. Feb. 15, 2017) (William Pryor, Rosenbaum, and Ungaro, JJ.) (opinion by William Pryor, J.).

**Code § / Rule**: § 523(a)(19)(A)—nondischargeability of debts for violation of securities laws

**Held**: Section 523(a)(19)(A) applies irrespective of debtor conduct; although in this case, the court found the debtor was the party who violated the securities laws.

**History**: 11th Circuit affirms the District Court for the Northern District of Georgia, which affirmed the Bankruptcy Court for the Northern District of Georgia.

**Facts**: Process Technologies agreed to invest $300,000 and purchased that amount of securities in a company owned by the debtor, after meeting with the debtor and being assured that the company had tangible assets exceeding $1 million. When Process Technologies discovered there were problems with title to the tangible assets, it sued in state court in Mississippi to rescind the securities purchase. The parties were ordered to arbitration, and the debtor filed bankruptcy. The bankruptcy court stayed the action pending arbitration, and the arbitrator ruled in favor of Process Technologies awarding it $606,892. The state court confirmed the award and entered final judgment against the debtor, the debtor's company, and another individual, with joint and several liability. The debtor did not object to confirmation of the arbitrator's award, nor did he appeal the state court judgment.

The bankruptcy court then lifted its stay of proceedings, and Process Technologies filed an AP seeking nondischargeability under § 523(a)(19)(A) as a debt for the violation of securities laws. The debtor answered, and also asserted that the arbitrator's award was fraudulently obtained, which issue the bankruptcy court directed the debtor to pursue in state court (and he did so, unsuccessfully). The bankruptcy court ruled that the debt was nondischargeable, because the arbitrator found that the debtor violated state securities laws in several respects, and that the state court had confirmed the arbitration award. The debtor appealed on grounds that § 523(a)(19)(A) applies only when the debtor commits the securities violation at issue, and not when the liability arises due to a third party's violation. The district court ruled that § 523(a)(19)(A) applies irrespective of debtor conduct. On further appeal, the circuit court agreed, explaining that first, the bankruptcy court utilized issue preclusion, and made a finding that the debtor himself violated state securities laws; and second, § 523(a)(19)(A) applies irrespective of debtor conduct. If the debtor has liability for the violation of securities laws, even if that violation was actually committed by a third party, that debt falls under § 523(a)(19)(A). The circuit court pointed out that Congress knows how to include a causation requirement when it chooses to do so (such as in §523(a)(6) and (a)(9)), and therefore a causation limitation should not be inferred where not explicitly stated. The context of the entire subsection "precludes discharge regardless of whether the debtor violated securities laws as long as the securities violation caused the debt." The court distinguished as unpersuasive 10th Circuit precedent that was factually distinct, and 9th Circuit precedent that was "unpersuasive" and that relied on "prescriptions of general statutory purpose over the text."

Judge Rosenbaum concurred and would have stopped the opinion after ruling that because the debtor himself was found to have violated securities laws, the ruling below was due to be affirmed. Judge Rosenbaum expressed concern that the further ruling, that § 523(a)(19)(A) applies irrespective of debtor conduct, may create confusion in a different context, such as a Ponzi scheme.

***Frank v. Yip (In re Ocean 4660, LLC.)***, ---Fed. Appx.---, 2016 WL 7367783, Case No. 16-12056 (11th Cir. Dec. 20, 2016) (per curiam) (Hull, Martin, and Anderson, JJ.).

**Code § / Rule**: § 702 disputed trustee election; finality of bankruptcy court order for appeal purposes

**Held**: An order removing or appointing a chapter 7 trustee is a final order for appeal purposes.

**History**: 11th Circuit affirms the District Court for the Southern District of Florida, which affirmed the Bankruptcy Court for the Southern District of Florida

**Facts**: At the initial meeting of creditors, two of the three creditors in the case requested the election of a permanent trustee, and nominated and elected Brandt as permanent trustee over the objections of the third creditor and the interim trustee. Following a hearing on the election, the bankruptcy court concluded that the election was not valid because the two creditors who elected the trustee held claims that were disputed, and thereafter the bankruptcy court appointed the interim trustee as permanent trustee. The district court affirmed. On appeal, the circuit court only discussed finality, and was bound to follow the prior panel precedent of *In re Walker*, 515 F.3d 1204, 1210 (11th Cir. 2008) and found that the bankruptcy court's order was a final order for appeal purposes. On the merits, there is no discussion by the circuit court, which instead affirms the district court based on the district court's reasoning in its order.

***Appling v. Lamar, Archer & Cofrin, LLP (In re Appling)***, 848 F.3d 953, Case No. 16-11911 (11th Cir. Feb. 15, 2017) (William Pryor, Rosenbaum, and Martinez, JJ.) (opinion by William Pryor, J.), *petition for cert. filed* (U.S. April 11, 2017) (No. 16-1215).

**Code § / Rule**: § 523(a)(2)(B) statement about a single asset, not in writing

**Held**: A statement about a single asset can be a "statement respecting the debtor's . . . financial condition" and therefore must be made *in writing* to be nondischargeable under § 523(a)(2)(B).

**History**: 11th Circuit reverses the District Court for the Middle District of Georgia, which affirmed the Bankruptcy Court for the Middle District of Georgia.

**Facts**: Appling made false oral statements to his lawyer about a large tax refund that he was anticipating, which he would use to pay the lawyer's fees. After failing to pay, the lawyer obtained a judgment against Appling, and Appling then filed bankruptcy. The lawyer filed an A.P. to have the debt declared nondischargeable under § 523(a)(2) as having been incurred by fraud. The bankruptcy court and district courts agreed; the 11th Circuit reversed. The circuit court determined that because the statements about the tax return were statements "respecting the debtor's . . . financial condition" and were not made in writing, they were dischargeable. In order to be nondischargeable under§ 523(a)(2)(B), the creditor must show that it reasonably relied on a statement by the debtor about the debtor's financial condition that was intentional, materially false, and that was made in writing.

The first issue was whether a statement about a single asset, the tax refund in this case, can be a statement "respecting the debtor's . . . financial condition." If not, then the facts fall under § 523(a)(2)(A)'s general fraud provisions; if so, then the facts fall under § 523(a)(2)(B) and must be made in writing to trigger nondischargeability. Citing a circuit split on this issue, the 11th Circuit joined the 4th Circuit (and some bankruptcy courts in the 11th Circuit) and ruled that a statement about a single asset can be a statement respecting a debtor's financial condition. This ruling disagrees with the 5th, 8th, and 10th Circuits, all of which have ruled that a statement about a single asset says nothing about overall financial condition and thus does not qualify as a statement respecting a debtor's financial condition. The 11th Circuit found that the word "respecting" is only given effect if read to mean "relates to" or "impacts" the debtor's financial condition, as a piece of the debtor's financial picture rather than the financial picture as a whole. Finding the text of the statute to be clear, the court looked no further. "A distaste for dishonest debtors does not empower judges to disregard the text of the statute. Because the text is not ambiguous, we hold that 'statement[s] respecting the debtor's . . . financial condition' may include a statement about a single asset." Because the debtor's statements were such, and were not in writing, the debt was dischargeable under § 523(a)(2)(B).

Judge Rosenbaum concurred to point out that reading the phrase "statement respecting . . . the debtor's financial condition" broadly in § 523(a)(2)(B) advances congressional intent to construe exceptions to discharge strictly against the creditor and to provide relief for honest debtors moreso than a narrow reading would, because the same phrase appears in § 523(a)(2)(A) and it must have the same meaning in both subsections. A broad reading means more debts related to false oral statements will be dischargeable under § 523(a)(2)(A).

***FCGI Associates, LLC v. McAfee (In re Harman)***, ---Fed. Appx.---, 2017 WL 1192200, Case No. 16-15735 (11th Cir. March 31, 2017) (per curiam) (Martin, Anderson, and Black, JJ.).

**Code § / Rule**: ability of chapter 7 trustee to release claims against third parties and to return property to the debtor in the absence of formal abandonment, when the release and return are part of a properly noticed, court-approved settlement

**Held**: In approving a compromise, the bankruptcy court is required to "survey the legal issues to reasonably determine the efficacy of a proposed settlement under the circumstances." Also, "compliance with the formal abandonment requirements of Bankruptcy Rule 6007 and 11 U.S.C. § 554 is unnecessary when the release of a claim is part of a compromise settlement entered into by a trustee with the approval of the bankruptcy court, and when creditors are given notice and an opportunity to be heard."

**History**: 11th Circuit affirms the District Court for the Northern District of Georgia, which affirmed the Bankruptcy Court for the Northern District of Georgia.

**Facts**: Harman filed chapter 7 bankruptcy, and Neil Gordan was appointed trustee. Harman's largest creditor was the Estate of James McAfee ("McAfee"). Gordon, as trustee, filed an adversary proceeding against Harman and many others, with the claims based upon transactions between the debtor, his wife, and various companies the debtor owned or controlled. The trustee and some of the defendants settled all claims of the trustee against the settling defendants for $675,000 in exchange for a release of all claims. McAfee objected, and the bankruptcy court eventually approved the settlement. McAfee appealed, and the district court affirmed. On appeal to the 11th Circuit, the court pointed out that McAfee's argument that the trustee settled claims for which he lacked authority, including McAfee's claims against third parties, was misplaced. By its terms, the settlement agreement only released claims that the trustee had standing to assert. The court was not required to conduct a mini-trial on a claim-by-claim basis before approving the settlement, but instead to "survey the legal issues to reasonably determine the efficacy of a proposed settlement under the circumstances." Further, in response to McAfee's argument that the trustee improperly returned to the debtor his membership interest in one of the companies at issue, the circuit court ruled that "compliance with the formal abandonment requirements of Bankruptcy Rule 6007 and 11 U.S.C. § 554 is unnecessary when the release of a claim is part of a compromise settlement entered into by a trustee with the approval of the bankruptcy court, and when creditors are given notice and an opportunity to be heard."

***Beem v. Ferguson (In re Ferguson)***, ---Fed. Appx.---, Case No. 15-13358, 2017 WL 1173664 (11th Cir. March 30, 2017) (per curiam) (Tjoflat, William Pryor, and Black, JJ.).

**Code § / Rule**: equitable mootness and constitutional mootness

**Held**: A live case or controversy existed, so that the appeal of the order confirming the chapter 11 plan and striking an invalid ballot was not constitutionally moot.

**History**: 11th Circuit affirms the District Court for the Southern District of Florida, which affirmed the Bankruptcy Court for the Southern District of Florida.

**Facts**: Ferguson filed chapter 11, and after two years of litigation, submitted a proposed chapter 11 plan. The bankruptcy court scheduled confirmation, and set a deadline for filing objections to the plan. Beem, a creditor, filed an objection one day after the objection deadline and submitted a ballot rejecting the plan. Ferguson moved to strike the objection as untimely and the ballot as not representing an allowed claim. Beem, having been notified that he could not vote as he did not have an allowed claim, and having therefore never been served with a ballot, instead found an attorney suspended from the practice of law to "fraudulently concoct his own purported ballot." The bankruptcy court struck the ballot and objection, and confirmed the plan. On appeal to the district court, Beem again used the services of the suspended attorney, who prepared the brief for Beem to then file *pro se*. The district court struck the brief and gave Beem a deadline to file his initial brief, which Beem again missed by one day (and which brief still appeared to be the work of the suspended attorney). Ferguson moved to strike the brief again, and Beem failed to respond to that motion within the time allowed. Therefore, the district court dismissed the appeal and denied Beem's motion for reconsideration. The 11th Circuit affirmed.

First, the circuit court examined whether the appeal was equitably moot or constitutionally moot. The doctrine of equitable mootness is discretionary and does not divest the court of jurisdiction. It involves a balancing of the equities, "including whether a stay pending appeal has been obtained and if not, why not; whether the plan has been 'substantially consummated;' what type of relief is sought; and what the effect of granting such relief would be." Constitutional mootness, on the other hand, "derives directly from the case-or-controversy limitation because an action that is moot cannot be characterized as an active case or controversy." The two doctrines are often mutually exclusive: the fact that very real, concrete interests are at stake and parties' rights would be significantly affected if the plan were disturbed on appeal (indicators that equitable mootness should apply) indicates that the appeal is not constitutionally moot (there is very much a live case and controversy with much at stake). The appeal was therefore not constitutionally moot, and the circuit court had jurisdiction to entertain the appeal. On the merits, Beem simply failed to follow court orders and timelines when given an opportunity to do so, and there was no abuse of discretion.

***Helman v. Bank of America***, ---Fed. Appx.---, Case No. 15-13672, 2017 WL 1350728 (11th Cir. April 12, 2017 (per curiam) (Marcus, Anderson, and Ginsburg, JJ.).

**Code § / Rule**: Fair Debt Collection Practices Act; post-discharge mortgage statements where the debtor discharged the debt but continues in possession of the property.

**Held**: Mortgage statements regarding discharged debts are viewed in the context of what information the least sophisticated consumer has, including the language of the discharge order itself, and in this case, the least sophisticated consumer in the debtor's position would know she had no personal liability on the debt, so that no claim was stated under the Fair Debt Collection Practices Act or under Florida state law.

**History**: 11th Circuit affirms the District Court for the Southern District of Florida.

**Facts**: The debtor had a home mortgage and equity line, both secured by her primary residence, with Bank of America ("BANA"). She filed chapter 7 and received a discharge. After her discharge, BANA continued to send her monthly statements for both loans. The statements, according to the debtor, were "implied assertions of a right to collect against her personally" even though BANA had no such right post-discharge. The statements contained terms that could be read in some circumstances as an attempt to collect the debt, but the statements also contained express language that informed her that she had no personal obligation to pay the debt, was not personally responsible for the debt, and could not be pressured to repay the debt, although BANA did retain the right to enforce its rights against the property should the loan be in default. Her discharge order also gave her that same information. She filed a class action, alleging violations of the Fair Debt Collection Practices Act ("FDCPA") and several Florida state law claims. The 11th Circuit found first that BANA was the originator of the loans at issue, and was therefore not acting as a debt collector under the FDCPA but was the original creditor. The Florida state law claims could still apply to an original creditor, however, so further analysis was required under the Florida consumer protection statute at issue. The circuit court next found that the statements could not mislead a least sophisticated consumer under these facts, and that it would not limit the analysis merely to the isolated potentially-problematic language in one part of the statements at issue. The least sophisticated consumer in the debtor's position knew that she had received a bankruptcy discharge, had no personal liability on the debt, and that the bank could still enforce its mortgage. This information was set forth in the statements, as well as in the discharge order. The court declined to find that against all that information, a least sophisticated consumer could be misled by the statements. That "is exactly the type of 'bizarre or idiosyncratic interpretation of collection notices' to which [the court] h[as] refused to give protection even under the least sophisticated consumer standard." Similarly, the debtor could show no reliance to substantiate her state law claims for misrepresentation and fraudulent inducement.

***ECMC v. Acosta-Conniff (In re Acosta-Conniff)***, ---Fed. Appx.---, Case No. 16-12884, 2017 WL 1396164 (11th Cir. April 19, 2017) (per curiam) (Rosenbaum, Julie Carnes, and Schlesinger, JJ.).

**Code § / Rule**: undue hardship and *Brunner*, § 523(a)(8)

**Held**: The district court should review the bankruptcy court's factual findings under a clear error standard, rather than *de novo*, and the second prong of the *Brunner* test involves an analysis of future circumstances only and does not permit the consideration of the debtor's past behavior.

**History:** 11th Circuit reverses and remands to the District Court for the Middle District of Alabama, which had reversed the Bankruptcy Court for the Middle District of Alabama.

**Facts**: The debtor sought a declaration of dischargeability for her student loan debt, under the three-prong test set out in *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987). Under that test, a debtor must prove each of the following in order to discharge her student loans:

> (1)That the debtor cannot maintain, based on current income and living expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) That additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) That the debtor has made good faith efforts to repay the loans.

*Brunner*, 831 F.2d at 396. The 11th Circuit stated that each prong looks at a discrete time period. The first prong focuses on the present ability to repay the debt; the second on the future to determine if it is unlikely the debtor could become able to pay; and the third focuses on the debtor's past conduct to determine whether she has shown a good faith effort to repay what she owes. The bankruptcy court found the debtor met her burden as to all three prongs, but the district court reversed, finding she did not meet her burden as to the second prong. In making that determination, the district court used a de novo rather than clear error standard in reviewing the factual findings, and so the case was remanded to the district court for the correct standard of review to be applied under each prong. The circuit court also made special mention of the district court's findings that the debtor had only herself to blame for her failure to satisfy the second prong, as the district court stressed the debtor's admission that she incurred tremendous debt in "pursuit of multiple degrees that she should have known would not lead to an increase in income sufficient to cover the debt." The debtor's past behavior, no matter how reckless or imprudent, should not have been considered in the analysis of the second prong, but may be relevant to the third prong (good faith).

**CASES OF PARTICULAR INTEREST:**

***Slater v. U.S. Steel Corp***., 820 F.3d 1193 (11th Cir. 2016), in which the court held that judicial estoppel barred the debtor-employee's claims against the company because she failed to schedule those claims as assets in her chapter 7 case, has now been vacated and rehearing *en banc* granted, as of August 30, 2016. Oral argument was scheduled for February 2017.

***Czyzewski v. Jevic Holding Corp.***, 137 S. Ct. 973 (March 22, 2017) (opinion by Breyer, J., joined by Roberts, C.J., and Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.; dissent by Thomas, J., joined by Alito, J.). Reversing the Third Circuit, the Supreme Court held that a bankruptcy court may not approve a structured dismissal of a chapter 11 case when the dismissal provides for a distribution that does not follow the usual priority rules of the Code, at least in the absence of the affected creditors' consent. The Court distinguished a structured dismissal from other common violations of the usual priority rules, such as first-day orders, critical vendor orders, and roll ups that allow lenders who provide postpetition financing to be paid first on their prepetition debts, by saying that those type violations of the usual priority scheme serve a further purpose by preserving the debtor as a going-concern, help revive a business, maximize value for the estate, and promote the possibility of a confirmable plan, while structured dismissals do not. That is the case, notwithstanding the lower courts' findings that the structured dismissal at issue actually resulted in the only hope for any distribution to the unsecured creditors and thereby made the creditors better off than they would have been in its absence. The language in this opinion closes the door on any possibility that such a distinction may matter, as the Court said there should be no "rare case" exception to the rule that any structured dismissal that violates the Code's priority distribution scheme cannot be approved without the consent of the affected creditors.