11TH CIRCUIT CASES UPDATE
June 2017-May 2018

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

31st Annual
Bankruptcy at the Beach Seminar
June 8-9, 2018

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

McHenry v. Dillworth (In re Caribbean Fuels America, Inc.), 688 Fed. Appx. 890, Case No. 16-15786 (11th Cir. June 22, 2017) (per curiam) (Jordan, Rosenbaum, and Jill Pryor, JJ.).

Practical Lesson: One man's trash is another man's reasonably equivalent value.

Code § / Rule: § 548 reasonably equivalent value standard

Held: Following the holding in *In re Financial Federated Title & Trust, Inc.*, 309 F.3d 1325, 1331-33 (11th Cir. 2002), the determination of whether reasonably equivalent value was given for purposes of § 548 is based upon the objective value of the consideration exchanged and not on the subjective benefit that the consideration provided to the debtor. The burden of proving lack of value rests on the party challenging the transfer.

History: 11th Circuit reversed and remanded to the Bankruptcy Court for the Southern District of Florida, which had been affirmed by the District Court for the Southern District of Florida.

Facts: McHenry entered into a lease agreement as lessor with the debtor entity ("C Fuels") and its principals as lessees for a home in Florida. C Fuels was in the business of providing fuel to ships in port, and the home at issue suited the principals' family and business needs, being used for business offices as well as family purposes. C Fuels paid 25% of the rent, while the principals paid the other 75%. Shortly after lease termination, C Fuels filed under Chapter 7. Dillworth, the Chapter 7 trustee, filed an AP against McHenry to recover the portion of the rental payments made by C Fuels as having been constructively fraudulent transfers. At trial, Dillworth conceded that the rental payments were reasonable, but argued that C Fuels had gained no value from the lease. The bankruptcy court agreed and found the lease payments were constructively fraudulent, given that C Fuels was insolvent at the time of the payments and gained no reasonably equivalent value because the use of the house provided little value to the company, which also maintained separate commercial offices. On appeal, the district court agreed. The 11th Circuit reversed, pointing out that its precedent in *In re Financial Federated Title & Trust, Inc.*, 309 F.3d 1325, 1331-33 (11th Cir. 2002) established that the standard for determining reasonably equivalent value required an objective assessment of the value of the consideration received and did not allow a subjective assessment of whether the consideration was of any specific benefit to the debtor, regardless of its objective value, as both the bankruptcy and district courts had ruled. Under § 548, "in assessing the 'value' of property, goods, or services provided directly to the debtor, the question is not whether the debtor subjectively benefited from the property it received; the operative question is whether the property, goods, or services provided had objective value."

Pollitzer v. Gebhardt, 860 F.3d 1334, Case No. 16-11506 (11th Cir. June 27, 2017) (Ed Carnes, C.J., and Anderson and Parker, JJ.) (opinion by Parker, J., U.S. Cir. Judge for the 2d Cir. sitting by designation).

Code § / Rule: § 707(b) abuse in a case converted from Chapter 13

Held: Section 707(b) applies to a petition that was initially filed under Chapter 13 but later converted to Chapter 7.

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

Facts: The above-median debtor filed Chapter 13. After two years, he converted his case to Chapter 7. The debtor conceded that his disposable income far exceeded the means test under § 707(b) and would be an abuse if he had filed under Chapter 7 originally, or if § 707(b) applied to the converted case. The bankruptcy court held that § 707(b) did apply to the case at conversion because the debtor was an individual debtor "under this chapter [Chapter 7]" even though the case was not originally "filed . . . under this chapter [Chapter 7]." The district court and 11th Circuit agreed. The circuit court examined the text of the statute at issue as well as Congressional intent and found that it would be "inconceivable" that Congress contemplated or intended the result urged by the debtor. The goal of forcing those who have the ability to pay into Chapter 13 rather than Chapter 7 would be "eviscerated" if debtors could avoid the means test by filing under Chapter 13 initially and then converting the case immediately to one under Chapter 7.

Hernandez v. Federal Nat'l Mortg. Assoc. (In re Hernandez), 701 Fed. Appx. 848, Case No. 15-14451 (11th Cir. July 12, 2017) (per curiam) (Hull, Wilson, and Jill Pryor, JJ.).

Code § / Rule: automatic stay § 362; *Rooker-Feldman* doctrine

Held: The bankruptcy court did not abuse its discretion in granting an oral motion for relief from the automatic stay when the debtor's own evidence established that the property at issue was never estate property, and when the state court had already issued a final judgment of foreclosure.

History: 11th Circuit affirmed the Bankruptcy Court for the Northern District of Florida, which was also affirmed by the District Court for the Middle District of Florida.

Facts: The debtor filed chapter 13 in December 2013. Prior to that time, the debtor's residence was foreclosed under Florida law and sold to Fannie Mae as successful bidder at the foreclosure sale. Fannie Mae also had the foreclosure sale affirmed by the state appellate court, and obtained a writ of possession (which was stayed by the state court) and had obtained a certificate of title to the property, all prepetition. After filing bankruptcy, the debtor, who was still in possession of the property, moved for sanctions against Fannie Mae for its allegedly violating the automatic stay by sending the debtor a letter seeking possession and threatening state court action. Fannie Mae orally requested stay relief at the sanctions hearing, and argued that the property was never covered by the automatic stay, as it was not estate property having already become vested in Fannie Mae by virtue of the certificate of title issued prepetition. The bankruptcy court orally granted the stay relief motion, giving the debtor no opportunity to respond, but gave the debtor 30 days to make other living arrangements. During that time, the debtor appealed and the district court affirmed. The 11th Circuit also affirmed the stay relief, finding no abuse of discretion. The evidence on which the bankruptcy court based its finding of "cause" was attached to the debtor's own sanctions motion, and established that the property never became property of the estate. Additionally, the

state court foreclosure judgment could not be attacked in bankruptcy court in any event under the *Rooker-Feldman* doctrine, which prohibits federal courts from reviewing prior state court judgments.

Baumann v. PNC Bank, N.A. (In re Baumann), 694 Fed. Appx. 742, Case No. 16-15906 (11th Cir. July 19, 2017) (per curiam) (Marcus, Martin, and Edmondson, JJ.).

Code § / Rule: appeal becomes moot upon dismissal of underlying case

Held: When the debtor voluntarily dismisses his underlying chapter 13 case, no controversy remains, and thus the debtor's appeal of an order confirming his chapter 13 plan with what he contended were impermissible changes is moot.

History: 11th Circuit dismissed appeal from the U.S. District Court for the Middle District of Florida, which had affirmed the Bankruptcy Court for the Middle District of Florida.

Facts: The debtor appealed the confirmation of his chapter 13 plan, because he argued the court's confirmation order impermissibly altered the plan he proposed. The District Court affirmed, and while the appeal to the Eleventh Circuit was pending, the debtor voluntarily dismissed the chapter 13 case. With the dismissal, no controversy remained regarding the terms of the plan versus the confirmation order, and the appeal was thus moot. *See also Neidich v. Salas*, 783 F.3d 1215 (11th Cir. 2015) ("[T]he dismissal of a Chapter 13 case moots an appeal arising from the debtor's bankruptcy proceedings."). *See also* ***Baumann v. PNC Bank, N.A. (In re Baumann)***, 697 Fed. Appx. 629, Case No. 16-12615 (11th Cir. Sept. 1, 2017) (per curiam) (Hull, Wilson, and Anderson, JJ.) (the issue in this appeal was the bankruptcy court's order lifting the co-debtor stay under § 1301; that appeal was also mooted by the dismissal of the underlying case).

Similar Case: ***Zalloum v. River Oaks Comm. Svcs. Assoc., Inc. (In re Zalloum)***, 714 Fed. Appx. 973, Case No. 17-11853 (11th Cir. March 5, 2018) (per curiam) (Jordan, Rosenbaum, and Fay, JJ.). *Zalloum* was an appeal from the United States District Court for the Middle District of Florida, which had dismissed as moot the debtor's appeal of the bankruptcy court's order overruling her objections to claim. The district court found that the appeal was mooted by the subsequent dismissal of the case, applying *Salas,* and the 11th Circuit agreed. There was no chapter 13 proceeding, and so there was no way to grant meaningful relief.

Aamodt v. Narcisi (In re Narcisi), 691 Fed. Appx. 606, Case No. 16-16688 (11th Cir. July 26, 2017) (per curiam) (Tjoflat, William Pryor, and Jordan, JJ.).

Code § / Rule: § 523(a)(4) fraud committed while in a fiduciary capacity, or larceny; *sua sponte* grant of summary judgment under Rule 7056

Held: The bankruptcy court did not err in *sua sponte* granting summary judgment in favor of the debtor, given that the plaintiffs had ample opportunity to present evidence and arguments in

conjunction therewith; and the breach of contract state court judgment was not preclusive as to the issues of intent and fiduciary relationship, which were not addressed in that judgment.

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

Facts: Over 30 years ago, the Aamodts consigned certain antiques to Narcisi for sale at auction, and Narcisi guaranteed them a return of at least $25,000 from the auction. Due to some irregularities in the auction, the Aamodts received only $14,795 and they sued Narcisi for breach of contract. The Pennsylvania state court entered judgment against Narcisi, finding that he breached the agreement by selling items on days other than those advertised and without notice, that he commingled the Aamodts' property with others', and that he conducted the auction in "a less than vigorous manner." Narcisi filed chapter 7 years later, and the Aamodts sued for nondischargeability under § 523(a)(4). The Aamodts moved for summary judgment, and the bankruptcy court denied their motion, then entered summary judgment *sua sponte* in favor of Narcisi. The Aamodts appealed and the District Court and 11th Circuit affirmed.

In assessing the Aamodts' collateral estoppel argument as it related to the Pennsylvania state court judgment, the 11th Circuit used the collateral estoppel law of that state, and found no preclusion. The state court judgment made no finding that Narcisi was a fiduciary or violated a fiduciary duty. There was also no finding of intent or fraud, and thus the bankruptcy court was free to find to the contrary because the issues were not identical, as required for preclusive effect under state law. The court also affirmed the denial of the Aamodts' motion for leave to amend, finding that because the claim they wanted to add for embezzlement would be time-barred, the amendment would have been futile. Nothing in the amended complaint or its supporting affidavits mentioned embezzlement or accused the debtor of actually keeping the consigned items rather than selling them, so there was no relation-back.

Finally, the *sua sponte* grant of summary judgment was upheld. There was no evidence of a fiduciary relationship, and a consignment agreement standing alone does not establish such a relationship. *See In re Blaszak*, 397 F.3d 386, 391 (6th Cir. 2005) (holding that an agent-principal relationship alone does not create the fiduciary relationship contemplated by § 523(a)(4)). While the 11th Circuit has held that state statutes that impose trust-like duties, such as requiring an agent to promptly account for and pay funds, and forbidding the commingling of funds of the agent with those of the principal, may create fiduciary relationships as a matter of law, there was no evidence here that Pennsylvania law imposed the type of duties that would so establish nor that any such law was violated. There was no evidence that the debtor committed larceny, because the evidence showed he took possession of the property with the Aamodts' consent under the consignment agreement and not unlawfully. This was a breach of contract case, pure and simple. The Aamodts had sufficient notice and an opportunity to present all of their evidence, and they had in fact done so, prior to the bankruptcy court's *sua sponte* grant of summary judgment in the debtor's favor, which ruling was based entirely upon the evidence the Aamodts presented to the court.

Woide v. Fed. Nat'l Mort. Assoc., 705 Fed. Appx. 832, Case No. 16-15847 (11th Cir. Aug. 9, 2017) (per curiam) (Marcus, Julie Carnes, and Black, JJ.).

Code § / Rule: TILA (rescission under 15 U.S.C. § 1635(f)), FDCPA

Held: For purposes of rescission under TILA, consummation occurs when a consumer signs the contract, not when the bilateral contract becomes binding under state law.

History: 11th Circuit affirmed the District Court for the Middle District of Florida

Facts: The Woides brought claims under the Truth in Lending Act ("TILA") and the Fair Debt Collection Practices Act ("FDCPA") as well as Florida consumer protection statutes. The basis of each of the claims was that the Woides rescinded their mortgage obligation under TILA and that the defendants in the case therefore were wrong to pursue enforcement of the mortgage. The District Court found that the transaction was consummated in 2007, when the Woides executed the note and mortgage. Thus, their right to rescind expired in 2010. The Woides did not send their notice of rescission until 2015. They argued that even though they were contractually obligated when they signed in 2007, no enforceable contract was formed under Florida law so that there was no "consummation." The 11th Circuit disagreed. Whether a contract is formed under state law is irrelevant. The Woides consummated the transaction when they became obligated by signing the loan documents in 2007. Even unfunded financing agreements can be consummated for purposes of TILA, because "[c]onsummation occurs when a consumer signs the offered contract, not when that contract becomes binding under state law." The circuit court also found that the Woides did not establish the necessary information regarding the scope of the state court order upon which they were relying, and also failed to prove that one of the defendants had also been a defendant in that state court action, so that the elements of collateral estoppel were not satisfied. Finally, leave to amend would be futile because no changes in pleading could state a claim under these facts.

Yormak v. Yormak (In re Yormak), 2017 WL 4857438, Case No. 17-13239 (11th Cir. Sept. 13, 2017) (per curiam) (Martin, Julie Carnes, and Jill Pryor, JJ.).

Code § / Rule: appeals court will not review interlocutory order

Held: Bankruptcy court's order denying the claimant's motion for summary judgment following debtor's objection to claim was not a final order and so could not be reviewed on appeal.

History: 11th Circuit dismissed appeal *sua sponte* for lack of jurisdiction

Facts: The claimant moved the district court to allow him to appeal the bankruptcy court's order denying his motion for summary judgment, which the district court denied. The claimant appealed that denial to the 11th Circuit, which dismissed the appeal *sua sponte* for lack of jurisdiction. "Because the bankruptcy court order is not final, we lack jurisdiction to review the district court's order denying [the claimant's] motion for leave to appeal, as that order merely declined to review the interlocutory bankruptcy court order." The order was interlocutory because it did not "resolve any claim, controversy, or adversary proceeding."

Slater v. U.S. Steel Corp., 871 F.3d 1174 (11th Cir. Sept. 18, 2017) (opinion by Jill Pryor, J.; concurrence by Ed Carnes, C.J.).

Code § / Rule: judicial estoppel

Held: In examining whether judicial estoppel bars employment discrimination suit, district court must consider all facts and circumstances of the case to determine whether the debtor intended to "make a mockery" of the court system by omitting an employment discrimination claim from her scheduled assets in her chapter 7 case.

History: following en banc review, the 11th Circuit remanded to the District Court for the Northern District of Alabama

Facts: The debtor filed chapter 7 and did not list as an asset an employment discrimination claim against U.S. Steel. Following *Barger v. City of Cartersville*, 348 F.3d 1289 (11th Cir. 2003) and *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282 (11th Cir. 2002), the district court granted U.S. Steel's motion for summary judgment and found that the equitable doctrine of judicial estoppel barred her claims, given that she did not schedule the claims in her bankruptcy schedules. Under those prior cases, the omission of the cause of action could be considered inadvertent only if she either lacked a motive to conceal the cause of action, or did not know about the cause of action. Neither applied, and so the binding precedent required summary judgment be granted. On appeal, the 11th Circuit affirmed (820 F.3d 1193 (11th Cir. 2016)) with Judge Tjoflat urging en banc reconsideration in an extensive concurring opinion. The circuit court granted en banc review, vacated the panel's prior opinion, and reversed its prior precedent.

The circuit court explained that a two-part test for invoking judicial estoppel should continue to apply, considering "whether (1) the party took an inconsistent position under oath in a separate proceeding, and (2) these inconsistent positions were 'calculated to make a mockery of the judicial system.'" (quoting *Burnes*, 291 F.3d at 1285). The doctrine should not be applied when the inconsistent positions resulted from inadvertence or mistake, and the level of sophistication of the debtor should be considered, along with the totality of the circumstances. This requires more than the rigid test of prior precedent, which presumed "intent" from any nondisclosure of a cause of action that the debtor could have had a motive to conceal. The actual motive must now be determined in light of all the facts of the case. The doctrine should only be applied when the facts are egregious and warrant equitable intervention. Actual misconduct must be shown, and not presumed. Judicial estoppel in its prior form in the 11th Circuit worked to harm the debtor's creditors under many circumstances, as the asset (the cause of action) became worthless for the estate based on the debtor's nondisclosure and presumed intent if the nondisclosure was in any way beneficial to the debtor. The district court must instead examine the full facts of the case to determine the debtor's actual intent.

In his concurring opinion, Chief Judge Carnes stressed the district court's ability to assess the debtor's credibility in making this determination. He emphasized that for the doctrine to have any meaning at all, the district court need not accept as true the debtor's testimony that her

omission in her schedules was not made with the intent to mislead, even if not contradicted. The district court is in the position to reject the debtor's explanation even if not contradicted or impeached. "People who have defrauded others through misleading bankruptcy schedules, which are signed under penalty of perjury, have committed a crime. It is a small step from original perjury to cover-up perjury." If a district court were forced to accept as true a debtor's uncontroverted statement that she did not intend to defraud her creditors, then judicial estoppel would never apply, would be purely academic as a possible repercussion, and would serve no deterrent purpose. "And if debtors were freed from any threat of judicial estoppel, the losers would be both honest creditors and the integrity of the judicial process, which means we all would lose."

Wholesalecars.com v. Hutcherson, Case No. 16-00155, 2018 WL 1509509 (N.D. Ala. Mar. 27, 2018) (Bowdre, CJ.) applied the re-vamped judicial estoppel analysis now required by *Slater*. In *Hutcherson*, the debtor sued her prior employer for allegedly firing her because she was pregnant, and the court compelled arbitration. While the arbitration was ongoing, the debtor filed a chapter 7 bankruptcy. She did not list the suit in her bankruptcy schedules and statements, and also did not inform the arbitrator that she had filed bankruptcy. The debtor received an arbitration award of $116,677.22 postpetition, which she then did not disclose to the bankruptcy court, trustee, or her creditors. The employer discovered the bankruptcy filing and moved to vacate the arbitration award as having been procured by fraud (because the debtor pursued arbitration in her own name when the bankruptcy trustee was the true party in interest with standing to pursue the claim once her chapter 7 case was filed) and also on grounds that the debtor should be judicially estopped from enforcing the arbitration award because she intentionally concealed it. The district court (Chief Judge Bowdre) allowed the chapter 7 trustee to intervene.

The district court found that the debtor's "lack of standing did not affect the arbitrator's final decision" and so denied the motion to vacate. On the judicial estoppel issue, the district court examined the timing of events, the schedules and statements signed by the debtor under penalty of perjury both before and after the arbitration award, the debtor's postpetition briefs filed in the arbitration, and her testimony at the § 341 meeting of creditors. The district court found the nondisclosure was an intentional effort to protect the arbitration award from the reach of the debtor's creditors. Under the judicial estoppel test articulated by the Eleventh Circuit in *Slater*, the district court examined "all the facts and circumstances of the particular case." Here, the most egregious of the circumstances, in addition to the omission from her original and amended schedules (which amended schedules were filed after the arbitration award), was the debtor's unequivocally false testimony at the § 341 meeting where in response to the trustee's question, "[Are you] suing anyone for any reason?" she responded, under oath, "No sir." The debtor had both awareness of her duty to report as well as a motive to conceal. As the district court succinctly stated, "Someone does not forget a recently awarded $116,677.22 asset." The court thus found that the debtor "intended to make a mockery of the judicial system" and was judicially estopped from enforcing the arbitration award in her name. However, the trustee was not estopped from enforcing the award on behalf of the bankruptcy estate. The trustee never took inconsistent positions under oath. The award itself was not vacated or set aside, and remained an asset of the bankruptcy estate.

Diamond v. Bank of America (In re Diamond), 698 Fed. Appx. 571, Case No. 16-16033 (11th Cir. Sept. 26, 2017) (per curiam) (Tjoflat, Martin, and Anderson, JJ.).

Code § / Rule: reopening under § 350; technical abandonment under § 554

Held: After the chapter 7 case is closed and the property is deemed abandoned, the debtor does not have standing to exercise the trustee's strong-arm power as to a security deed that is unrecorded on the petition date, but which was later recorded post-discharge and post-case-closing. The lien was valid between the debtor and creditor, the lien survived the discharge, and the debtor did not have the trustee's power under § 544 to challenge the perfection, so that there was no reason to allow the case to be reopened on the debtor's motion.

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

Facts: In 2009, Diamond purchased real property and executed a note and security deed in favor of Bank of America. The closing attorney failed to record the security deed. Diamond then filed chapter 7 bankruptcy, and the case was discharged and closed with a "no asset" report by the chapter 7 trustee, thus technically abandoning the property under § 554 at the closing of the case. In 2011, after her bankruptcy was discharged and closed, Diamond defaulted on the loan. The closing attorney realized the mistake and filed a corrective affidavit and the security deed. The bank also filed a declaratory judgment action in state court, in which the state court found that the security deed was valid and enforceable, and survived the discharge. Following that ruling, Diamond moved the bankruptcy court to reopen her case so she could avoid the unperfected lien. She did not dispute the existence of the lien, but disputed the validity of the security deed given that it was not recorded when she filed bankruptcy. The bankruptcy court denied the motion, finding that it would have to revoke the trustee's technical abandonment in order to grant the relief requested, and that the time for revoking that abandonment had expired. The District Court affirmed.

On appeal, the 11th Circuit affirmed but on different grounds. While noting that it had never addressed in a published opinion whether (and under what circumstances and within what timeframe) a bankruptcy court can revoke a trustee's technical abandonment, it did not need to reach those issues here because even if the case were reopened, the bankruptcy court could not give Diamond the relief she sought. Under Georgia law, the security deed was valid between the parties even though it was not recorded. Such a valid security interest survives discharge, and it is no violation of the discharge injunction for a lender to enforce its valid lien so long as it does not attempt to collect the debt from the debtor personally. In addition, the debtor could not avail herself of the trustee's strong-arm power under the express language of § 544, and she provided no authority to support an argument that a debtor has standing under that code section.

Moore v. Seterus, Inc., 711 Fed. Appx. 575, Case No. 16-17571 (11th Cir. Oct. 19, 2017) (per curiam) (Tjoflat, Marcus, and Wilson, JJ.).

Code § / Rule: FDCPA and RESPA, following dismissal without discharge of chapter 13

Held: The payments Seterus received during and after the bankruptcy were applied correctly, the plaintiffs did owe the amounts asserted in the demand letter, and it was no violation to send the demand letter at issue.

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

Facts: The plaintiffs filed chapter 13 to stop a foreclosure. They paid several months of payments postpetition, and then also paid the arrearage claim filed by the mortgagee a few months into the case, which wound up being applied to prepetition payments and interest that were due when the case was filed. None of the money Seterus received on the claim arrears was applied to fees, expenses, or attorney fees and costs. It was all applied to past-due interest, although in an amount that exceeded what was shown on the claim. The chapter 13 case was eventually dismissed without a discharge. It appears that the proof of claim filed by the mortgagee did not list all of the past-due interest payments, so that the funds when received wound up being applied to past-due interest payments beyond what the claim showed, rather than being applied to the fees listed on the claim. Those fees were still due and owing when the case was dismissed. The debt was transferred to Fannie Mae with Seterus as servicer during the case. After the dismissal, Seterus sent a demand letter setting out a default amount due, which the plaintiffs paid. Those funds also were not applied to legal, publication, title, or property inspection fees, all of which were still owed.

A month later, the plaintiffs sent Seterus a QWR/NSE and Seterus eventually responded. The suit was filed because the plaintiffs alleged violations of RESPA based on the response to the QWR, violations of the FDCPA by communicating misleading information and by threatening to foreclose, and breach of contract. The District Court granted Seterus' motion for summary judgment, and the plaintiffs appealed. The 11th Circuit affirmed. The FDCPA claim was examined under the "least sophisticated consumer" standard. The plaintiffs claimed the demand letter Seterus sent them postpetition contained a false, deceptive, or misleading statement because it demanded payment of fees that the plaintiffs believed they had already paid when they paid the arrears claim in the bankruptcy. The circuit court disagreed. The undisputed evidence showed that the plaintiffs owed more interest than was shown in the claim, and that the arrears payment was applied to that interest rather than to the fees, which remained owing under the contract. The demand was not false, deceptive, or misleading. Further, a review of the payment history indicated that the post-petition payments plaintiffs made were applied to advance the due date of the loan, that the amount in the letter was mathematically correct, and that the foreclosure postpetition was not threatened based on the unpaid fees in any event. The letter further indicated that foreclosure would not occur "unless and until allowed by applicable law" so the mortgage's notice requirement was not violated. The least sophisticated consumer could not read that language as meaning that the notice requirement of the mortgage would be ignored.

Under RESPA, plaintiffs' only argument was that a reasonable investigation would have revealed to Seterus that it had the facts and math wrong, but that was foreclosed by the ruling that

Seterus had its facts and math right, vis-à-vis the contract and the application of the payments. Finally, there was no breach of contract under state law because Seterus was not attempting to collect a debt that had already been paid.

Estate of Juanita Jackson v. Schron (In re Fundamental Long Term Care, Inc.), 873 F.3d 1325, Case No. 16-16462 (11th Cir. Oct. 19, 2017) (opinion by Julie Carnes, J.) (Jordan, Julie Carnes, and Vinson, JJ.).

Code § / Rule: power of bankruptcy court to issue a bar order as part of a settlement; Rule 16 of the Fed. R. Civ. P. and Bankruptcy Code § 105(a)

Held: "[A] bankruptcy court can enjoin any civil action if the outcome could alter the debtor's rights, liabilities, options, or freedom of action or in any way impacts upon the handling and administration of the bankruptcy estate."

History: 11th Circuit affirmed the Bankruptcy Court for the Middle District of Florida, which had also been affirmed by the District Court for the Middle District of Florida.

Facts: Judgment creditors filed an involuntary chapter 7 case against an entity formed as part of a bust-out scheme to hold all the liabilities but none of the assets of the original nursing home entity against which the creditors held a judgment. The petitioning creditors then immediately filed a fraudulent transfer adversary proceeding, attempting to undo the transfer of assets from the judgment-entity nursing home into a distinct bust-out entity that held all the assets but none of the liabilities of the judgment-entity. One of the defendants was a real estate investor named Rubin Schron. The bankruptcy court dismissed claims against Schron, allowed the other claims to go forward, and conducted a 12-day bench trial. At the conclusion of the trial, the remaining defendants settled, and the bankruptcy court approved the settlement, conditioned on the plaintiffs being permanently enjoined (barred) from pursuing any further claims against Schron related to the bust-out scheme. The plaintiffs appealed the dismissal of Schron from the adversary proceeding and also appealed the bar order as to Schron. The district court affirmed on both counts, as did the 11th Circuit.

The 11th Circuit found the bankruptcy court had subject matter jurisdiction to enjoin the suit in another venue, under the "related to" prong of 28 U.S.C. § 1334, and reiterated the circuit's position that "related to" jurisdiction exists if the claims could "conceivably effect" the administration of the bankruptcy estate. That was met here as any asset to satisfy the judgment would have to flow from Schron as a down-stream transferee, back through the bankruptcy estate, and into the debtor entity as a recovered transfer before being available to satisfy the appellants' judgment. Further, the bankruptcy court had the authority to issue the injunction under the All Writs Act, 28 U.S.C. § 1651, as limited by the Anti-Injunction Act at 28 U.S.C. § 2283. The bankruptcy court, district court, and circuit court all agreed that the injunction of the bar order was "necessary in aid of its jurisdiction" and necessary "to protect or effectuate its judgments" under the Anti-Injunction Act, and thus was permissible under the All Writs Act. The settlement resolved issues pending in 25 lawsuits and 15 appeals, involving 11 different courts, in five different states, over the course of 11 years of litigation. The settlement would bring over $24 million into the

estate and resolve the adversary proceeding and bankruptcy completely. The approval of the settlement as "fair and equitable" was expressly conditioned on the issuance of the permanent injunction that prevented pursuit of further claims against Schron that arose out of the same "nucleus of facts" as the adversary proceeding.

The circuit court also examined the possible repercussions of success on the non-settling defendants' state court claims, and found that if the non-settling defendants (now appellants) were successful, the "potential existed to deconstruct the bankruptcy court's resolution of the dispute." This rationale stands alongside that in *In re Munford*, 97 F.3d 449 (11th Cir. 1996), in which the circuit court pointed out that the settlement was *conditioned upon* the bar order, and thus approved a bar order in conjunction with the settlement, which barred even the non-settling defendants from further pursuing state court claims against the debtor. The circuit court also affirmed the dismissal of alter-ego liability claims against Schron, the dismissal of the claims of abuse of process and conspiracy to commit abuse of process under Florida law, and affirmed the dismissals with prejudice as "future amendments would be futile or unfairly prejudicial" to Schron.

Mantiply v. Horne (In re Horne), 876 F.3d 1076, Case No. 16-16789 (11th Cir. Dec. 5, 2017) (opinion by May, District Judge for N.D. Ga. sitting by designation) (Ed Carnes, C.J., Black, and May, JJ.).

Code § / Rule: § 362(k) attorney fees as actual damages resulting from violation of the automatic stay

Held: As a matter of first impression, the 11th Circuit ruled that "the Bankruptcy Code authorizes payment of attorneys' fees and costs incurred by debtors in successfully pursuing an action for damages resulting from the violation of the stay and in defending the damages award on appeal."

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

Facts: The Hornes filed chapter 7 and were discharged in 2011. Mantiply, an attorney, filed a civil action on her clients' behalf during the case while the stay was in effect, and refused to dismiss the action voluntarily after being made aware of the stay. The Hornes sought damages for the stay violation under § 362(k)(1), and were awarded damages of $81,714.31 including $41,714.31 attorneys' fees. Mantiply appealed that award to the district court, and that court affirmed and awarded an additional $34,551.28 in attorney fees for the appeal. Mantiply then filed recusal motions in both bankruptcy court and district court, seeking the bankruptcy judge's recusal, which she lost, but for which the district court did not allow additional attorney fees to the Hornes. On appeal, the 11th Circuit affirmed of the denial of the recusal motion but remanded on the attorney fee issue. On remand, the district court decided that the litigation over the recusal motion was in fact litigation involving the stay violation, and awarded $14,918.60 additional attorney fees. Mantiply also petitioned for a writ of certiorari and was denied. The district court found that the Hornes were entitled to appellate fees for defending the appeal to the 11th Circuit as well as the petition for the writ of cert, and that the fees were reasonable at $92,495.86. That ruling was appealed and the 11th Circuit affirmed.

In a matter of first impression in this circuit, the court ruled that "the Bankruptcy Code authorizes payment of attorneys' fees and costs incurred by debtors in successfully pursuing an action for damages resulting from the violation of the stay and in defending the damages award on appeal." The American Rule did not apply because § 362(k)(1) specifically and explicitly contemplates a departure from that rule with regard to attorney fees and costs as damages for a stay violation. Those damages are mandated by the statute and are not optional. The circuit court also disagreed with reasoning that the fee shift ends under that statute as soon as the stay violation ends, and instead allowed attorneys' fees as actual damages, even when incurred for pursuing a damages remedy or defending the judgment on appeal. The language of the statute broadens "the notion of actual damages beyond the immediate injury incurred in ending the violation of the stay." The text of the statute shows Congress intended to enlarge actual damages for a stay violation to include attorney fees and costs to obtain full relief under the statute. The only other circuit to reach the issue has ruled similarly. *See In re Schwartz-Tallard*, 803 F.3d 1095, 1101 (9th Cir. 2015) (en banc). The largest part of damages from stay violations are almost always attorneys' fees, and to limit the recoverable fees to those incurred in ending the stay violation would read an exception into the statutory language that simply is not present.

Nationstar Mortgage, LLC v. Iliceto (In re Iliceto), 706 Fed. Appx. 636, Case No. 16-16815 (11th Cir. Dec. 11, 2017) (per curiam) (Wilson, Rosenbaum, and Robreno, JJ.).

Practical Lesson: *Espinosa* giveth you a house free and clear and taketh away collateral albeit with notice that does not comply with Rules or Code.

Code § / Rule: Due process

Held: Creditor received notice "reasonably calculated to apprise it that its status as a secured creditor" was being challenged by the debtor, under all the circumstances of the case.

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

Facts: The debtor was in default and facing foreclosure when he filed chapter 13. He listed the secured creditors as "Bank of America" and listed U.S. Bank as "Representing: Bk of Amer." U.S. Bank filed a secured proof of claim and listed an attorney as the service address. Nationstar then filed a notice of transfer of claim as to the U.S. Bank proof of claim, and specified a street address as the notice address. The BNC sent notice to the street address on the notice of transfer as well as to Nationstar's preferred address nationwide, which is a P.O. Box. After the notice of transfer, the debtor objected to the claim, alleging that U.S. Bank was not a proper holder of the note and mortgage. The objection was served on Bank of America and on U.S. Bank, but not on Nationstar and Nationstar never had actual notice of the objection to the claim prior to the order sustaining the objection. The bankruptcy court sustained the objection after negative notice with no response in opposition having been filed. The order stated that U.S. Bank was not a holder of the note and mortgage, and was not entitled to any claim against the debtor.

Four days after the claim objection order, the debtor filed a claim on Nationstar's behalf, and BNC provided notice of that filing to Nationstar's national preferred address, the P.O. Box. That same day, the debtor objected to the claim he filed for Nationstar, asserting that Nationstar could not prove it was the assignee of the note and mortgage. That objection was served by BNC on Bank of America and on U.S. Bank's attorney, but not on Nationstar by mail (although it is unclear, according to the opinion, whether Nationstar received electronic notice of that objection). Again, the bankruptcy court sustained the objection after negative notice with no response having been filed, and ruled that Nationstar failed to produce the original note and therefore was not entitled to a secured claim in the case but was nevertheless entitled only to a general unsecured claim of $507,209.79. The bankruptcy court further found that any mortgage held by Nationstar would be void upon entry of discharge. There is no dispute that Nationstar received a copy of that order which was a critical component of the "notice" in this case.

Nationstar then filed notices of payment change during 2014, which were objected to and which objections were served on Nationstar at its preferred address, although showing they were addressed to "Bank of America Nationstar Mortgage LLC." The district court found that was sufficient notice. The order striking those notices of payment change was never served on Nationstar. In 2015, the debtor moved to payout his case early, which the bankruptcy court granted, and the debtor was discharged. He then filed a motion to have Nationstar's mortgage deemed extinguished. Nationstar appeared and objected to the notice, its first appearance in the case aside from the transfer of claim. Nationstar asserted it was denied due process because of the total failure to serve it with the earlier filings in the case. The bankruptcy court ruled that Nationstar had "ample notice, on multiple occasions, over an extended period of time" to protect its interests and failed to do so (apparently based solely on Nationstar's receipt of the order sustaining the claim objection and the objection to the notices of payment increase). The bankruptcy court also rejected Nationstar's argument that extinguishing its lien required an adversary proceeding, reasoning that the debtor did not seek to determine the validity of the lien as an initial matter, but only as an act of enforcing the prior order that said it would have no lien after discharge because it failed to respond to the objection to the secured status of its claim. The district court agreed, finding that Nationstar was also bound by the confirmed plan which did not provide for it as a secured creditor. To preserve its lien, the district court said Nationstar should have responded when it received the claim objection order that recited the lien would be extinguished upon discharge.

The 11th Circuit affirmed, saying that at some point, Nationstar had "conceded" that it had "actual notice of the key documents that impacted its status as a secured creditor" so that its "due process rights were not violated when the bankruptcy court invalidated its mortgage lien." The notice Nationstar received was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." That was satisfied here by the receipt of the order sustaining the claim objection, served to Nationstar's preferred P.O. Box through BNC. This outcome was supported by the decision in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 272 (2010), which held that a creditor was bound by a plan that proposed to pay only principal and discharge interest on a student loan, thus evading the required adversary proceeding to determine whether that interest would have been dischargeable. Even though the bankruptcy court likely committed a legal error by allowing such a plan to be confirmed, that legal error was not a basis for setting aside the confirmation order. The deprivation of the right to an adversary proceeding and its attendant

heightened notice requirements did not amount to a deprivation of due process. The exact same reasoning applied here.

It is interesting to note that the 11th Circuit agreed the failure to serve the objection to claim was a violation of both a procedural rule and a statutory requirement (Rule 3007(a) and § 502(b)). *Espinosa* arguably casts the burden of ensuring compliance with those rules and statutory requirements on the bankruptcy court in the first instance, even if no party objects. But the creditor should have recognized this when it received the order sustaining the claim objection, and should have raised the issue then. The circuit court distinguished its ruling from *Foremost Fin. Servs. Corp. v. White (In re White)*, 908 F.2d 691 (11th Cir. 1990) in which it ruled that it was error for a bankruptcy court to *sua sponte* disallow a secured claim for failure to attach legible documentation, because there was no substitute for the claim objection procedure set out in Rule 3007. Here, the creditor had notice of the order sustaining the claim objection, even though it had no notice of the claim objection itself prior to the entry of the order, and failed to timely move for reconsideration.

Title Max v. Northington (In re Northington), 876 F.3d 1302, Case No. 16-17468 (11th Cir. Dec. 11, 2017) (opinion by Newsome, J.) (Wilson, Newsom, and Moreno, JJ.) (dissenting opinion by Wilson, J.).

Practical Lesson: *Espinosa* who?

Code § / Rule: § 541; res judicata effect of confirmed plan in light of pending motion for relief from stay and in the absence of a formal objection to confirmation

Held: When state law redemption period expired post-petition, pawned car was no longer estate property so that the debtor had no power to modify the obligation under § 1322(b)(2), in light of creditor's preconfirmation motion for relief from stay, and despite confirming a plan that proposed to pay the debt in full with interest as a secured claim.

History: 11th Circuit reversed and remanded to the District Court for the Middle District of Georgia, which had affirmed the Bankruptcy Court for the Middle District of Georgia.

Facts: Under Georgia law, an item that is pawned but not redeemed within the statutory grace period is forfeited to the pawnbroker by operation of law and the pledgor's ownership interest is extinguished automatically as a matter of law. The debtor pawned his car and filed chapter 13 shortly before the redemption period under state law expired. The Bankruptcy Code at § 108(b) extended that period by sixty days from the petition date, but the debtor did not redeem. Prior to confirmation, Title Max filed a motion for relief from stay, alleging that the car was no longer estate property. Before the stay relief motion was heard, the court confirmed a plan that treated Title Max as a secured creditor to be paid through the plan. The parties then litigated the stay relief motion and the court denied the relief requested, ruling that the car and the right of redemption were estate property and that the car itself was still owned by the debtor despite Georgia's pawn statute, so that the secured claim against it could be paid through the plan. The court then also ruled that the confirmed plan bound Title Max to that outcome in any event, as Title Max did not file a formal objection to confirmation even though it had raised the issue in its

pending stay relief motion. The district court affirmed, but did not address the res judicata issue. On appeal, the 11th Circuit reversed.

The circuit court first addressed the res judicata argument and stated that it was error to conclude that Title Max slept on its rights by not objecting to confirmation when it had moved for stay relief and asserted that the car was not estate property. This distinguished the case on its facts from *In re Young*, 281 B.R. 74 (Bankr. S.D. Ala. 2001) in which the creditor took no action to preserve the issue whatsoever and was thus bound by the plan's treatment of the pawnbroker as having a claim, rather than ownership, of the vehicle. Judge Wilson filed a dissenting opinion and stated that Title Max should have taken some action, beyond the stay relief motion, to object to confirmation. The majority of the panel agreed that some action was required, but found that the motion for relief from stay raising the issue was action sufficient to preserve the issue. The debtor agreed that the body of the stay relief motion was exactly what Title Max would have needed for a good objection to confirmation. The majority of the panel thus concluded that the substance of Title Max's position was squarely before the court prior to confirmation; the argument was "teed up" in a motion rather than objection, but was nonetheless preserved.

On the merits of the objection, although the car was estate property initially, it ceased to be so upon the expiration of the extended redemption period with no redemption having been made. Thus, there was no "claim" to modify under the chapter 13 plan. The ordinary operation of state law can cause an asset to drop out of the estate, as the petition does not freeze the debtor's estate in time or stop the "operation of the state-law rules that define and regulate the property interests that comprise the estate." "Property interests are created and defined by state law." *Butner v. United States*, 440 U.S. 48, 55 (1979). While the issue of whether the debtor's interest in property is also property of the estate is a federal question, the issue of the nature and existence of the debtor's interest in the first place is a question of state law. The state law clearly provided that the car ceased to be the debtor's property upon expiration of the redemption period (as extended), and thus it ceased to be property of the estate, and Congress has not chosen to supersede that authority. For support, the panel majority cited *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994), which held that "reasonably equivalent value" under § 548 must be read in reference to the underlying state law, so that a foreclosure sale conducted in accordance with state law would be conclusively reasonable. In reaching that conclusion, the Supreme Court pointed out that courts interpreting the Bankruptcy Code must give credence to the validity and effect of the state law background, to traditional state regulation (such as state's traditional regulation of both mortgage foreclosures in BFP and pawn transactions in the instant case), and should read the Bankruptcy Code as superseding state law only when the intent to override the effect of state law is unambiguous. Here, there was no indication in the text of the Code that Congress intended to override state laws that established the nature of the debtor's interest in property, and that the interest was not "frozen" at the petition date. The majority rejected the view that the automatic stay prevents state law redemption periods from having their usual effect, in large part because if that were the case, there would be no need whatsoever for § 108(b)'s extension and it would be rendered entirely superfluous by such a ruling. The "freezing" argument also misunderstands § 362(a)'s language, which speaks to affirmative steps by creditors and does not speak to actions that take place automatically by operation of state law.

Finally, while it is true that § 541 creates the bankruptcy estate as of the "commencement of the case," that section neither states nor implies that the estate thus created remains static. In fact, § 541 itself provides otherwise and denotes situations in which the estate may expand and contract postpetition.

Echeverry v. Weiner (In re Echeverry), 720 Fed. Appx. 598, Case No. 17-12722 (Jan. 23, 2018) (per curiam) (Marcus, Wilson, and Jordan, JJ.).

Code § / Rule: chapter 13 dismissal "for cause" under § 1307(c)

Held: It was no abuse of discretion for a bankruptcy court to dismiss the case of a pro se chapter 13 debtor for "cause" when she had notice of plan and schedule deficiencies, as well as notice that the deficiencies must be cured prior to confirmation, but she nonetheless failed to cure the deficiencies.

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

Facts: Pro se debtor in her sixth chapter 13 case in as many years (all five priors having been dismissed before confirmation) attended her 341 meeting, at which the trustee provided her with a list of deficiencies in her plan and schedules and further informed her that she would have to correct those deficiencies prior to confirmation. The debtor did not correct any of the deficiencies, and did not appear for confirmation. Her case was dismissed. The debtor argued that the docket did not show that the trustee had informed her of the deficiencies, and also that the bankruptcy court should not have dismissed her case without a hearing. The district court found no abuse of discretion, and the 11th Circuit affirmed. The debtor never sought reconsideration of the district court's finding that she was indeed provided a list of deficiencies at the 341 meeting and was told she needed to correct them prior to confirmation. Even if she had not abandoned any challenge to that finding, she provided no transcript of the 341 meeting or of the confirmation hearing (and she also did not expressly deny that she was provided the deficiency details—she argued that the deficiency details were not "on the docket") so there was no record basis to support her appeal. In a lengthy footnote, the circuit court notes that it may affirm on any ground, and points out that although the 11th Circuit has not addressed in a published opinion the consequences of failing to fulfill the credit counseling requirement of § 109(h)(1), her certificate showed she took the course *after* her case was filed, and the clerk had issued a notice of deficiency warning that dismissal could result. The panel cites the 6th Circuit B.A.P. case of *In re Ramey*, 558 B.R. 160, 163-64 (6th Cir. B.A.P. 2016) (persuasive authority) in support of that as an alternate basis on which the dismissal could have been affirmed.

Beem v. Ferguson, 713 Fed. Appx. 974, Case No. 16-11842 (11th Cir. Feb. 6, 2018) (per curiam) (Jordan, Jill Pryor, and Reeves, JJ.).

Code § / Rule: Rule 4007(c); Rule 7001(6); Rule 7008; Rule 7015; § 523(a)

Held: Untimely adversary complaint related "back to the filing of a timely, but procedurally improper, motion in the bankruptcy case" and the bankruptcy court properly granted plaintiff's motion for summary judgment.

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

Facts: In 2011, Beem sued Ferguson in state court and was awarded a judgment for "defamation; abuse of process" based on a finding that despite ample opportunity, Ferguson failed to bring forward any evidence to support his allegation that Beem had stolen over $1 million from their former business. In 2012, Ferguson filed bankruptcy and Beem wanted to have his judgment declared nondischargeable, but Beem's lawyer made a big mistake. After seeking and being granted an extension of the complaint deadline, Beem's attorney filed a "Motion to Dismiss or for Determination of Non-Dischargeability of His Debt" rather than filing an adversary proceeding complaint. The motion was filed before the complaint deadline expired. After the deadline expired, the attorney realized his mistake and filed what was then an untimely complaint objecting to dischargeability. Ferguson moved to dismiss the complaint, as being untimely filed under Rule 4007(c) and because nondischargeability claims must be brought by complaint rather than by motion under Rule 7001(6) so that the motion was not sufficient. The bankruptcy court allowed the complaint on 2 grounds: (1) a ruling that retroactively extended the complaint deadline for excusable neglect; and (2) a ruling that the adversary complaint related back to the timely, but procedurally improper, motion. The bankruptcy court then granted Beem's motion for summary judgment, finding that the state court judgment established a willful and malicious injury as a matter of law, under § 523(a)(6). The district court affirmed on appeal, based on the relation back of the adversary complaint to the timely motion, and also finding summary judgment was appropriate. The district court found that the bankruptcy court did not have the power to retroactively extend the complaint deadline for excusable neglect, and that ruling was not challenged on appeal.

The 11th Circuit also affirmed both rulings. Bankr. Rule 7015 incorporates Rule 15 of the Fed. R. Civ. P. and allows for relation back of amendments to the date of the "original pleading" when "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original pleading." The circuit court found that the procedurally improper motion was an original pleading for purposes of Rule 15. Ferguson argued, and the circuit court agreed, that technically Rule 15 applies only to allow relation back to a "pleading" and a motion is not a pleading under Bankr. Rule 7007, which incorporates Rule 7 of the Fed. R. Civ. P. However, Rule 7008, incorporating Rule 8 of the Fed. R. Civ. P., is the determinative rule at play in this scenario. Rule 8 applies in adversary proceedings and provides the minimum requirements for a pleading to state a claim for relief, which amount to a short and plain statement of the claim that gives the defendant "fair notice of what the claim is and the

grounds upon which it rests." (*quoting Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007))).

The court also pointed out that the Federal Rules reject a "gotcha" approach to pleading where a "misstep by counsel" can decide the outcome in favor of an approach that facilitates a decision on the merits. "Pleadings musts be construed so as to do justice." Fed. R. Civ. P. 8(e). In line with the 9th Circuit and other courts to consider the issue, the 11th Circuit analyzed the issue in light of Rule 8 and found that the timely motion satisfied Rule 8's standards for a complaint although not labeled as such. The court distinguished this case on its facts from other cases that have declined to treat a motion as a complaint under similar circumstances, because unlike those cases, this motion was more than a boiler-plate document that just objected to discharge. Instead, the motion set out the specific facts and legal standards that were the basis for the complaint and thus satisfied the "fair notice" standard and was the "functional equivalent" of a complaint, so that the AP should be deemed "commenced" as of the day the motion was filed. The court also found that the concept of "case" in bankruptcy was broad enough to encompass not only the main bankruptcy commenced by the petition but also all of the "discrete proceedings" that follow the filing of the petition, including adversary proceedings. Finally, the state court elements for abuse of process included a willful intent element, and the requirements of collateral estoppel were fully satisfied so that summary judgment was appropriate.

Mohorne v. Beal Bank (In re Mohorne), 718 Fed. Appx. 934, Case No. 17-13534 (11th Cir. Feb. 12, 2018) (per curiam) (Wilson, Jordan, and Rosenbaum, JJ.).

Code § / Rule: Fed. R. Bankr. P. 8018 (deadline for filing brief on appeal)

Held: The district court abused its discretion by applying a "stringent rule of dismissal" that was contrary to the appropriate "flexible standard" requiring "bad faith, negligence or indifference" before dismissal of an appeal for failure to timely file a brief under Rule 8018.

History: 11th Circuit vacated and remanded to the District Court for the Southern District of Florida

Facts: Pro se debtor-appellant appealed the bankruptcy court's denial of his motion to reopen his case. The debtor sought an extension of time to file his brief on appeal, citing "medical testing" and that he was seeking new counsel. The district court denied the motion without prejudice because the debtor did not state the length of extension he was seeking. The district court entered that order the day before the brief was due (the opinion does not indicate exactly when the motion was filed). Three days later, with no timely brief and no further extension having been sought, the district court dismissed the appeal and closed the case. Approximately one week later, the debtor filed his brief and also filed a notice of appeal to the 11th Circuit. The circuit court found the district court abused its discretion by applying a "stringent rule of dismissal" for failure to timely file a brief, which is contrary to the appropriate "flexible standard" requiring "bad faith, negligence or indifference" before dismissal. *See Brake v. Tavormina (In re Beverly Mfg. Corp.)*, 778 F.2d 666, 667 (11th Cir. 1985). Nothing in the record supported bad faith, negligence, or indifference.

Meus v. Weatherford (In re Meus), 718 Fed. Appx. 937, Case No. 16-16036 (11th Cir. Feb. 14, 2018) (per curiam) (Marcus, Julie Carnes, and Fay, JJ.).

Code § / Rule: Mootness

Held: The debtor's appeal of an order granting relief from the stay was mooted by the foreclosure sale, there being no stay pending appeal.

History: 11th Circuit dismissed as moot in part and affirmed in part appeal from the District Court for the Middle District of Florida, which had affirmed the Bankruptcy Court for the Middle District of Florida.

Facts: The debtor and his fiancé were co-makers on a mortgage, for which the creditor obtained a judgment of foreclosure in October 2007. Before the scheduled foreclosure sale could take place in 2009, the fiancé filed bankruptcy and stopped the sale. Her case lasted less than a month and was dismissed for failure to file information. Eight tag-team cases and five years later, the instant case was filed to stop the foreclosure sale again, but the sale took place and the state court issued a certificate of sale. The creditor sought relief from the stay both prospectively and retroactively to the date of the petition in the instant case, seeking a ruling that a filing by either the debtor or the fiancé would not trigger an automatic stay until after the foreclosure sale was completed, the state court issued the certificate of title and writ of possession, and the occupants were evicted from the property. Following an evidentiary hearing, the bankruptcy court granted the motion, thus validating the foreclosure sale, and further imposed a 180-day bar on filings by either the debtor or the fiancé based on the court's finding of intent to hinder, delay, or defraud the creditor by virtue of their serial filings.

The debtor appealed the order to the district court, and moved the bankruptcy court for a stay pending appeal. The bankruptcy court denied the stay, but did temporarily stay the order while the debtor moved for a stay pending appeal from the district court, which was also denied. In the meantime, the debtor's case was dismissed for failure to make payments. The district court eventually affirmed both the stay relief order and the case dismissal order. The debtor appealed both rulings, and the 11th Circuit affirmed both orders.

The circuit court found that the appeal of the stay relief order became moot, at the latest, when the district court declined to issue a stay pending appeal. At that point, the retroactive grant of relief (to encompass the sale and issuance of the certificate of title some months before) became effective. "When a debtor fails to obtain a stay pending appeal of an order granting a creditor relief from the automatic stay and allowing that creditor to foreclose on the debtor's property, a completed foreclosure and sale of the property will render any appeal moot, as this Court is powerless to rescind the completed sale on appeal." Once a state-court foreclosure sale is complete, even the bankruptcy court is without the power retroactively void the sale to allow the debtor to pursue an appeal of the order lifting the stay that allowed the sale to take place. *See Lashley v. First Nat'l Bank of Live Oak (In re Lashley)*, 825 F.2d 362, 364 (11th Cir. 1987). The dismissal of the case for failure to make payments was not argued on appeal and so was affirmed.

Basson v. Federal National Mortgage Association (In re Basson), 713 Fed. Appx. 987, Case No. 17-10309 (11th Cir. Feb. 20, 2018) (per curiam) (Ed Carnes, C.J.; Martin and Jill Pryor, JJ.).

Code § / Rule: statutory standing under § 362

Held: A creditor has standing to seek relief from the automatic stay.

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

Facts: Fannie Mae moved for relief from the automatic stay to proceed with foreclosure against the pro se chapter 7 debtor's real property. The debtor appealed, arguing Fannie Mae did not have standing to seek relief from the automatic stay. The 11th Circuit reiterated its test for standing under any particular section of the bankruptcy code: "To have statutory standing in a bankruptcy case, a party must be a 'party in interest.' A 'party in interest' may raise and be heard on 'any issue' in a bankruptcy case. A 'party in interest' includes a 'creditor,' which the bankruptcy code defines as an 'entity that has a claim against the debtor.' A 'claim' is a 'right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.'" Because Fannie Mae alleged it was the holder of the note secured by the mortgage, and alleged a default, Fannie Mae held a claim and was thus a creditor and a party in interest sufficient to have standing to be heard on any issue, including relief from the automatic stay.

Russell v. Ingegneri (In re Russell), 713 Fed. Appx. 991, Case No. 16-16943 (11th Cir. Feb. 21, 2018) (per curiam) (Martin, Jill Pryor, and Anderson, JJ.).

Code § / Rule: dismissal of adversary proceeding when the underlying bankruptcy case is dismissed

Held: The bankruptcy court correctly exercised its discretion in deciding not to retain jurisdiction over the pending adversary proceeding upon dismissal of the underlying case, applying the 11th Circuit's three-factor *Morris* test, which mandates consideration of (1) judicial economy; (2) fairness and convenience to the litigants; and (3) the degree of difficulty of the related legal issues involved.

History: 11th Circuit affirmed District Court for the Northern District of Alabama (Chief Judge Bowdre), which affirmed the Bankruptcy Court for the Northern District of Alabama)(Judge Jessup)

Facts: The underlying bankruptcy case was dismissed while the adversary proceeding was still pending. In the adversary proceeding, discovery had not yet occurred, the defendants had not consented to jurisdiction by the bankruptcy court, and the plaintiff was seeking a jury trial. The bankruptcy court dismissed the adversary proceeding in light of these facts, and the plaintiff

appealed. The district court affirmed, as did the 11th Circuit. The dismissal of a bankruptcy case does not automatically strip the bankruptcy court of jurisdiction over a pending related adversary proceeding, and the bankruptcy court should decide that question in light of the three-factors established by the 11th Circuit in *In re Morris*, 950 F.2d 1533 (11th Cir. 1992): "(1) judicial economy; (2) fairness and convenience to the litigants; and (3) the degree of difficulty of the related legal issues involved." (*citing Morris*, 950 F.2d at 1535). The bankruptcy court correctly decided the issue in light of those factors.

Petricca v. Jensen (In re Petricca), 718 Fed. Appx. 942, Case No. 17-10325 (11th Cir. Feb. 22, 2018) (per curiam) (Wilson, Jordan, and Anderson, JJ.).

Code § / Rule: "person aggrieved" standing to appeal

Held: Pro se chapter 7 debtor was at best only at risk of being indirectly involved in litigation, and was not a "person aggrieved" sufficient to have standing to appeal the bankruptcy court's order.

History: 11th Circuit affirmed in part and dismissed in part appeal from the District Court for the Middle District of Florida, which had dismissed the debtor's appeal from the Bankruptcy Court for the Middle District of Florida

Facts: The pro se chapter 7 debtor received his discharge in 2013. In 2014, the chapter 7 trustee sold certain estate property, including the estate's interest in several trusts and civil lawsuits. The debtor objected to the sale and to the report of sale, both of which objections the bankruptcy court overruled, and the appeal of which the district court dismissed in 2015. In 2016, the trustee filed the final report, to which the debtor also objected. The final report showed no distribution to the debtor. The debtor claimed the sale would spawn litigation in another forum and would deprive him of his fresh start. The bankruptcy court overruled the debtor's objection to the final report, denied the debtor's motion to vacate, and the debtor appealed. The district court dismissed the appeal for lack of standing, and the 11th Circuit affirmed that dismissal.

The 11th Circuit found it lacked jurisdiction over the appeal of the 2014 order overruling his objection to the sale, as the district court had dismissed his appeal of that order back in 2015 with no timely further appeal having been filed. He did not get a second bite at that apple. The interesting part of the opinion is the circuit court's discussion of the "person aggrieved" standard for the appeal of the 2016 order. Under the "person aggrieved" doctrine (which is more restrictive than traditional Article III standing), the person appealing must be "directly and adversely affected pecuniarily" by the bankruptcy court order at issue. *In re Westwood Cmty. Two Ass'n, Inc.*, 293 F.3d 1332 (11th Cir. 2002). "An order will directly, adversely, and pecuniarily affect a person if that order diminishes their property, increases their burdens, or impairs their rights." *In re Ernie Hare Ford, Inc.*, 764 F.3d 1321 (11th Cir. 2014). The person appealing must also be seeking to vindicate on appeal a right that is protected or regulated by the bankruptcy code. Under the facts of this case, the debtor was not aggrieved simply because there existed a possibility of litigation that would involve the estate's interest—not his interests. He had already received his discharge, and had no expectation of further distributions from the estate. Thus, he was at risk of only

indirectly being involved in litigation, and was not a "person aggrieved." The 11th Circuit affirmed the district court's dismissal of the appeal on that ground.

Cadwell v. Kaufman, Englett & Lynd, PLLC, 886 F.3d 1153, Case No. 17-10810 (11th Cir. Mar. 30, 2018) (Ed Carnes, C.J.; Newsom, and Siler, JJ.) (opinion by Newsom, J.).

Code § / Rule: § 526(a)(4)

Held: Section 526(a)(4) prohibits an attorney from instructing a client to pay bankruptcy-related legal fees using a credit card.

History: 11th Circuit reversed and remanded to District Court for the Middle District of Florida

Facts: The client met with an attorney and decided to file chapter 7. The attorney and law firm were "debt relief agencies" under § 526(a)(4) and the client was an "assisted person" for purposes of the statute as well. To pay the bankruptcy attorney fees, the client agreed to an up-front $250 retainer, with monthly installments ($250 first month, $300 thereafter) to follow until the full fee amount of $1700 was paid. The attorney instructed the client to make the initial retainer payment as well as the subsequent monthly payments by credit card. The client ended his relationship with the lawyer and the law firm, and filed suit against the firm under § 526(a)(4), which states that a law firm "shall not … advise" a client "[1] to incur more debt in contemplation of such person filing a case under the [bankruptcy code] or [2] to pay an attorney" for bankruptcy-related services. The law firm moved to dismiss the complaint for failure to state a claim, and alternatively asserted that § 526(a)(4) was unconstitutional because it restricted attorney-client communication. The district court granted the motion to dismiss, and ruled that merely advising a client to pay bankruptcy attorney fees with a credit card did not violate that section unless the law firm acted with an "improper purpose or with an intent to manipulate the bankruptcy system." The district court relied on the case of *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010), in which the Supreme Court held that the first prong of § 526(a)(4), which prohibits advice to incur debt in contemplation of filing bankruptcy, did include an improper purpose element. The district court applied that same requirement of improper purpose to the second prong at issue in this case. The district court thus dismissed for failure to state a claim and did not reach the 1st Amendment challenge.

On appeal, the 11th Circuit reversed and explicitly held that the second prong of § 526(a)(4), regarding advice to incur debt to pay attorney fees for bankruptcy-related services, does not include an invalid purpose requirement. The reasoning of *Milavetz* did not sensibly apply to the second prong at issue in this case, and to read the statute so that the "in contemplation of" analysis with its improper purpose requirement applied to the second prong as well as the first would "make a syntactical hash" of the statute. The logical "hinge" in the statute falls after "to incur more debt"—so that the statute prohibits advice to incur more debt (1) in contemplation of (with the improper purpose requirement) filing bankruptcy, or (2) to pay an attorney for bankruptcy services. This reading also furthers the debtor's fresh-start goal and avoids putting the attorney's interests ahead of the interests of either the client or the client's creditors.

Having found a claim stated, the circuit court then analyzed the 1st Amendment challenge and found that the prohibition on advising clients to incur debt to pay bankruptcy attorney fees did not prohibit a discussion of potential options and legal consequences. It only prohibited attorneys from giving affirmative advice and instruction to incur more debt to pay the bankruptcy fees.

In re Woide, --- Fed. Appx. ---, Case No. 17-10776 and 17-10777 (11th Cir. Apr. 5, 2018) (per curiam) (Marcus, Jordan, and Rosenbaum, JJ.).

Code § / Rule: chapter 7 secured debt must be redeemed, reaffirmed, or surrendered

Held: In chapter 7, even where no statement of intent is filed, secured debts must be reaffirmed, the property redeemed, or the property surrendered. "Doing nothing is not an option."

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

Facts: The debtors filed chapter 13, and listed real property on Schedule A showing it was "to be surrendered." The debtors then converted their case to one under chapter 7, but they never filed a statement of intent for the mortgaged property. The chapter 7 case proceeded to discharge and was closed. In response to the creditor's foreclosure action, the debtors defended that action and also initiated their own lawsuits to attempt to attack the validity of the note and mortgage, as well as trying to rescind the note under TILA (15 U.S.C. § 1635). In response to the creditor's motion, the bankruptcy court reopened the case. The bankruptcy court ordered the debtors to surrender the property and prohibited them from taking any action to "impede, contest, or dispute the validity or enforceability of the note and mortgage." The order also prohibited the debtors from attempting to rescind the obligation under TILA. The debtors appealed, and the district court affirmed. The 11th Circuit then affirmed, reiterating that for secured debt in chapter 7, "[doing] nothing is not an option" for debtors; such debts must be reaffirmed, the property redeemed, or the property surrendered. *See In re Failla*, 838 F.3d 1170 (11th Cir. 2016); *In re Taylor*, 3 F.3d 1512 (11th Cir. 1993). This was true even though the debtors never filed a statement of intent with regard to the property. In this case, the debtors had represented during their case that they intended to surrender the property. And even though years had passed between the closing of the bankruptcy and the motion to reopen and compel surrender, the circuit disdained the debtors' laches defense, and found that there was no prejudice to the debtors because they had used and enjoyed the property free during all of those years, which was a "benefit to which they were not entitled."

Jackson v. Jackson (In re Jackson), --- Fed. Appx. ---, Case No. 17-10536 (11th Cir. Apr. 16, 2018) (per curiam) (William Pryor, Martin, and Anderson, JJ.).

Code § /Rule: Rule 9011; abstention; § 727(a)(4)(A) and § 523(a)(4)

Held: Under § 727(a)(4)(A), there was no evidence that the debtor made a false statement in her bankruptcy filings regarding the property, and the debtor was not a fiduciary under § 523(a)(4)

because such relationship does not arise from a mere constructive trust. There was no abuse of discretion by either the bankruptcy court or the district court for awarding attorney fees to the debtor as a sanction under Rule 9011 because there was no reasonable factual basis for the plaintiffs' assertion that the debtor had included fraudulent information in her bankruptcy disclosures, and the requisite warnings were given but not heeded under Rule 9011.

History: 11th Circuit affirmed in part and dismissed in part appeal from the District Court for the Northern District of Georgia, which had affirmed the Bankruptcy Court for the Northern District of Georgia

Facts: Momma transferred real property to one of three children, allegedly with the understanding that upon her death, the recipient-child would then transfer the property equally to herself and her siblings. Momma died, and the recipient-child did not perform as allegedly promised. The other siblings sued the recipient-child in state court, and were successful in having the court impose a constructive trust against the property at issue, but not for the full relief they were requesting. The offended siblings appealed that decision and while that appeal was pending, the recipient-child (now the debtor) filed chapter 7 bankruptcy. The debtor disclosed the property and the constructive trust, as well as the pending appeal of that decision, in her bankruptcy. The offended siblings filed an adversary proceeding, alleging that the statements regarding the property were materially false and seeking the denial of the discharge, as well as seeking a determination of non-dischargeability and a finding that the debtor had no interest in the real property. The debtor moved to dismiss the AP, which the bankruptcy court treated as a motion for summary judgment. In response, the plaintiff-siblings moved for abstention and remand on the basis that the state-law claims predominated and asking that the complaint be "remanded" to state court. The plaintiffs also moved to disqualify the bankruptcy judge and filed a cross-motion for summary judgment.

The bankruptcy court denied the abstention and remand motions, and granted the debtor's motion for summary judgment as well as a motion for sanctions. The bankruptcy court also later sanctioned the plaintiffs under 9011. On appeal, the district court affirmed the grant of summary judgment and sanctions, denied mandamus relief, and further sanctioned the plaintiffs related to the appeal. The 11th Circuit affirmed the decision not to abstain under both the mandatory and discretionary abstention provisions of 28 U.S.C. § 1334(c). The filing of an adversary complaint related to dischargeability commences a core proceeding, which the bankruptcy court has original jurisdiction to decide as arising under the Code, so that mandatory abstention did not apply. And because the decision not to abstain under the discretionary abstention provision is not reviewable on appeal, that aspect of the appeal was dismissed.

On the merits of the § 727(a)(4)(A) and § 523(a)(4) claims, there was no evidence that the debtor made a false statement in her bankruptcy filings regarding the property. Further, the debtor was not a fiduciary under § 523(a)(4) because such relationship does not arise from a mere constructive trust. Thus, the summary judgment rulings were also affirmed. With regard to sanctions, the court found no abuse of discretion by either the bankruptcy court or the district court for awarding attorney fees to the debtor as a sanction under Rule 9011 because there was no reasonable factual basis for the assertion that the debtor had included fraudulent information in her bankruptcy disclosures, and the requisite warnings were given but not heeded under Rule 9011.

First Nat'l Bank of Oneida, N.A. v. Brandt, 887 F.3d 1255 (11th Cir. Apr. 24, 2018) (per curiam) (William Pryor, Julie Carnes, and Antoon, JJ.).

Code § / Rule: § 1141(a); 1141(d)(1)(A); effect of dismissal of an individual chapter 11 case, post-confirmation and pre-discharge.

Held: The dismissal of the individual chapter 11 case while the appeal was pending changed the issues, and the circuit court required briefing and a decision at the district court level before proceeding.

History: 11th Circuit vacated and remanded to the District court for the Middle District of Florida.

Facts: The individual chapter 11 debtor owed the bank over $1.3 million in various real estate loan obligations. The bank filed proofs of claim that showed each loan as oversecured, and the debtor never objected to the claims. In his chapter 11 plan, the debtor grouped the bank's claims in one class of which the bank was the sole member, and issued a new note to the bank in the amount of $150,000 (which the circuit court says was for postpetition interest and brought the loans current through August 2010) with direct payments to the bank to begin in September 2010. The plan also provided that in order to receive a distribution as an unsecured creditor, any secured creditor would have to amend its claim to show the unsecured status within 30 days of confirmation. Because the bank did not consider itself to be unsecured and its unobjected-to claims showed it to be oversecured, it never amended its secured claims. A little over a year after confirmation, the debtor defaulted on the direct pay loans as well as the new note issued under the plan. The bank sought and obtained stay relief to foreclose. After sale, the debtor still owed the bank more than $180,000 on the plan note, and approximately $1.2 million more on the direct-pay obligations. The bank again moved for stay relief, which was granted without opposition, to pursue "its rights and claims against [the debtor]." The bank then sued to recover the amounts owing on the plan note and the underlying direct-pay obligations.

The district court ruled that the bank did not state a claim for any amount other than the $180,000 owing on the plan note, and held that any deficiency balance owing under the direct-pay obligations was not collectible under the plan's terms because the proofs of claim were never amended to "unsecured" status within 30 days of confirmation as the plan required for participation in any distribution as unsecured. The bank argued that it "was not required to file a contingent unsecured claim in a speculative unknown amount to preserve its right to receive the full payment promised by the Plan, in the event that [the debtor] should perhaps default at some later date on his Plan obligations." (The parties eventually stipulated to the entry of judgment in favor of the bank for $180,000 related to the plan note, but the issue of the effect of the plan on the remaining debt remained.)

The bank appealed to the 11th Circuit, and while the appeal was pending, the bankruptcy case was dismissed on the debtor's motion. The parties disagreed as to what effect the dismissal had on the appeal, and the 11th Circuit vacated the district court's ruling and remanded the case for

briefing and a decision on that issue. However, the circuit court gave the district court the benefit of its guidance in considering that issue, indicating that instruction can be found in cases discussing the effect of dismissal after confirmation but before discharge in chapter 13 and chapter 12 cases. Under that precedent, "a confirmed plan of reorganization creates a contractual relationship between the debtor and the creditor" where "[t]he creditor's pre-confirmation claim is subsumed in and replaced by the new contract created by the confirmed plan." *In re Winn-Dixie Stores, Inc.,* 381 B.R. 804, 807 (Bankr. M.D. Fla. 2008). The court then discussed the changes in 2005 for individual chapter 11 debtors, who now are not discharged at confirmation but must instead complete their plans before gaining discharge. The court also pointed out that an order confirming a plan is NOT specifically enumerated as an order that is "undone" upon dismissal under § 349(b), but then cautioned that statutorily, exclusions must be read in context of the overall statute, and pointed out that the aim of § 349 is to "return the parties, as far as practicable, to the financial positions they occupied before the case was filed." *Quoting Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 979 (2017). The district court was then instructed to consider that issue in the first instance.

Mirzataheri v. Dunn (In re Mirzataheri), --- Fed. Appx. ---, Case No. 17-13280 (11th Cir. May 3, 2018) (per curiam) (Martin, Jill Pryor, and Black, JJ.).

Code § / Rule: § 707

Held: The bankruptcy court did not err in finding the debtors in contempt and reducing to judgment the award of fees and costs in favor of the trustee.

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

Facts: The bankruptcy court found the bankruptcy case was filed in bad faith, but did not do so on an automatic presumption that the debtors filed their chapter 7 case for the purpose of rejecting an executory contract. The record instead showed the bankruptcy court considered several factors, including the debtors' solvency when the case was filed and a "lack of candor" in the debtor's testimony before the bankruptcy court. The record did not demonstrate that the bankruptcy court's finding of "bad faith" was clearly erroneous. It was also not error for the bankruptcy court to consider bad faith under § 707 in conjunction with the consideration of an alleged violation of a so-called "settlement agreement," when the court announced at the outset of the hearing that it was also considering the bad faith issue and gave debtors' counsel the opportunity to present evidence. That was sufficient notice under the circumstances of the case. *In re Piazza*, 719 F.3d 1253 (11th Cir. 2013). The circuit court agreed with the district court that there was no merit to the argument that the bankruptcy court was without authority to award sanctions under § 707. Finally, the bankruptcy court had authority to enter a judgment against the debtors for the court's previous order that required the debtors to pay the trustee's fees and costs. Even if reducing the order to judgment had been error, it was an invited error because the debtors' counsel suggested that such would be an appropriate course at the show-cause hearing.

Garcia v. Bank of America, N.A. (In re Garcia), --- Fed. Appx. ---, Case No. 17-12065 (11th Cir. May 21, 2018) (per curiam) (Marcus, Rosenbaum, and Newsom, JJ.).

Code § / Rule: no review of interlocutory orders

Held: "Although a district court, at its discretion, may review interlocutory judgments and orders of a bankruptcy court . . . a court of appeals has jurisdiction over only final judgments and orders entered by a district court or a bankruptcy appellate panel sitting in review of a bankruptcy court."

History: 11th Circuit dismissed in part appeal as interlocutory, and affirmed in part the District court for the Southern District of Florida, which had dismissed in its entirety an appeal from the Bankruptcy Court for the Southern District of Florida.

Facts: The pro se chapter 13 debtor appealed the district court's dismissal of her appeal of several bankruptcy court orders, in part on the basis that it declined to exercise jurisdiction over 2 interlocutory rulings of the bankruptcy court (which were orders dismissing certain objections), and in part on the basis that the debtor failed to prosecute her claims for violation of the automatic stay. The parties and the court clearly contemplated that the dismissed objections would be filed instead as an adversary proceeding (which the debtor had already filed by the time the circuit court issued its opinion). A dismissal order is not final when it leaves open the opportunity to refile the action, as was obviously the case here. *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1093-95 (11th Cir. 1996). Because the orders specifically preserved the right to litigate her case, they were not final. Thus, the district court's decision not to exercise jurisdiction over the interlocutory orders was itself a non-final ruling, and the circuit court had no jurisdiction to review that decision. Finally, under an abuse of discretion standard, it was not error for the district court to dismiss the appeal of the automatic stay violation claim. Despite a one-month briefing window at the district court, which the debtor never sought to extend prior to its expiration, the debtor failed to brief that position to the district court and it was correctly dismissed for want of prosecution. Further, she also failed to appeal the district court's decision that dismissed the claim, and thus abandoned that issue on appeal to the circuit court in any event.

Hampton Island Holdings, LLC v. Burton (In re Hampton Island Owners' Assoc., Inc.), --- Fed. Appx. ---, Case No. 17-12177 (11th Cir. May 22, 2018) (per curiam) (Rosenbaum, Jill Pryor, and Bartle, JJ.).

Code § / Rule: Rule 2004, including its use as to non-debtors, and sanctions for non-compliance

Held: Joint and several sanctions against the debtor entity and other related non-debtor entities were justified by the entities' failure to comply with Rule 2004 document production requests.

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

Facts: "This appeal arises out of a protracted, multi-fora dispute between a number of property owners on Hampton Island, a residential real estate development on the Georgia coast, and real estate developer Ron Leventhal . . . along with several entities he owns and controls, including [the debtor entity, referred to in short as HIOA]." While state court litigation was ongoing, HIOA filed chapter 11. The property owners filed a motion for discovery under Rule 2004, seeking information from the debtor and the other entities controlled by Leventhal, which the bankruptcy court granted. After finding that the debtor and other entities failed to comply with an order requiring document production, the court sanctioned the debtor and related entities jointly and severally. The sanctioned parties appealed, and the district court affirmed.

On appeal to the circuit court, and following oral argument, the circuit court adopted but did not reiterate the district court's reasoning and affirmed the sanctions, taking pains to depart in reasoning only as to one aspect. The entities argued that the bankruptcy court failed to make a finding that each entity had violated the discovery order, to justify imposing sanctions on each of them jointly and severally. The district court found that the entities failed to preserve that argument by not arguing it to the bankruptcy court at the sanctions hearing. Although the circuit court disagreed and found that the sanctioned entities had preserved that argument at least as to certain tax returns, it nevertheless agreed with the district court on the merits because even the entities that were not required to produce tax returns were nevertheless ordered to produce general ledgers, which they all failed to do.

Supreme Court decisions of interest:

Lamar, Archer & Cofrin, LLP v. Appling, 138 S. Ct. 734 (Jan. 12, 2018) granted the petition for writ of certiorari for the 11th Circuit's February 2017 decision (found at 848 F.3d 953) holding that a statement about a single asset can amount to a statement "respecting the debtor's . . . financial condition" so that it must be in writing in order to support nondischargeability under § 523(a)(2)(B). The 4th and 11th Circuits have taken the position above, while the 5th and 10th Circuits (and arguably the 8th) have taken the position that only statements that describe the debtor's financial situation as a whole qualify as "respecting the debtor's . . . financial condition" and therefore other statements about a single asset (such as the anticipated tax refund at issue in *Appling*) can satisfy the requirement of nondischargeability without having to be in writing.

***Henson v. Santander Consumer USA, Inc.*,** 137 S. Ct. 1718 (June 12, 2017) (unanimous opinion, the first authored by Justice Gorsuch). In this opinion, the Court resolved a circuit split and agreed with the 4th and 11th Circuits that a company that buys defaulted consumer debt does not by virtue of that act alone become a "debt collector" under the Fair Debt Collection Practices Act, specifically the provisions of 15 U.S.C. § 1692a(6). The decision agreed with the 11th Circuit's ruling in *Davidson v. Capital One Bank*, 797 F.3d 1309 (11th Cir. 2015), in which the circuit court decided that buying consumer debt that was in default at the time of the purchase of the debt did not a "debt collector" make. Such debts, having been purchased, are not "owed [to]… another" by definition and the debt buyer may collect its own debts without falling under this particular

portion of the statute's definition of "debt collector," despite the fact that those debts were in default when purchased. A different issue, and one not yet decided by the Supreme Court, is whether the "principal purpose" argument may still be viable to bring buyers of defaulted consumer debts under the FDCPA if the facts establish that the principal purpose of the entity's business is to collect debts. That remains a possibility and was not addressed in the narrow *Henson* opinion.

Merit Management Group, LP v. FTI Consulting, Inc., 138 S. Ct. 883 (Feb. 27, 2018). Justice Sotomayor authored the unanimous opinion of the Court in this case, dealing with a trustee's avoidance powers under the securities safe harbor language of § 546(e). That subsection provides that if the trustee is seeking to avoid a transfer "by," "to," or "for the benefit of" a "financial institution … in connection with a securities contract," then the transfer cannot be avoided. In the *Merit Management* case, the debtor had transferred prepetition $55 million to purchase all the stock of a competitor company from its shareholders (one of which was Merit, the petitioner in the case), in expectation of opening a racetrack casino. The "racino" fell through, the debtor filed chapter 11, and the trustee of a litigation trust sought to avoid the transfer of the funds for the purchase of the competitor's stock on grounds that the transfer was constructively fraudulent. Merit defended by raising the securities safe harbor, because Credit Suisse had wired the purchase price funds into Citizens Bank as disbursing agent. The issue was whether the safe harbor protected transfers in which a financial institution was a mere conduit and was not the ultimate transferee against whom avoidance was sought. Resolving a circuit split, the Court held that the relevant transfer is the transfer that the trustee is seeking to "undo"—that is, the end-to-end transfer, and the safe harbor does not consider the nature of all the intermediate transfers along the way. In so deciding, the Court agreed with the 11th Circuit's side of the split as set out in *In re Munford, Inc.,* 98 F.3d 604 (11th Cir. 1996), in which the circuit court held the safe harbor did not apply when the entity that would qualify for that protection was merely an intermediary and not the ultimate transferee against which the trustee was seeking avoidance.

U.S. Bank Nat. Ass'n v. Village at Lakeridge, LLC, 138 S. Ct. 960 (Mar. 5, 2018) (opinion by Kagan, J. for unanimous court; Kennedy, J., concurred; Sotomayor, J., concurred and was joined by Kennedy, Thomas, and Gorsuch, JJ.). The underlying issue in the chapter 11 case was whether an individual qualified as a non-statutory insider (so that his vote to accept the plan would not count for cram-down confirmation purposes under Code § 1129(a)(10)). The individual was romantically involved with a board member of the company that owned the debtor entity, and the board member struck a deal to sell the company's claim against the debtor entity for pennies on the dollar ($5,000 for a $2.76 million claim) in an attempt to secure the required vote to cramdown the plan over U.S. Bank's objection (U.S. Bank being one of only 2 substantial debts owed by the debtor entity, the other debt being that owed to the parent company and sold to the boyfriend). U.S. Bank argued that the boyfriend was a non-statutory insider. The bankruptcy court found that the individual was not an insider, and the 9th Circuit affirmed, by a divided vote. The majority of the circuit court found that the bankruptcy court's determination that the boyfriend purchased the debt in an arm's length transaction after doing his due diligence was subject to clear error review and would not reverse under that high standard. The dissenting judge felt that the

issue was one subject to de novo review, as more of a question of law, and felt that it was clear error nonetheless.

Cert was granted on the limited question of "[w]hether the Ninth Circuit was right to review for clear error (rather than *de novo*) the Bankruptcy Court's determination that Rabkin does not qualify as a non-statutory insider because he purchased MBP's claim in an arm's-length transaction." Because that determination involved mixed question of law and fact, and because the case-specific factual issues weighed so heavily in the determination, the decision was entitled to greater deference. "So appellate review of the arm's-length issue—even if conducted *de novo*—will not much clarify legal principles or provide guidance to other courts resolving other disputes. And that means the issue is not of the kind that appellate courts should take over." Thus, the Court affirmed the 9th Circuit. Justice Kennedy concurred to point out that the Court's decision was not approving the "non-statutory insider" test as formulated or applied in this case, but was limited strictly to the standard of review. Justice Sotomayor's concurrence went even further and detailed how it appeared that it may well have been clear error to find that the boyfriend was not a non-statutory insider, although that issue was not before the Court.