Eleventh Circuit Cases Update

June 2023-May 2024

Hon. Bess Creswell and Hon. James J. Robinson

36th Annual Bankruptcy at the Beach Seminar, May 31-June 1, 2024

Opinions issued May 1, 2023- November 2, 2023, collected and summarized by Judge Creswell[1]

Opinions issued November 3, 2023- May 1, 2024, collected and summarized by Judge Robinson[2]

[1] Judge Creswell wishes to acknowledge her law clerks, Jessica Brown and Connor Lunney, for preparing these materials.
[2] Judge Robinson wishes to acknowledge his law clerk, Alyssa Ross, for preparing these materials.

ELEVENTH CIRCUIT CASES:

- ***Deutsche Bank Nat'l. Trust Co. v. Karr (In re Karr)***, No. 23-11040, 2023 WL 3676883 (11th Cir. May 26, 2023) (per curiam) (Wilson, Lagoa, and Brasher, JJ.)
- ***Steed v. Gsran-Z, LLC, Investa Services, LLC (In re Steed)***, No. 22-11800 2023 WL 3719006 (11th. Cir. May 30, 2023) (per curiam) (Wilson, Luck, and Tjoflat, JJ.)
- ***Gullett-El v. Internal Revenue Service (In re Gullett-El)***, No. 21-13429 2023 WL 4399013 (11th Cir. July 7, 2023) (per curiam) (Newsom, Branch, and Anderson, JJ.)
- ***Otoh v. Fed. Nat'l Mortg. Ass'n***, No. 22-13279 2023 WL 4623614 (11th. Cir. July 19, 2023) (per curiam) (Wilson, Jordan, and Branch, JJ.)
- ***In re Seven Stars on the Hudson Corp.***, No. 22-13591, 2023 WL 4760713 (11th Cir. July 26, 2023) (per curiam) (Lagoa, Brasher, and Black, JJ.)
- ***In re 160 Royal Palm, LLC*, No. 22-13592**, 2023 WL 5193506 (11th Cir. Aug. 14, 2023) (per curiam) (Jill Pryor, Newsom, and Marcus, JJ.)
- ***Uribe v. Weatherford (In re Uribe)***, No. 22-11524 2023 WL 5950131 (11th Cir. Sept. 13, 2023) (per curiam) (Wilson, Luck, and Anderson, JJ.)
- ***In re Fundamental Long Term Care, Inc.***, 81 F.4th 1264 (11th Cir. Sept. 18, 2023), (Lagoa, Brasher, and Tjoflat, JJ.) (opinion by Tjoflat, J.) *(writ of certiorari denied on March 25, 2024).*
- ***Lynch v. Ocwen Loan Servicing, LLC (In re Lynch)***, No. 22-12584 2023 WL 6231067 (11th Cir. Sept. 26, 2023) (per curiam) (Lagoa, Abudu, and Anderson, JJ.)
- ***PRN Real Est. & Invs., LTD., v. Cole***, 85 F. 4th 1324 (11th Cir. November 2, 2023) (Jill Pryor, Grant, and Maze, JJ.) (opinion by Maze, J.).
- ***Sweetapple v. Asset Enhancement, Inc. (In re Asset Enhancement, Inc.)**,* 87 F.4th 1271 (11th Cir. Dec. 5, 2023) (Rosenbaum, Branch, and Brasher, JJ.) (opinion by Rosenbaum, J.).
- ***Hansjurgens v. Bailey (In re Bailey)***, 90 F. 4th 1158 (11th Cir. Jan. 12, 2024) (William Pryor, C.J.; Rosenbaum and Abudu, JJ.) (opinion by Rosenbaum, J.).
- ***Sewalk v. Valpak Direct Marketing Systems, LLC***, 2024 WL 767619 (11th Cir. Feb. 26, 2024) (per curiam) (Wilson, Jill Pryor, and Brasher, JJ.).
- ***White-Lett v. Bank of New York Mellon (In re White-Lett)***, 2024 WL 578122 (11th Cir. Feb. 13, 2024) (per curiam) (Jordan, Branch, and Lagoa, JJ.).
- ***The Alabama Creditors v. Dorand (In re Dorand)***, 95 F.4th 1355 (11th Cir. Mar. 14, 2024) (William Pryor, C.J.; Jill Pryor and Marcus, JJ.) (opinion by William Pryor, C.J.).
- ***Losch v. Nationstar Mortgage, LLC, and Experian Information Solutions, Inc.***, 2024 WL 1282459 (11th Cir. Mar. 26, 2024) (per curiam) (Jordan, Lagoa, and Hull, JJ.).
- ***Al Zawawi v. Diss (In re Al Zawawi)***, 97 F.4th 1244 (11th Cir. Apr. 3, 2024) (Luck, Lagoa, and Tjoflat, JJ.) (opinion by Lagoa, J.) (Lagoa, J., specially concurring) (Tjoflat, J., specially concurring).
- ***Grant-Carmack v. Carmack (In re Grant-Carmack)***, 2024 WL 1433714 (11th Cir. Apr. 3, 2024) (per curiam) (Rosenbaum, Jill Pryor, and Grant, JJ.).

SUPREME COURT CASES OF INTEREST:

- ***Tyler v. Hennepin Cnty., Minnesota***, 598 U.S. 631 (May 25, 2023) (opinion by Roberts, C.J.; concurrence by Gorsuch, J. and joined by Jackson, J.)
- ***Lac du Flambeau Band of Sup. Chippewa Indians v. Coughlin***, 599 U.S. 382 (June 15, 2023) (opinion by Jackson, J.; concurrence by Thomas, J.; dissent by Gorsuch, J.)
- ***Federal Bureau of Investigation v. Fikre***, 601 U.S. 234 (Mar. 19, 2024) (opinion for the unanimous Court by Gorsuch, J.; concurring opinion by Alito, J., and joined by Kavanaugh, J.).

Deutsche Bank Nat'l. Trust Co. v. Karr (In re Karr), No. 23-11040, 2023 WL 3676883 (11th Cir. May 26, 2023) (per curiam) (Wilson, Lagoa, and Brasher, JJ.)

Code §/ Rule: Finality of Bankruptcy Orders; Certification under FED. R. BANKR. P. 7054, FED. R. CIV. P. Rule 56

Held: Because not all claims and counterclaims were resolved in the adversary proceeding, the summary judgment order was not final, and the appellate court lacked jurisdiction to review it.

History: Eleventh Circuit dismissed the appeal for lack of jurisdiction, remanding to the Bankruptcy Court for the Northern District of Alabama.

Facts: The Chapter 7 Trustee discovered that Debtor unknowingly owned a one-half interest in real property. Ameriquest Mortgage Company made a mortgage loan in 2004 to Debtor's wife under the mistaken impression that Debtor had no interest in the real property; that loan was later assigned to Deutsche Bank. The real property was sold years later at a foreclosure sale, for which the sale deed was silent as to any sale of the Debtor's continuing one-half interest in the property, and for which Deutsche Bank satisfied the entire mortgage indebtedness.

Trustee sought to bring the Debtor's interest in the real property into the bankruptcy estate. The bankruptcy court agreed with the trustee that Deutsche Bank had no right to the Debtor's interest in the property. The bankruptcy court also concluded that the bankruptcy estate was entitled to Debtor's interest in the property and granted partial summary judgment to the trustee. The court noted that "[a] separate Order will be entered in conformity herewith. Under FED. R. CIV. P. 54(b), which applies in this proceeding per FED. R. BANKR. P. 7054(a), there being no just reason for delay, the court will direct the entry of the separate order as a final and immediately appealable judgment as to the matters determined in this Opinion and the conforming Order."

After the district court affirmed the bankruptcy court's opinion and order, Deutsche Bank appealed to the Eleventh Circuit. The Eleventh Circuit concluded that it lacked jurisdiction to decide the appeal. The Eleventh Circuit noted that the bankruptcy court's order did not resolve "all claims and counterclaims in the adversary proceeding," and therefore the order needed to be certified under FED. R. BANKR. P. 7054(a) to be immediately appealable. The Eleventh Circuit concluded that the bankruptcy court abused its discretion when it certified the order for immediate review under FED. R. BANKR. P. 7054(a). While the bankruptcy court stated that "there was no just reason for delay" in appealing the order, the bankruptcy court did not sufficiently justify its certification decision. Finding that the record "reveal[ed] no obvious reason to permit an immediate appeal," and that no "special circumstances" warranted departure from the policy against piecemeal appeals, the Court dismissed the appeal for lack of jurisdiction.

Steed v. Gsran-Z, LLC, Investa Services, LLC (In re Steed)*,* No. 22-11800 2023 WL 3719006 (11th. Cir. May 30, 2023) (per curiam) (Wilson, Luck, and Tjoflat, JJ.)

Code §/ Rule: § 362(k), Damages for Violations of the Automatic Stay

Held: The bankruptcy court did not clearly err in calculating damages resulting from creditor's violation of the automatic stay, nor in finding that Plaintiff was not entitled to damages for emotional distress or punitive damages.

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

Facts: Steed ("Plaintiff") filed an adversary proceeding against Investa, Inc., ("Investa") alleging it violated the automatic stay. Investais a corporation which issues *fieri facias* against real properties for failure to pay their real estate taxes. Plaintiff owned real property for which he had failed to pay real estate taxes since 2011. After accumulating tax liens of nearly $15,000, Plaintiff reached out to Investa, to discuss a payment plan on those tax debts. After Plaintiff failed to reach a payment agreement with Investa, Investa scheduled a tax sale of the property on December 4, 2018. Plaintiff filed for Chapter 13 bankruptcy on November 19, 2018, to prevent the tax sale, and Investa cancelled the tax sale.

Additionally, Plaintiff claims he discussed renting to an individual interested in leasing the apartment. That tenant, Plaintiff claimed, agreed to a three-year lease with monthly rent of $750, to begin in January 2019. In February 2019, debtor's bankruptcy case was dismissed. After finding out that the bankruptcy had been dismissed, Investa initiated a sheriff's sale of Plaintiff's property. On March 14, 2019, the bankruptcy court vacated the dismissal order and reinstated Plaintiff's bankruptcy case. Investa was sent notice of the reinstatement through the mail on March 19, 2019. On April 11, 2019, the sheriff posted a notice that the property would be sold at a June tax sale. Afterwards, Plaintiff reached out to Investa to explain that the bankruptcy case had been reinstated. Despite discussing the reinstatement with a company representative, Investa posted two more delinquency notices at the property and the property was advertised in May for its June tax sale. Based on these undisputed facts, the bankruptcy court granted summary judgment on Plaintiff's complaint that Investa violated the automatic stay and held a trial to determine damages.

Plaintiff argued at trial that he had sustained actual damages in the amount of $24,000, as a tenant "cancelled" his "three-year lease" with Plaintiff in April 2019 because he was concerned Plaintiff would lose the property to a tax sale. The remaining 32 months of the lease would equal lost rents of $24,000. Plaintiff also argued he was entitled to $100,000 in emotional distress, and $240,000 in punitive damages. The bankruptcy court awarded actual damages in the amount of $2,250, equivalent to three months of rent. The bankruptcy court found that Plaintiff and the tenant did not provide consistent or believable testimony as to the length and nature of the lease. As to the emotional distress claim, the bankruptcy court explained that to find damages for emotional distress resulting from an automatic stay violation, "a plaintiff must (1) suffer significant emotional distress, (2) clearly establish the significant emotional distress, and (3) demonstrate a causal connection between that significant emotional distress and the violation of the automatic stay," as formulated in *Lodge v. Kondaur Cap. Corp.*, 750 F.3d 1263, 1271 (11th Cir. 2014). Those elements

must be demonstrated through "corroborating evidence, such as medical evidence or non-expert testimony from family members, friends, or co-workers." But if a stay violator's conduct "is egregious and significant emotional distress is readily apparent," corroborating evidence may not be necessary. Plaintiff only presented his own testimony in support of emotional damages, and the bankruptcy court found that Investa's actions were not egregious enough to warrant emotional damages. The bankruptcy court also did not find punitive damages to be warranted as the violation was not egregious, nor "in reckless or callous disregard for the law or rights of others."

Plaintiff asked the court to reconsider its verdict or for a new trial, which the bankruptcy court denied. Plaintiff then appealed to the district court, which affirmed the bankruptcy court. Plaintiff thereafter appealed to the Eleventh Circuit. Noting the inconsistencies in the testimony, the Eleventh Circuit found that the bankruptcy court did not clearly err in finding that the lease was month-to-month, nor in its formulation of damages. As well, the Court concluded that because the bankruptcy court did not err in determining Investa's conduct was not egregious, Plaintiff "needed to provide corroborating evidence to clearly establish both that he suffered significant emotional distress and that there was a causal connection between that distress and violation of the automatic stay." Given that he failed to do so, as he relied on his own testimony, the bankruptcy court did not err in finding that he failed to meet his burden to prove emotional distress. Finally, the Court found that the bankruptcy court did not err in denying punitive damages because Plaintiff failed to show that Investa acted with reckless or callous disregard for the law or rights of others. The bankruptcy court's award to Plaintiff of $2,250 in damages was affirmed.

Gullett-El v. Internal Revenue Service (In re Gullett-El), No. 21-13429 2023 WL 4399013 (11th Cir. July 7, 2023) (per curiam) (Newsom, Branch, and Anderson, JJ.)

Code §/ Rule: Standing, FED. R. APP. P. 24(a)(5); FED. R. CIV. P. 58; FED. R. BANKR. P. 8002(a); Availability of Relief in Bankruptcy Proceedings; Mootness

Held: The district court's denial of Gullett-El's motion for leave to proceed in forma pauperis on appeal is not an appealable order. Gullett-El's challenge to the dismissal of the adversary complaint was rendered moot by the bankruptcy court's discharge order and closing of his bankruptcy case. A party may not seek relief from convictions or damages related to allegedly wrongful convictions in bankruptcy court.

History: Eleventh Circuit dismissed the appeal for lack of jurisdiction, leaving in place the dismissal order entered by the Bankruptcy Court for the Middle District of Florida which had been affirmed by the District Court for the Middle District of Florida.

Facts: Taquan Rahshe Gullett-El ("Petitioner") was convicted of two counts of submitting false, fictitious, or fraudulent claims to the IRS and two counts of attempting to file a false lien or encumbrance against the property of government employees in California. While imprisoned, Petitioner filed a pro se Chapter 7 bankruptcy. During the pendency of the bankruptcy case, Petitioner filed an adversary proceeding against the IRS, the American Bar Association, "and several other defendants." The adversary proceeding sought "(1) specific performance of the

‘contract’ in his criminal case; (2) discharge of the IRS’s allegedly unlawful tax lien, the $100,000 assessment owed to State of California, and the $400 special assessment imposed as part of his sentence; (3) his immediate discharge from unlawful detainment; and (4) reparations, restitution, and damages related to the unlawful convictions.”

The United States and the ABA moved to dismiss the complaint. The bankruptcy court granted the motions to dismiss, noting that Petitioner “failed to state a claim concerning his request for release from prison and for damages based on his convictions, and that Petitioner failed to allege a legal or factual basis concerning the dischargeability of his state and federal tax debts.” Petitioner was given leave to amend his complaint with respect to the dischargeability of the tax debts. Petitioner instead appealed the bankruptcy court’s dismissal order. Two days after issuing the AP dismissal order, the bankruptcy court granted Petitioner a discharge in the underlying bankruptcy proceeding and later closed the case.

The district court dismissed Petitioner’s appeal, concluding that the notice of appeal was untimely and that Petitioner’s appeal of the bankruptcy court’s order dismissing the adversary proceeding was frivolous. The district court affirmed the bankruptcy court’s order, and denied Petitioner’s motion to proceed on appeal in forma pauperis, concluding that permitting Petitioner to do so would be frivolous.

Petitioner appealed to the Eleventh Circuit, which granted Petitioner the right to proceed IFP. The Eleventh Circuit concluded that even if Petitioner’s appeal of the bankruptcy court’s AP dismissal order had been timely, the appeal was rendered moot when the bankruptcy court granted him a Chapter 7 discharge two days after the dismissal order entered. “In other words, any ruling as to the dischargeability of those [tax] debts was rendered moot by Gullett-El's discharge and the closing of his bankruptcy case.” The Court did note that while the general rule is that the closure of a bankruptcy case results in dismissal of all remaining adversary proceedings, there may be an exception when certain factors may provide a court with discretionary jurisdiction over an adversary proceeding after dismissal of the underlying bankruptcy case. *See In re Morris*, 950 F.2d 1531, 1534 (11th Cir. 1992). Finding none of the factors were present here, the Court concluded Petitioner’s appeal of the AP dismissal order was moot. The Eleventh Circuit also determined that it lacked jurisdiction to grant relief from Petitioner’s allegedly unlawful conviction and sentence, as such relief is not available in bankruptcy court. The Eleventh Circuit concluded it lacked jurisdiction over the appeal and dismissed the appeal.

Otoh v. Fed. Nat'l Mortg. Ass'n, No. 22-13279 2023 WL 4623614 (11th. Cir. July 19, 2023) (per curiam) (Wilson, Jordan, and Branch, JJ.)

Code §/ Rule: Res Judicata, Fed. R. Civ. P. 12(b)(6), Removal

Held: The district court did not err in determining that Otoh's claims were barred by res judicata.

History: The Eleventh Circuit affirmed the District Court for the Northern District of Georgia, which dismissed Otoh's complaint.

Facts: Otoh, pro se, filed suit in state court against four entities: Federal National Mortgage Association, Nationstar Mortgage, LLC, NewRez LLC, and U.S. Bank Trust N.A. The lawsuit pertained to a security deed which he claimed to be invalid. Previously, Otoh had filed an adversary proceeding which also argued the invalidity of the security deed. The Bankruptcy Court for the Northern District of Georgia dismissed that adversary proceeding, finding that the security deed was valid. The entities filed for removal of the state court case, and the case was heard in federal district court.

The entities argued that res judicata barred Otoh's claims, and that in the alternative, Otoh's arguments were without merit. The district court concluded through the application of res judicata that the adversary proceeding Otoh filed prior to the state court action alleging the invalidity of the security deed bound Otoh from relitigating the same claims. The district court found that each of the elements of res judicata were satisfied: there was a final judgment (the dismissal order), rendered by a court of competent jurisdiction (the Bankruptcy Court for the Northern District of Georgia), in a case involving the same parties, and the same claims were brought or could have been brought in the adversary proceeding. Reviewing the district court's determination that res judicata applied, the Eleventh Circuit agreed and found that Otoh's claims were barred from being relitigated. Accordingly, the Eleventh Circuit affirmed the district court's granting of the mortgage companies' motions to dismiss.

In re Seven Stars on the Hudson Corp., No. 22-13591, 2023 WL 4760713 (11th Cir. July 26, 2023) (per curiam) (Lagoa, Brasher, and Black, JJ.)

Code §/ Rule: FED. R. CIV. P. 16 and 37; FED. R. BANK. P. 9006.

Held: In a case with complex and extensive procedural history with which bankruptcy court was familiar, the bankruptcy court did not abuse its discretion or make a clear error in judgment in declining to extend expert disclosure deadlines.

History: Eleventh Circuit affirmed the District Court for the Southern District of Florida's affirmance of the bankruptcy court's refusal to extend expert discovery deadlines.

Facts: Seven Stars on the Hudson Corporation ("Seven Stars") filed for Chapter 11 bankruptcy, and subsequently filed an adversary proceeding arguing that MDG Powerline Holdings, LLC ("MDG") and XBK management, LLC ("XBK") interfered with its business. As an element of its case, Seven Stars would need expert testimony on the damages it incurred to meet its burden of

proof. During the litigation, Seven Stars asked for several extensions relating to discovery deadlines, which were granted by the court. After the third request for extension of discovery deadlines that had already passed, the bankruptcy court declined to issue a new extension of the deadline to disclose experts under FED. R. CIV. P. 16. MDG and XBK moved for summary judgment, arguing Seven Stars could not produce expert testimony on damages, which was required to prevail. The bankruptcy court awarded summary judgment after it "found that Seven Stars had long-known about the need for an expert on damages yet failed to timely disclose an expert, timely move to extend the expert deadline, or show good cause under Federal Rule of Civil Procedure 16 to extend it." Without those extensions, the bankruptcy court found that Seven Stars had failed to present competent evidence on damages and summary judgment was warranted. Seven Stars appealed to the district court which affirmed, and then appealed to the Eleventh Circuit.

On appeal, Seven Stars conceded there were no damages calculations contained in its initial Rule 26(a) disclosures, interrogatory responses, or deposition testimony. Seven Stars narrowed the complicated procedural history down to the narrow issues of whether the bankruptcy court should have extended the expert discovery deadline so it could present expert testimony on damages and whether the bankruptcy court misapplied FED. R. BANKR. P. 9006 and FED. R. CIV. P. 16 and 37. Noting the bankruptcy court's familiarity with the extensive history of the main bankruptcy case and the adversary proceeding and its explanation that "Seven Stars planned early in the litigation to introduce expert testimony on damages, yet it failed to act diligently to protect its ability to do so," the Eleventh Circuit stated: **"**The bankruptcy court's refusal to extend the expert discovery deadlines was undoubtedly a consequential decision, and we might have made a different decision. But we cannot say the bankruptcy court's choice to enforce the April 6 expert disclosure deadline constituted a clear error of judgment." The Eleventh Circuit then declined to decide whether the bankruptcy court's decision regarding FED. R. CIV. P. 37(c) was correct because Seven Stars did not actually seek to admit late expert evidence. The Eleventh Circuit held that the bankruptcy court did not abuse its discretion, and because there was no competent evidence on damages, the Eleventh Circuit affirmed the grant of summary judgment for the defendants.

***In re 160 Royal Palm, LLC*, No. 22-13592**, 2023 WL 5193506 (11th Cir. Aug. 14, 2023) (per curiam) (Jill Pryor, Newsom, and Marcus, JJ.)

Code §/ Rule: § 544(b), §550(a)-Fraudulent Transfers; Fla. Stat. §§ 726.101; §768.79

Held: Attorney's fees in a bankruptcy action were denied because the Florida Offer of Judgment Statute did not apply to an action governed by federal law.

History: Eleventh Circuit affirmed the District Court for the Southern District of Florida

Facts: Straub and Palm Beach Polo successfully defended a fraudulent transfer action in an adversary proceeding initiated by the Debtor, 160 Royal Palm. The district court and a panel of the Eleventh Circuit affirmed that judgment. Thereafter, Straub and Palm Beach Polo sought $389,863.50 in attorney's fees under the Florida Offer of Judgment Statute which entitles a

prevailing party to attorney's fees and costs "in any civil action for damages." Fla. Stat. §768.79. Counsel for Straub and Palm Beach Polo argued that they succeeded in the adversary proceeding, the adversary proceeding was a civil action for damages in Florida, and, thus, they should be entitled to fees and costs under Florida's Offer of Judgment statute. The Debtor countered that the statute was limited to actions for damages under Florida state law, and since the adversary proceeding was under federal law, specifically it was an action under 11 U.S.C. § 550(a), the offer of judgment statute did not apply.

The bankruptcy court recognized that the Florida Offer of Judgment Statute could apply in federal court, including bankruptcy court, but it concluded it did not apply in this case because the case arose "entirely under Federal law." With that distinction, the bankruptcy court denied the fees. The district court and Eleventh Circuit later affirmed, agreeing that this was a federal case governed by federal law so the "Florida Offer of Judgment Statute had no relevancy." Because the statute did not apply here, Straub and Royal Palm Beach had no claim against Debtor for attorney's fees.

Uribe v. Weatherford (In re Uribe), No. 22-11524 2023 WL 5950131 (11th Cir. Sept. 13, 2023) (per curiam) (Wilson, Luck, and Anderson, JJ.)

Code §/ Rule: FED. R. BANKR. P. 8018(A), (A)(4); FED. R. CIV. P. 60(a)

Held: The District Court did not abuse its discretion in dismissing Uribe's appeal for failure to comply with a court order. The bankruptcy court did not abuse its discretion in denying Uribe's motion for reconsideration of its order dismissing his bankruptcy case. The bankruptcy court's order denying Uribe's motion for reconsideration was not arbitrary or capricious merely because it was initially not entered by the bankruptcy judge who presided over that hearing, nor because the hearing was presided over a different judge than the one the case was assigned.

History: The Eleventh Circuit affirmed the District Court for the Middle District of Florida, which had dismissed Debtor's appeal of the bankruptcy court's dismissal of his Chapter 13 case.

Facts: Debtor successfully confirmed a Chapter 13 plan, but he later failed to make his monthly payments. The trustee moved for the case to be dismissed due to the failure to make plan payments, the motion was granted, and the case was dismissed. After dismissal, Debtor filed a motion to reconsider, seeking reinstatement of the case. A hearing was held on the motion to reconsider, but it was presided over by Judge Jennemann, not Judge Vaughan who had presided over the case at all other stages. After the hearing, an order signed by Judge Vaughan entered denying Debtor's motion to reconsider. The next day, the order was vacated, and the bankruptcy court re-entered the same order signed by Judge Jennemann.

Debtor filed a notice of appeal with the district court. Debtor argued that the denial of his motion for reconsideration was arbitrary and capricious because "a different bankruptcy judge who hadn't heard the case's earlier proceedings presided on the motion." Alternatively, he argued that the bankruptcy court's denial of his motion for reconsideration was arbitrary and capricious because the order denying his motion to reconsider was originally entered by a judge who did not

preside over the hearing. After Debtor missed two deadlines to file a brief with the district court and failed to properly file a motion for extension of time (despite the district court's instructions), the district court dismissed the appeal. Debtor appealed the district court's dismissal of his appeal as well as the bankruptcy court's denial of his motion for reconsideration to the Eleventh Circuit.

The Eleventh Circuit affirmed the district court's dismissal of the appeal, noting Debtor failed to follow the district court's instructions and was untimely in filing his brief. The Court found that the bankruptcy court did not abuse its discretion in denying Uribe's motion for reconsideration, noting that the fact that a different judge heard the matter and ruled on the motion "doesn't constitute either newly discovered evidence or an error of law or fact." Lastly, the Court concluded that the order's initial entry by Judge Vaughan, who did not preside over the hearing, was a mere clerical error that was remedied when the Order was withdrawn and re-entered by Judge Jennemann. The bankruptcy court and district court rulings were affirmed.

In re Fundamental Long Term Care, Inc., 81 F.4th 1264 (11th Cir. Sept. 18, 2023), (Lagoa, Brasher, and Tjoflat, JJ.) (opinion by Tjoflat, J.) *(writ of certiorari denied on March 25, 2024).*

Code §/ Rule: 11 U.S.C. § 327(a); Fed. R. Bankr. P. 2014; 28 U.S.C. § 455; Judicial Estoppel

Held: Trustee's special counsel was disinterested as required by 11 U.S.C. § 327(a) and sanctions were not warranted because any violation of Rule 2014 was non-negligent. The Eleventh Circuit added that "when this saga is viewed as a whole," the claims of bias against special counsel to the trustee raised by Wilkes and the Probate Estates were "baseless."

History: Bankruptcy Court for the Middle District of Florida initially denied Creditors' (Probate Estates) nunc pro tunc motion to disqualify law firm from serving as special litigation counsel to Chapter 7 trustee and for disgorgement of approximately $5.6 million that firm received in costs and fees. Creditors appealed and the District Court affirmed in part, vacated in part, and remanded with instructions. On remand, the bankruptcy court again denied the Creditors' motion and Creditors appealed. This time, the District Court affirmed, and, after oral argument, the Eleventh Circuit affirmed the District Court's decision.

Facts: Wilkes & McHugh, P.A. (Wilkes) brought an involuntary petition on behalf of several probate estates ("Creditors") against Fundamental Long Term Care, Inc. ("FLTCI"). FLTCI was a corporation that had been utilized in a "bust-out" scheme by Trans Health Management, Inc. ("THMI") to thwart collection on judgments in Florida state court for wrongful death against it and its parent company, Trans Health, Inc. ("THI"). Through a series of transactions, THMI transferred its valuable assets to Fundamental Long-Term Care Holdings, LLC (FLTCH), and its significant liabilities to FLTCI, leaving behind a judgment-proof shell corporation for the estates to attempt to collect from. It then concealed those transactions in the hopes of making it past the statute of limitations for any fraudulent transfer action without the transactions being discovered. Troutman, Sanders LLP ("Troutman") was later discovered to be the creator of the legal structure

of the scheme. Trustee hired Steven M. Burman and Shumaker, Loop & Kendrick, LLP ("Shumaker") as special litigation counsel.

The Creditors filed an adversary proceeding against FLTCI (and the bankruptcy court would eventually treat THMI as part of the Debtor's estate) ("Defendants"), seeking a judgment on the corporations' fraudulent transfer liability (and numerous other counts). The Bankruptcy Court described what the Chapter 7 case had become: "at least 27 lawsuits and 15 appeals before 13 different courts and 17 judges in 5 states' involving 16 defendants." Two compromises were reached by the Trustee: 1) the Defendants would pay an $18.5 million dollar settlement to the bankruptcy estate, in exchange for a general release in Trustee's and Probate Estates' claims and a bar order preventing third parties from bringing similar claims against the Defendants. Second, a $1.25 million dollar settlement to the Trustee by the Quintairos law firm. As part of the settlement, Shumaker received $5,620,148.48 in attorney fees, and withdrew from the case shortly thereafter. After a third settlement was agreed upon between the Trustee and Troutman, Creditors came forward alleging that Shumaker was impermissibly not disinterested and seeking disgorgement of Shumaker's attorney fees.

Bankruptcy Court denied Creditors' motion requesting to disqualify Debtor counsel and disgorge compensation of Special Litigation Counsel (Shumaker and Berman) because they alleged counsel was not disinterested as required by 11 U.S.C. § 327(a) and it failed to timely disclose connections that revealed disinterestedness as required by Rule 2014. Creditors claimed that Shumaker's representation of Healthcare REIT, Inc. ("HCN"), which owned the real estate leased to nursing homes where some of the decedents resided, was a disqualifying conflict. However, Shumaker filed a supplemental disclosure in which it conceded its long-term relationship with HCN, but that it did not believe that to be a disqualifying conflict. The Bankruptcy Court initially denied the motion based on the record and without an evidentiary hearing. Creditors appealed and the District Court affirmed as to the §327(a) issue, but remanded for further review as to potential violations of the Rule 2014 disclosure requirements under a negligence standard. Specifically, on remand, the Bankruptcy Court held that the omissions did not warrant sanctions and Creditors appealed again, but District Court affirmed the decision. Here, Creditors appealed to the Eleventh Circuit contending the Bankruptcy Court abused its discretion in denying their motion. After oral argument, the Eleventh Circuit also affirmed.

The Court explained that a disqualifying interest under § 327 is an "economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant ... or ... a predisposition under the circumstances that render such a bias against the estate." Despite a judicial estoppel argument by Creditors based on a scrivener's error in one district court order (which stated that HCN had owned and operated one of the entity nursing homes), the Eleventh Circuit found that HCN did not own or operate any of the nursing homes, and therefore had no economic stake in the bankruptcy case. Moreover, judicial estoppel was an equitable argument that did not apply to these facts. The Court concluded that "Shumaker's representation of HCN did not lessen the value of the bankruptcy estate, create a dispute between the bankruptcy estate and HCN, or create a circumstance that could

be considered a bias against the bankruptcy estate." It therefore affirmed the bankruptcy court order denying Creditors' motion.

Creditors also filed a Motion for Recusal because the Bankruptcy Judge's law clerk formerly worked at the Shumaker law firm and because the clerk's spouse is a partner at Shumaker. However, the Bankruptcy Judge concluded that he would not impute the law clerk's prior association with the firm to himself and explained that when evaluating a request for recusal, a judge should consider whether there is an actual and reasonable doubt concerning the judge's impartiality. Specifically, the impartiality must "reasonably be questioned before the judge recuses himself because there is a need to prevent parties from manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking." Ultimately, the Bankruptcy Judge concluded that there was no reasonable basis to question its impartiality, and found that the request stemmed from a strategic search for a different judge rather than a concern for the Court's impartiality. Wilkes sought leave to appeal the denial of the recusal request but did not meet the elements for an interlocutory appeal.

Lynch v. Ocwen Loan Servicing, LLC (In re Lynch), No. 22-12584 2023 WL 6231067 (11th Cir. Sept. 26, 2023) (per curiam) (Lagoa, Abudu, and Anderson, JJ.)

Code §/ Rule: power to stay proceedings, finality of bankruptcy orders, FED. R. Evid. 803(6)

Held: The bankruptcy court did not err when it denied the Lynches' motion to stay the proceedings. The district court did not err in finding Ocwen's employee's affidavit fell within the business records hearsay exception, GMACM did not violate the covenant of good faith and fair dealings, and GMACM did not waive the right to require the creation of an escrow account. However, the district court did err in concluding it lacked jurisdiction to review a non-final order of the bankruptcy court because an appeal from a final judgment brings up for review all preceding non-final orders that produced it.

History: The Eleventh Circuit affirmed the District Court for the Southern District of Florida, which had affirmed the Bankruptcy Court for the Southern District of Florida's grant of summary judgment to Ocwen Loan Servicing.

Facts: After a dispute concerning escrow funds due to force-placed insurance, joint debtors filed an adversary proceeding against Ocwen Loan Servicing, GMACM, and Deutsche Bank, alleging "mortgage servicing abuse" and breach of their agreement. Ocwen filed a motion for summary judgment, attaching to the motion an affidavit from a senior loan analyst for Ocwen. Rather than respond to the summary judgment motion, at the hearing before the bankruptcy court, the Lynches asked for a stay of the proceeding for 15 months to allow the Lynches to reopen a prior mortgage company's 2007 Chapter 11 bankruptcy in Delaware. The bankruptcy court denied their motion for a stay. Relying in part on the affidavit submitted by Ocwen, the bankruptcy court granted summary judgment against the Lynches.

Appealing to the district court, the Lynches argued for the first time that the affidavit submitted by Ocwen in support of its motion for summary judgment constituted inadmissible hearsay. They

also argued that the bankruptcy court's refusal to stay the proceeding denied them of their due process and equal protection rights. Finding the affidavit fell within the business records exception, the district court affirmed the bankruptcy court's evidentiary ruling, as well as its grant of summary judgment for Ocwen. But the district court determined it lacked jurisdiction to consider the bankruptcy court's denial of the motion to stay proceedings due to it not being a final order. The Lynches filed a motion for reconsideration, arguing that the entities violated an implied covenant of good faith and fair dealings. That motion was denied.

The Eleventh Circuit affirmed the bankruptcy court's evidentiary ruling, as well as the bankruptcy court's grant of summary judgment. The Eleventh Circuit also concluded, however, that the district court had jurisdiction to review the motion to stay proceedings. The Eleventh Circuit explained that the Lynches' appeal of the final judgment made appealable all non-final orders prior to that judgment, and that included the motion to stay proceedings. Regardless, the Eleventh Circuit concluded that the bankruptcy court did not err in denying the motion to stay proceeding. Reviewing the Lynches' arguments as to the admissibility of the affidavit and the violation of the covenant of good faith and fair dealing, the Eleventh Circuit found that, beyond their waiver due to not being argued before the bankruptcy court, the claims failed.

PRN Real Est. & Invs., LTD., v. Cole, 85 F. 4th 1324 (11th Cir. November 2, 2023) (Jill Pryor, Grant, and Maze, JJ.) (opinion by Maze, J.).

Code §/ Rule: 11 U.S.C. § 727(a)(2), 11 U.S.C. § 727(a)(4), 11 U.S.C. § 544(b)(1), Standing, 11 U.S.C. § 523(a)(2)(A), 11 U.S.C. § 523(c), Fed. R. Civ. P. 9(b)

Held: The bankruptcy court erred in granting summary judgment against PRN on its § 523(a)(2)(A) exception to discharge count. The Trustee's § 544(b) avoidance action does not preempt Cole's § 523(a)(2)(A) action for a discharge exception. The judgment of the bankruptcy court is affirmed as to the other twelve counts.

History: The Eleventh Circuit reversed the District Court for the Middle District of Florida, which had affirmed the Bankruptcy Court's grant of summary judgment on Counts 3-6 in favor of Cole, and judgment in favor of Cole on the remaining Counts after trial.

Facts: William J. Cole, Jr., a real estate developer, personally guaranteed loans to a former business partner, PRN Real Estate, ("PRN"). Unable to repay the loans when they came due, Cole entered into a settlement agreement with PRN, which he then subsequently breached by failing to make payments under the terms of the agreement. After PRN sued Cole in state court for breaching the agreement, Cole filed a Chapter 7 bankruptcy case.

PRN brought an adversary proceeding seeking nondischargeablity of its debts under §§ 727 and 523. PRN alleged in the complaint that Cole transferred $4 million from a Nevada-based company he and his wife owned,Cole of Orlando Limited Partnership, ("COLP") to a Florida-based account held by him and his wife as tenants by the entireties (the "TBE Account") after the

debt became due. After filing his petition, Cole transferred $750,000 from Coledev, LLC to a construction business owned primarily by his wife, as well as about $250,000 to the couple's joint bank account. Cole also divided his lake house property into two parcels prior to filing his bankruptcy petitionexecuting and recording special warranty deeds, so as to fit within the Florida homestead exemption amounts. Cole listed the property in his petition and schedules as a .765 acre $2.5 million dollar dry-land parcel and as a 2.185 acre $1,000 mostly submerged parcel.

PRN alleged 13 counts in the adversary proceeding, all stemming from PRN's allegation that Cole undertook improper acts to place his assets out of PRN's reach. Counts 1 and 2 alleged that Cole's debt should be exempted from discharge pursuant to § 523(a)(2)(A) and 523(a)(2)(B), alleging Cole never intended to follow through on his promises made in the settlement agreement and that he misrepresented his financial condition in writing. Count 3 alleged that Cole was subject to "*Husky*" liability as the alter ego of COLP under § 523(a)(2)(A), which meant that when Cole caused COLP to transfer $4 million from COLP to the TBE Account, and as a result, Cole became liable for the fraudulent transfer to PRN. PRN alleged in Counts 4 through 6 that Cole was liable under § 523(a)(2)(A) as the transferee of the COLP funds, and in Count 7 PRN sought an "accounting" to assess the amount owed to PRN by Cole. Counts 8, 9, and 11 sought to deny Cole a discharge pursuant to § 727(a)(2)(A), § 727(a)(2)(B), and § 727(a)(4)(A). Counts 10, 12, and 13 were deemed abandoned by the bankruptcy court.

The bankruptcy court granted summary judgment for Cole on Counts 3-6. The bankruptcy court found that Count 3 "just isn't there, and to the extent that it ever could be there, it belongs to the Trustee." Counts 4-6 similarly were found to be in the exclusive purview of the Chapter 7 Trustee under § 523(c), and the bankruptcy court ruled PRN lacked standing to pursue those fraudulent transfer claims. After trial, Cole prevailed on the remaining Counts. The bankruptcy court concluded that PRN failed to meet its burden of proof as to Counts 1 and 2, as the bankruptcy court found that Cole did not fraudulently induce PRN into entering the agreement without an intent to perform nor did he misrepresent his financial condition. The bankruptcy court found that Cole did not conceal assets, in violation of § 727(a)(2)(A), when he split his lake house property, as Cole scheduled the two properties and disclosed that he had split the property to the Trustee (Count 8). The bankruptcy court also found that Cole did not conceal assets of the estate under § 727(a)(2)(B) by characterizing advances he had made to ColeDev as "capital contributions," rather than "shareholder loans" (Count 9). The bankruptcy court also found that Cole's failure to disclose COLP on his schedules was unintentional in light of his testimony and the Trustee's testimony. Finally, the bankruptcy court found that Cole did not intentionally make any false oaths under § 727(a)(4) in his disclosures to the bankruptcy court (Count 11). PRN appealed the bankruptcy court's rulings as to Counts 3, 4, 5, 6, 8, 9, and 11.

The district court found that PRN failed to adequately brief standing issues in Counts 4 through 6, and deemed each of those Counts to be abandoned. The district court further affirmed the bankruptcy court's finding that PRN lacked standing to pursue the fraudulent transfer *Husky* claim under Count 3. Finally, the district court affirmed the bankruptcy court's findings as to Counts 8, 9, and 11, noting that the bankruptcy court's determinations as to credibility were not clearly erroneous. PRN then appealed to the Eleventh Circuit.

The Eleventh Circuit reviewed Counts 3, 4, 8, 9, and 11. Discussing first the § 727(a)(2) concealment of property claims alleged in Counts 8 and 9, the Eleventh Circuit found that the bankruptcy court did not err in finding for Cole. PRN's argument on appeal was that the bankruptcy court's definition of "conceal" was too narrow. The Eleventh Circuit announced its definition of conceal under § 727(a)(2): "to knowingly withhold information about property or to knowingly prevent its discovery." The Court agreed that Cole did not conceal information about the homestead. "To the contrary, Cole publicly recorded both deeds and continued to pay taxes on the whole property. After Cole filed his petition, Cole told the Trustee about the split and listed both parcels in his schedules." As to whether Cole labeling the advances as "capital contributions" constituted concealment pursuant to § 727(a)(2)(B), the Eleventh Circuit found that the bankruptcy court did not clearly err in its credibility determinations as to Cole or the Trustee. The Eleventh Circuit concluded similarly that the bankruptcy court did not err in determining that Cole's failure to include COLP in his schedules was an "unintended mistake." The Eleventh Circuit also found that the bankruptcy court did not clearly err in its credibility determinations and did not clearly err in finding that Cole did not intentionally make any false oaths in his disclosures to the bankruptcy court, and should not be denied a discharge under § 727(a)(4)(A).

Moving to Counts 3 and 4, the *Husky* claims, the Eleventh Circuit first found that PRN only sufficiently briefed Count 3, "shying away" from the from the 4th Count, and expressly dropped Counts 5 and 6 from the opening brief. Accordingly, the Eleventh Circuit addressed only Count 3. Using charts to describe different types of transfers, the Eleventh Circuit found that PRN adequately pleaded a cause of action for transferee liability under § 523(a)(2)(A). To get there, the Court first noted that COLP owed a debt to PRN, and that COLP transferred assets to Cole's TBE account. PRN alleged that Cole was acting as the alter-ego to the corporation when that transfer was made, and that he caused the transfer to occur. Nevada state law (COLP is a Nevada-based limited partnership) provides that a corporation's debt is not traceable to an individual so long as that individual is not acting as an alter-ego of the corporation. Nevada case law extended this liability to limited partnership, and held creditors may have a cause of action against an alter-ego to recover that debt. The Eleventh Circuit found that by pleading alter-ego liability when Cole caused the COLP assets to be transferred to his TBE account, and because Cole was the recipient of those funds (i.e., he obtained the funds through a debt obtained through fraud), PRN adequately pleaded a § 523(a)(2)(A) exemption to discharge claim.

The bankruptcy court, in the alternative, granted summary judgment against PRN since *Husky* cause of action would have belonged to the Trustee, who sought to void the fraudulent transfer pursuant to § 544(b)(1). However, the Eleventh Circuit found that the Trustee's settlement of the § 544(b)(1) claim against the estate for the fraudulent transfer did not preempt PRN's ability to bring its own claim under § 523(a)(2). The Eleventh Circuit noted that separate interests are at play: the Trustee is seeking to avoid the fraudulent transfer in order to bring assets into the estate for all creditors, while a Creditor seeking to exempt the debt pursuant to § 523 is not seeking to bring assets into the estate, but instead to cause the claim to survive bankruptcy so that the Creditor alone may collect on it. Therefore, the Eleventh Circuit reversed the grant of summary judgment in favor of Cole as to Count 3 and remanded to the bankruptcy court for further proceedings.

***Sweetapple v. Asset Enhancement, Inc. (In re Asset Enhancement, Inc.)**,* 87 F.4th 1271 (11th Cir. Dec. 5, 2023) (Rosenbaum, Branch, and Brasher, JJ.) (opinion by Rosenbaum, J.).

Code § / Rule: finality of contempt order when attorney fees are possible sanction, not yet imposed

Held: An appeal is timely even though filed more than fourteen days after entry of an order finding a party in contempt when the appeal is taken fewer than fourteen days after entry of a second order sanctioning the contempt with a specific award of attorney fees as damages.

History: Eleventh Circuit reversed and remanded to the District Court for the Southern District of Florida, which had dismissed appeal as untimely.

Facts: "This case has a long and somewhat messy history." Opinion p. 3. The town of Gulfstream, Florida and its attorney Sweetapple entered a prepetition agreement with Asset Enhancement, Inc. for a judgment to be entered against Gulfstream and in favor of Asset Enhancement regarding a public records request issue, while reserving the issue of attorney fees and costs. Before the state court could decide the fees and costs issue, Asset Enhancement filed chapter 11. Gulfstream through Sweetapple argued that conducting the hearing on damages was not a stay violation (the suit having been initiated by the Debtor) and the state court agreed. It then conducted a postpetition hearing on the appropriate amount of attorney fees and costs sanctions but deferred ruling. Meanwhile, the Debtor moved in the bankruptcy court for contempt sanctions against Asset Enhancement and Sweetapple for moving the state court to proceed with the postpetition sanctions hearing even though it was aimed at liquidating the damages against Enhancement and Sweetapple, as well as for requesting sanctions against the Debtor at the postpetition state-court hearing. The bankruptcy court agreed with the Debtor in part. The bankruptcy court determined that the automatic stay operated to prohibit movement in the state court action even though the action was initiated by the Debtor and was being defended by nondebtors, because those nondebtors (Gulfstream and Sweetapple) also sought sanctions against the Debtor at the postpetition hearing. The bankruptcy court found both Gulfstream and Sweetapple liable for the stay violation.

The bankruptcy court found authority in § 105 to sanction the contempt. The court also found that the Debtor had not shown that it sustained any compensatory damages and declined to grant further injunctive relief (the automatic stay being an injunction that already existed to protect estate property). Similarly, the court found no egregious or malicious conduct so that punitive damages were not appropriate. However, the bankruptcy court did award the Debtor reasonable attorney fees and costs for the contempt motion in its contempt order, without setting forth the specific fee and cost amounts. The court denied reconsideration. The Debtor then moved for specific attorney fee damages. The bankruptcy court entered a second order awarding a set amount of attorney fees and costs by consent, but without waiving Sweetapple's right to appeal the contempt order itself. The Town of Gulfstream paid the fee award, and Sweetapple then filed a notice of appeal aimed at the contempt order, the denial of reconsideration, and the order liquidating the attorney fee and cost damages. The notice of appeal was filed more than 14 days after the entry of the contempt order and of the order denying reconsideration, but within 14 days of the order liquidating the attorney fee and costs amount.

The district court ruled that it lacked jurisdiction over the appeal as to the contempt order and the order denying reconsideration because more than 14 days had run before the notice of appeal. The district court found support for the finality of those orders in Supreme Court precedent establishing that attorney fee issues are collateral to the merits. *See Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs and Emps.*, 571 U.S. 177 (2014) (order on contract claims was final and appealable notwithstanding collateral issue of attorney fee award as an element of the breach of contract damages remained to be adjudicated). As to the fee order, the district court found that Sweetapple lacked standing to appeal that order even though the notice of appeal had been timely as to it because he had consented to its entry. The district court thus dismissed the appeal in its entirety and Sweetapple appealed to the circuit.

Sweetapple failed to brief his appeal of the fee order, but that order would have been affirmed in any event because he consented to its entry. The appeal was therefore properly dismissed as to that order.

The answer was different, however, regarding the contempt order and the order denying reconsideration. Contrary to the precedent relied upon by the district court, the underlying issue here was one of contempt. "And we have explained that a contempt decision does not become 'final' until the contempt penalties imposed are no longer 'conditional or subject to modification.'" Opinion p. 14 (quoting *PlayNation Play Sys., Inc. v. Velex Corp*., 939 F.3d 1205, 1212 (11th Cir. 2019) (citations omitted)). There is no final contempt order until the attorney fees and costs awarded as contempt damages are also ordered, at which time the contempt order is no longer conditional but instead merges with the judgment for a set amount of attorney fees and costs. "[I]t is the nature of contempt, and not of bankruptcy, that drives the outcome here." Opinion p.15 n.7. The prior-precedent rule also required this result, there being no intervening Supreme Court ruling directly on point. *See PlayNation*, 939 F.3d 1205 (issued after the *Budinich / Ray Haluch* Supreme Court precedent cited by the district court). The bottom line: the contempt order was timely appealed, and the district court had jurisdiction.

By way of contrast, see *Sky Enterprises, LLC v. Seawalk Investments, LLC (In re Seawalk Investments, LLC)*, 2024 WL 1739775 (11th Cir. April 23, 2024) (per curiam) (Wilson, Jill Pryor, and Grant, JJ.). In the *Seawalk* decision, which arose in the Middle District of Florida, the Eleventh Circuit dismissed an appeal from the district court for lack of jurisdiction. Unlike the attorney fees for contempt in *Sweetapple*, the district court in *Seawalk* had affirmed several bankruptcy court rulings but also had remanded to the bankruptcy court for it to determine the amount of attorney fees, which would be allowable as part of the creditor's claim. The attorney fees were not a sanction; they arose instead from the note and mortgage and were an essential element of a merits determination regarding the amount of the secured claim. Accordingly, the district court's order that affirmed in part and remanded for attorney fee computation was not a final order as it did not end the litigation on the merits.

Hansjurgens v. Bailey (In re Bailey), 90 F. 4th 1158 (11th Cir. Jan. 12, 2024) (William Pryor, C.J.; Rosenbaum and Abudu, JJ.) (opinion by Rosenbaum, J.).

Code § / Rule: Fed. R. Civ. P. 69(a) revival of a federal judgment

Held: Revival judgment was a final order, for which the bankruptcy court did not need to re-establish personal jurisdiction. The bankruptcy court substantially complied with the state procedures for revival, strict compliance being not only unrequired but impractical, and the notice given and received by the defendant satisfied due process.

History: Eleventh Circuit affirmed the District Court for the Southern District of Georgia, which affirmed the Bankruptcy Court for the Southern District of Georgia.

Facts: The bankruptcy court (sitting in Georgia) entered a money judgment on April 7, 2011, in favor of Bailey and against Hansjurgens for tortious interference with contract over ten years prior to the ruling that led to this appeal. The total judgment, including punitive damages, exceeded $893,900.00. "Hansjurgens repeatedly and unsuccessfully appealed" the judgment on the merits. *Id.* at 1164. In attempting to compel post-judgment discovery, an arrest warrant was threatened and the U.S. Marshals tried to contact Hansjurgens, as did the Circuit Court, when his appeal was dismissed by the Circuit for lack of jurisdiction in 2015. The Circuit noted these attempts as a prelude to its ruling on the revival issue. Under Georgia law at the time of its entry, the judgment became dormant after seven years and would become unenforceable after ten years from entry. Before the judgment became unenforceable, Bailey requested a status conference and filed an emergency motion to revive the judgment in the AP. Both Bailey and the BNC mailed notice of the hearing to Hansjurgens, his prior attorneys, as well as his two business entities via their registered agents, at multiple addresses. Bailey's attorney also phoned Hansjurgens' attorney the day before the hearing. Despite copious notice, no one appeared for Hansjurgens at the hearing and the bankruptcy court granted the motion to revive the judgment. The bankruptcy court found the Georgia procedural requirements for revival had been satisfied, there being no dispute that the judgment remained unpaid and that the time within which it could be revived had not expired.

Hansjurgens then filed a pro se appeal of the revival, asserting lack of personal jurisdiction, failure to comply strictly with Georgia's procedures, lack of good cause for an "emergency" order, and failing to serve him with a new summons in violation of his due process rights. The district court affirmed, as did the Eleventh Circuit.

First, the revival order was a final judgment under the two-part finality inquiry for postjudgment proceedings: (1) treat the proceeding as a stand-alone matter; and (2) ask if the order at issue disposes of the matter as the last order to be entered thereon. Both of those were met here, so the revival order was itself a final order.

On the merits of the appeal, the circuit court agreed that the bankruptcy court did not need to re-establish personal jurisdiction because it retained personal jurisdiction over Hansjurgens based on the original adversary proceeding. Revival under Georgia law is a continuation of the original action. Further, under Fed. R. Civ. P. 69 (as incorporated by Fed. R. Bankr. P. 7069), the revival procedure must "accord with" the state procedure. This does not require strict compliance with

every aspect of the state procedure, particularly given that the state procedure has certain county-specific procedures that could not practically be incorporated into a federal revival procedure. Substantial compliance is required, via federal procedures that "agree" or are "in harmony" with the state procedures. Id. at 1168. That standard was met here, and due process was satisfied. Hansjurgens received no less than 12 notices of the revival hearing, and the revival request was made before the judgment became dormant. Personal service would have added nothing where actual notice had already been accomplished. Hansjurgens certainly received reasonable notice, even if not ideal notice, and that is what due process requires per *Mullane v. Cent. Hanover Bank & Tr. Co.,* 339 U.S. 306, 314 (1950).

Sewalk v. Valpak Direct Marketing Systems, LLC, 2024 WL 767619 (11th Cir. Feb. 26, 2024) (per curiam) (Wilson, Jill Pryor, and Brasher, JJ.).

Code § / Rule: elements of extortion under Fla. law; potential bankruptcy fraud

Held: The district court did not abuse its discretion in denying a motion to reopen a district court case resolved with a confidential settlement agreement even if the settlement agreement had been entered into following a threat by one side to report the opposing parties to the authorities for bankruptcy fraud. Such a threat was justifiable because a large asset (franchise agreement valued by the opposing parties at $1,000,000 in the district court case) was not scheduled as an asset or contract in an earlier bankruptcy, nor was the franchisor scheduled or listed in the bankruptcy.

History: Eleventh Circuit affirmed the District Court for the Middle District of Florida.

Facts: Valpak is a full-service marketing agency that offers exclusive franchisees the right to operate under the Valpak name. In the spring of 2019, Valpak entered into such a franchise agreement with SMS to sell advertising in southern Colorado. Sewalk is the principal of SMS and was considered the "owner" under the franchise agreement. In July 2021, Sewalk filed a chapter 11 petition in Colorado. In his petition and schedules, Sewalk listed his interest in SMS and valued it at $12,000. He did not schedule the franchise agreement as an asset or contract and did not schedule Valpak in any capacity. Sewalk first notified Valpak of his bankruptcy in early November 2021, and a few days later, Valpak terminated the franchise agreement with SMS on the basis of a provision that allowed termination in the event the owner filed bankruptcy. A few days later, the chapter 11 case was dismissed without opposition in late November 2021. A couple months later, in January 2022, Sewalk and SMS sued Valpak in the Middle District of Florida. They claimed Valpak violated the automatic stay when it terminated the franchise agreement which was at that time an estate asset, and also that the termination was a breach of the franchise agreement. They valued the damages from the loss of the franchise at $1,000,000. Valpak moved to dismiss and the magistrate ordered them to a confidential mediation, which resulted in a confidential settlement agreement. The case was then dismissed without prejudice, with a 60-day window within which either party could move to reopen upon a showing of good cause, or the dismissal would become with prejudice.

Within that window, SMS and Sewalk filed a motion to reopen on grounds that they were criminally extorted by Valpak. They claimed Valpak threatened to report Sewalk and SMS to the authorities for bankruptcy fraud unless they signed the settlement agreement within one hour. Sewalk's affidavit supported the motion to reopen and described in detail the confidential mediation discussions. Valpak objected to the motion to reopen, and the district court agreed. The motion to reopen was denied because the settlement agreement had not been entered into under coercion, duress, or extortion under Florida law. The motion was also stricken for violating the confidentiality agreement without leave of court. The district court then denied a pleading treated as a motion to reconsider, with no change in intervening law or need to correct clear error or avoid injustice. Sewalk and SMS appealed to the circuit court and moved the district court to supplement the record to allow the Sewalk affidavit, which motion the district court denied. The circuit court then moved to include the affidavit to give a full understanding, and the circuit court allowed the affidavit to be filed under seal and considered, before conducting oral argument.

The circuit court found it had jurisdiction and affirmed the district court on the merits. The substantive contract law of Florida applied to the diversity action. Florida law "demonstrates that the justified threat of criminal prosecution does not constitute duress … and will not justify setting aside a settlement agreement." Opinion at *5. Even assuming Valpak did threaten to turn Sewalk and SMS in to the authorities for bankruptcy fraud, which Valpak disputed, that threat would have been justified. The statements made under oath about the value of SMS and the falsity and materiality of those statements in Sewalk's bankruptcy supported a justifiable belief that Sewalk had knowingly and fraudulently lied under oath in the bankruptcy case in violation of 18 U.S.C. § 152(2). Florida case law clarifies that the threat of a lawful criminal prosecution does not rise to the level of duress or extortion (with the notable exception of a line of divorce cases that the circuit court refused to read broadly). Thus, the district court did not abuse its discretion in refusing to rescind the settlement agreement.

White-Lett v. Bank of New York Mellon (In re White-Lett), 2024 WL 578122 (11th Cir. Feb. 13, 2024) (per curiam) (Jordan, Branch, and Lagoa, JJ.).

Code § / Rule: Fed. R. Bankr. P. 8001(a)(1), (b)

Held: The district court did not abuse its discretion in denying the Debtor's request for a stay pending appeal and for an injunction as the Debtor should have first requested that relief from the bankruptcy court under these circumstances, where it was not impractical to have done so.

History: Eleventh Circuit affirmed the District Court for the Northern District of Georgia.

Facts: The pro se Debtor filed a chapter 7 case and received a discharge in the usual routine, with the case being thereafter closed in 2012. Eight years later, the Debtor moved to reopen her case to pursue the Bank of New York Mellon (BONYM) for allegedly attempting to collect a mortgage debt that had been discharged. The bankruptcy court reopened her case so she could file that adversary proceeding (the Debtor also filed another AP in which she asked the bankruptcy court to determine the validity of the mortgage and for declaratory and injunctive relief). When the case

was reopened, BONYM moved for stay relief, arguing first that no stay came into play upon reopening and second that the property at issue was no longer estate property in any event, having been abandoned when the case closed. The Debtor argued that her appeal of the AP in which she sought the declaratory and injunctive relief operated to divest the bankruptcy court of jurisdiction over the motion for relief in the reopened case, and asked to stay the motion for relief until her appeal was finalized. The bankruptcy court instead granted the motion for relief, ruling from the bench and then memorializing that ruling in a written order. The bankruptcy court held that the automatic stay terminated in 2012, that the appeal of the AP did not divest it of jurisdiction over the stay relief motion, and that because the property was scheduled but not administered when the case was originally open, it had been abandoned back to the Debtor and was no longer estate property.

The Debtor asked the district court to stay the bankruptcy court's order granting relief and to enjoin foreclosure pending her appeals. The district court denied the relief because the state court had already issued a temporary injunction on foreclosure so there was no risk of irreparable harm, and there was a low chance of success on the merits of the appeals because the state court had also already ruled that BONYM was the owner of the mortgage. Further, the Debtor had not shown that it was impractical for her to have first sought an injunction from the bankruptcy court under Rule 8007(a)(1), (b). The bankruptcy court found it had jurisdiction and implicitly denied the request to stay any ruling on the motion for relief by in fact granting that motion and giving extensive reasons for doing so. It was not impractical for the Debtor to ask the bankruptcy court for a stay pending appeal and for an injunction before making those requests to the district court. Even though the district court did not rely on that ground (Rule 8007) in its decision, the circuit court could affirm on that ground. Thus, the district court did not abuse its discretion in denying the Debtor's request for a stay pending appeal and for an injunction as the Debtor should have first requested that relief from the bankruptcy court under these circumstances, where it was not impractical to have done so.

The Alabama Creditors v. Dorand (In re Dorand), 95 F.4th 1355 (11th Cir. Mar. 14, 2024) (William Pryor, C.J.; Jill Pryor and Marcus, JJ.) (opinion by William Pryor, C.J.).

Code § / Rule: *Rooker-Feldman*; collateral estoppel

Held: A state court judgment on a creditor's bill following entry of a prepetition judgment against the Debtor, including a ruling that a retirement account was not exempt, did not operate to divest the Debtor's estate of the funds and did not enjoy preclusive effect as to the Debtor's exemption.

History: Eleventh Circuit on direct appeal affirmed the Bankruptcy Court for the Northern District of Florida.

Facts: A failed condominium project led to a default judgment in Tallapoosa County, Alabama state court against Dorand and in favor of a group of Alabama creditors for $1.6 million. The state court ruled that an individual retirement account established by Dorand with Morgan Stanley in Florida was not exempt because the creditors "filed a proper contest to the claim of exemption,

making both procedural and substantive challenges." Unfortunately for the creditors, the state court did not specify which of those challenges was being determined in the creditors' favor. The state court then entered judgment against Morgan Stanley under the creditor's bill provision of Ala. Code § 6-6-180 for the $856,622 in the account, and later amended that judgment to clarify that Morgan Stanley was "authorized to set-off this payment from any funds in its possession and held for [Dorand, whose] claim of exemption as to retirement funds was denied. …" 95 F.4th at 1361. The judgment against Morgan Stanley for the retirement account fund amount became final in February 2021, and Morgan Stanley liquidated the account to cash and requested payment instructions, but never actually wired the funds over to the state court clerk. The creditors alleged that Dorand's attorney threated Morgan Stanley with suit if it wired the funds as instructed, and whether in response to the alleged threat or not, Morgan Stanley never wired the funds. When Dorand filed chapter 7 in April 2021, the funds were still in the account.

Dorand scheduled the account as an estate asset and claimed it as exempt. The creditors argued the account was not estate property because the state court had denied Dorand's exemption and that Dorand was estopped from relitigating that issue. Despite the Alabama state court ruling that the funds were not exempt, and that Morgan Stanley could pay the funds to the creditors, the bankruptcy court found that the retirement account was an estate asset and that the judgment against Morgan Stanley as garnishee did not operate to divest the debtor of ownership because the funds remained in the account on the petition date. The bankruptcy court also ruled that the state court order gave Morgan Stanley a right to setoff against Dorand's account only if it had first paid the state court judgment against it as garnishee, which it had not done. On direct appeal, the Eleventh Circuit agreed on de novo review of all but the factual findings, which were reviewed for clear error.

First, the circuit court found that the bankruptcy court correctly applied *Rooker-Feldman* and exercised jurisdiction under these facts. The bankruptcy court was not being asked to overturn the state court judgment, but to interpret its effect on the ownership of the funds in the retirement account. Second, the bankruptcy court correctly ruled that the account remained Dorand's property and was therefore correctly considered an estate asset as of the petition date. The liquidation of the account to cash, without the payment of that amount over to the state court, did not terminate Dorand's interest in the account. The judgment against Morgan Stanley only gave it a right to setoff against Dorand's funds in the account if Morgan Stanley had first paid the judgment against it via the creditor's bill, which was not a personal judgment against Morgan Stanley and which created no obligation for Morgan Stanley to pay the judgment against it out of its own funds. Morgan Stanley had the ability but not the duty to transfer the retirement to the creditors, and it never did so prepetition.

Third, there was no § 553 right to setoff between Morgan Stanley and Dorand because there was no mutual debt owing from Dorand to Morgan Stanley. Setoff requires mutual debts, that both arose prepetition, and the debts must be outside of certain exceptions under § 553(a)(1)-(3). Again, the circuit court reiterated that the state court judgment against Morgan Stanley only authorized, but did not require, it to pay the account funds to the state court clerk. It was not an in personam judgment against Morgan Stanley. The judgment did not and could not, under the creditor's bill procedure, require Morgan Stanley to pay the judgment against it thereunder out of its own funds

and then seek reimbursement from Dorand. Thus, there was no debt owing from Dorand to Morgan Stanley. Without mutual debts there can be no setoff.

Finally, full faith and credit was not an issue because, as under the *Rooker-Feldman* analysis, the bankruptcy court was interpreting and applying but not overruling the Alabama state court judgment in ruling on whether it terminated Dorand's interest in the account. Similarly, the bankruptcy court was correct in not giving estoppel effect to the state court's order denying Dorand's exemption claim as to the account, because it was impossible to say that the issue of whether the funds were exempt had been necessarily determined as part of the state court's ruling. The state court did not specify whether it was denying the claim on the merits or on procedural grounds alone, or both. Therefore, it was impossible to know if the merits of the exemption (as reached by the bankruptcy court) had also been reached by the state court in its exemption order, and without an explanation from the state court of what facts the state court adjudicated, if any, in reaching its ruling. Collateral estoppel was not implicated because there were two potential independent grounds for the state court's ruling with neither being specified. The creditors walked away empty handed despite their win in state court, Morgan Stanley suffered no consequences for ignoring the garnishment for over a month while the Debtor prepared to file bankruptcy, and Dorand kept the entire fund as exempt.

Losch v. Nationstar Mortgage, LLC, and Experian Information Solutions, Inc., 2024 WL 1282459 (11th Cir. Mar. 26, 2024) (per curiam) (Jordan, Lagoa, and Hull, JJ.).

Code § / Rule: evidentiary rulings during jury trial under Fed. R. Evid. 401

Held: It was not error to admit bankruptcy documents into evidence as the documents were relevant to the reasonableness of the credit reporting agency's procedures.

History: Eleventh Circuit affirmed the District Court for the Middle District of Florida.

Facts: The Eleventh Circuit had earlier reversed a grant of summary judgment in favor of Experian on claims made against Experian under the Fair Credit Reporting Act. On remand, the district court conducted a jury trial, and the jury found in favor of Experian. A major portion of the evidence at issue in the appeal was offered to attempt to establish the reasonableness of Experian's policy of not reviewing bankruptcy court dockets even if a consumer claimed a reported debt had been discharged. Losch then appealed several evidentiary rulings, each of which was affirmed by the circuit court. First, there was no reversible error in the district court's decision to allow into evidence some of Losch's bankruptcy filings. They were relevant to the jury's task of deciding the reasonableness of the Experian policy to spend no time reviewing bankruptcy dockets when a customer claimed to have discharged a debt. Second, the amended complaint was admissible as an admission of a party opponent to show that Losch had also sued Nationstar when he claimed he could not remember if he did or did not. This information was relevant to whether it was Nationstar or Experian or both who acted or failed to act in a reasonable manner. There was no undue prejudice despite Losch's concern that the jury would see the amended complaint as somehow shifting part of the reporting error blame to Nationstar rather than Experian.

It was also appropriate to take judicial notice of the amended complaint's contents but not the truth thereof. It was error, however, for the district court to exclude as irrelevant evidence that another reporting agency had correctly reported the debt, as that information went to the reasonableness of Experian's actions in reporting the debt as it did. That ruling was nonetheless affirmed because the information was offered as Losch's testimony and would have been excluded as hearsay even if relevant. The other credit reports were not in evidence and were not within Losch's personal knowledge. He should have moved to admit the other reports as business records or called a representative with personal knowledge to testify as to their contents. Thus, their exclusion was affirmed.

It was also not error to instruct the jury that Losch had to prove Experian acted unreasonably in the procedures it had in place to prepare its credit report. "[T]o 'state a claim under § 1681e [of the Fair Credit Reporting Act], the plaintiff must show that the agency's report contained factually inaccurate information, that the procedures it took in preparing and distributing the report weren't "reasonable," and that damages followed as a result.' [quoting *Losch v. Nationstar Mortgage LLC*, 995 F.3d 937, 944 (11th Cir. 2021)]. And our sister circuits similarly have held that it is the plaintiff in an FCRA case who must demonstrate that the agency's procedures were not reasonable." Opinion at *2. Finally, the failure to correctly instruct the jury that it should not blame Losch's counsel for the credit reporting error, even though Losch's counsel filed the bankruptcy petition for Losch, was not an abuse of discretion. The jury verdict was affirmed, and none of the alleged evidentiary errors were reversible.

See also Holden v. Holiday Inn Club Vacations Inc., 98 F.4th 1359, *13 (11th Cir. Apr. 24, 2024) (Branch, Luck, and Tjoflat, JJ.) (opinion by Tjoflat) (explaining that to maintain a claim for a Fair Credit Reporting Act violation, "a plaintiff must 'identify[] inaccurate or incomplete information that the furnisher provided to the reporting agency. And second, to prove an investigation was unreasonable, a plaintiff must point out 'some facts the furnisher could have uncovered that establish that the reported information was, in fact, inaccurate or incomplete.'" (quoting *Felts v. Wells Fargo Bank, N.A.*, 893 F.3d 1305, 1313 (11th Cir. 2018))).

Al Zawawi v. Diss (In re Al Zawawi), 97 F.4th 1244 (11th Cir. Apr. 3, 2024) (Luck, Lagoa, and Tjoflat, JJ.) (opinion by Lagoa, J.) (Lagoa, J., specially concurring) (Tjoflat, J., specially concurring).

Code § / Rule: § 103(a), § 109(a), and § 1517 as applied by a prior panel in *In re Georg*, 844 F.2d 1562 (11th Cir. 1988) (holding that limits on debtor eligibility under § 109 do not apply to limit recognition of a foreign proceeding under § 1517).

Held: Debtor eligibility under § 109 does not apply to limit eligibility under Chapter 15.

History: Eleventh Circuit affirmed the Bankruptcy Court for the Middle District of Florida

Facts: Al Zawawi is a citizen of Oman. He owned shares in a Curacao entity, which in turn owned Florida real estate near Winter Park, Florida, valued at over ninety million dollars. Al Zawawi lived in the United Kingdom with his then-wife and children and there sought a divorce. His ex-wife was awarded a judgment against Al Zawawi of over (pounds symbol) 24,000,000.00. The U.K. court also issued a world-wide injunction that prohibited Al Zawawi from any asset transfers so long as the ex-wife's judgment against him remained unpaid. The ex-wife then filed an involuntary bankruptcy against Al Zawawi in the U.K. based on his failure to pay what he owed her under the divorce judgment. Shortly thereafter, the U.K. insolvency court appointed three individuals as joint trustees. Those individuals are the named Foreign Representatives who petitioned in the Middle District of Florida for Chapter 15 recognition of the U.K. bankruptcy proceeding, which would then bring Al Zawawi's assets located in the United States under the automatic stay of § 362 and provide means for investigating and exercising many of a trustee's powers as to those assets.

Al Zawawi agreed the requirements for recognition of the U.K. proceeding under § 1517 were met in his case but argued that the recognition must be denied because he was not eligible as a debtor under § 109(a). Section 109(a) provides in part that "only a person that resides or has a domicile, a place of business, or property in the United States" may qualify as a debtor under Title 11. Al Zawawi argued he satisfied none of those requirements as he was not a resident, domiciliary, or property owner under § 109. In response, the Foreign Representatives argued that § 109 did not apply to limit eligibility for recognition under § 1517, and that even if it did so limit, Al Zawawi's ownership interest in an entity that itself owned property in the United States satisfied § 109.

The bankruptcy court ruled that § 1517 was satisfied, that § 109(a) did not apply to the petition for recognition and ordered recognition of the foreign proceeding. The bankruptcy court also ruled that even if § 109(a) did apply, Al Zawawi's interest in the Curacao entity that in turn owned the real property near Winter Park was sufficient property interest to satisfy that subsection. The district court affirmed the bankruptcy court's ruling that § 109(a) does not apply under Chapter 15 and did not address the alternate ruling that the property interest requirement was nonetheless satisfied. The Eleventh Circuit panel agreed, as it was bound by prior precedent on point in the case of *In re Georg*, 844 F.2d 1562 (11th Cir. 1988) (decided under former 11 U.S.C. § 304 and holding that limits on debtor eligibility under § 109 do not apply to limit recognition of a foreign proceeding under § 1517). The plain language of § 103(a) says that the provisions of chapter 1 apply to cases under chapter 15, as the Second Circuit recognized in *In re Barnett*, 737 F.3d 238, 247 (2d Cir. 2013). But that creates some tension with the definition of "foreign proceeding" under Chapter 15 not requiring that the foreign proceeding even be one of bankruptcy, so that no foreign "debtor" is required to trigger foreign recognition, although a foreign debtor may exist in any particular case—it is not a "debtor" eligibility issue under § 1517; it is a "foreign proceeding" eligibility issue.

In a special concurrence, Judge Lagoa indicated the prior panel precedent is controlling but gets it wrong, and that on a clean slate, she would follow the *Barnett* logic as a matter of textual interpretation. Judge Tjoflat also specially concurred to agree with the result but emphasized that it is the foreign *proceeding* being recognized, and not a foreign *debtor.* Judge Tjoflat's lengthy

special concurrence also cautioned that applying § 109(a) as a requirement for foreign recognition under Chapter 15 would create an incentive for a foreign owner to transfer its property interests in the United States in order to defeat recognition of the foreign proceeding. Judge Tjoflat authored the prior panel decision at issue in *Georg*.

Grant-Carmack v. Carmack (In re Grant-Carmack), 2024 WL 1433714 (11th Cir. Apr. 3, 2024) (per curiam) (Rosenbaum, Jill Pryor, and Grant, JJ.).

Code § / Rule: § 524; § 523(a)(5) and (a)(15); § 362

Held: The bankruptcy court did not abuse its discretion in finding no discharge violation and no stay violation where an ex-spouse attempted to collect attorney fees awarded him by a state court judge in connection with a divorce proceeding.

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

Facts: Eva and Gary divorced. The state court found that Eva had violated the child custody requirements of its divorce judgment and as part of its contempt ruling, awarded Gary approximately $15,000.00 for his attorney fees along with additional time with the children. Eva appealed the attorney fee award and then filed chapter 7 soon thereafter. Gary filed his own chapter 7 case around the same time. In his schedules, Gary did not list the attorney fee award, which was at that time still on appeal to the state appellate court. Both Eva and Gary received discharges in the ordinary course of events, and approximately a year after their bankruptcies concluded, the state appellate court affirmed the award of attorney fees. Gary then tried to collect the fees awarded and moved the state court to find Eva in contempt when she refused to pay. Eva, acting pro se, removed the state court case as an AP in Gary's chapter 7 case, and moved the bankruptcy court to dismiss the case, arguing that Gary was attempting to collect from her a discharged debt. Gary sought remand and the bankruptcy court agreed because the state court had concurrent jurisdiction to determine whether the debt was discharged.

Eva also asked to reopen her own chapter 7 case so that she could pursue sanctions for what she claimed were discharge and stay violations by Gary. She made three arguments: (1) that Gary violated her discharge order when he attempted to collect the attorney fee award, as the award did not fall under § 523(a)(5) or (a)(15); (2) that Gary violated the automatic stay by not notifying the state appellate court of Eva's bankruptcy; and (3) that even if she was wrong about the attorney fee debt and it was discharged, it belonged to Gary's estate and only the chapter 7 trustee could attempt to collect it because Gary failed to schedule the award as an asset (and thus, according to Eva, he had no standing to pursue the award). The bankruptcy court reopened Eva's case and denied her request for sanctions. The bankruptcy court found that even if the attorney fee debt had been discharged (which issue it did not reach), Gary had an objectively reasonable basis to believe that it was not discharged under § 523(a)(5) or (a)(15). The bankruptcy court found that the only attempt to collect made by Gary was made after Eva's discharge, so the stay had already terminated

and was not violated by his actions. Finally, the bankruptcy court did not expressly address Eva's argument that Gary lacked standing to pursue the attorney fee award.

The district court affirmed, agreeing that Gary should not be sanctioned for a discharge violation because he had an objectively reasonable basis for his belief that the fee award was not covered by Eva's discharge, and pointing out that the state court had concurrent jurisdiction to decide whether the debt had indeed been discharged. The district court also affirmed the bankruptcy court's determination that there was no stay violation and that the "standing" issue was not relevant to the sanctions requests. The Eleventh Circuit also affirmed the district court, reviewing the bankruptcy court's ruling on the sanctions request for an abuse of discretion and finding none. The circuit court agreed that although it had not addressed the issue of whether attorney fees awarded for contempt of a divorce and custody decree fall under § 523(a)(15), other courts have done so and have found that such a fee award is nondischargeable. Because there was a fair ground of doubt as to dischargeability, Gary could not be sanctioned for contempt of the discharge order even if the fees were in fact discharged. The circuit court also agreed that the state court had concurrent jurisdiction and could make that determination on the merits. On the second issue, the circuit court pointed out that even if the continued litigation of the fee appeal during the brief window postpetition and predischarge was indeed a stay violation, it was a violation that both Eva and Gary participated in so that it was no abuse of discretion to refuse to sanction Gary. Finally, the circuit court also found no abuse of discretion in the bankruptcy court's refusal to sanction Gary for not scheduling the fee award. The circuit court made a point that its precedent in using phrases such as saying the "trustee has standing" to pursue any unabandoned estate assets is a reference to statutory or prudential standing, and not to Article III standing, the lack of which would deprive the court of subject matter jurisdiction. Failure to schedule the asset did not raise an issue with subject matter jurisdiction.

SUPREME COURT CASES OF INTEREST

Tyler v. Hennepin Cnty., Minnesota, 598 U.S. 631 (May 25, 2023) (opinion by Roberts, C.J.; concurrence by Gorsuch, J. and joined by Jackson, J.).

Code §/ Rule: U.S. Const. Amend. V, U.S. Const. Amend. VIII, U.S. Const. Amend. XIV, § 12(b)(6), Minn. Stat.§282.08, standing

Held: Petitioner has sufficient standing under Article III where she alleged that Hennepin County's retention of the excess value of her home above her tax debt following a tax sale violated the takings clause. Respondent's argument that Petitioner's failure to pay her property taxes was a "constructive abandonment" of her home is rejected.

History: The Supreme Court reversed the Eighth Circuit, which had affirmed the District Court for the District of Minnesota's dismissal of Petitioner's complaint for failure to state a claim under the Takings Clause of the Fifth Amendment.

Facts: Tyler owned a condominium which she failed to pay property taxes on for years, accumulating a $15,000 tax debt. Hennepin County seized the condominium in order to conduct a tax sale of the property, which sold for $40,000. After applying the sale proceeds to Tyler's tax debts, the County refused to turn over the remaining $25,000 from the sale proceeds to Tyler. Tyler sued in state court, arguing that the County's retention of the excess value of her condominium violated the Takings Clause of the Fifth Amendment and the Excess Fines Clause of the Eighth Amendment. After the County removed the case to federal court, the district court found that Tyler failed to state a claim under FED. R. CIV. P. 12(b)(6). The district court concluded that Minnesota's tax-foreclosure scheme does not give the property owner even a conditional right to the tax sale surplus, and that the Supreme Court "has unambiguously declined to recognize a former property owner's 'fundamental interest in the surplus' by virtue of her prior ownership of the forfeited property." The district court concluded that Tyler therefore had no ownership interest in the surplus from the tax sale, so she failed to establish that the County had taken something that belonged to her in violation of the Takings Clause. The district court also found her Excessive Fines claim failed, because Minnesota's tax-forfeiture scheme was remedial, and bore none of the hallmarks of punishment.

The Eighth Circuit affirmed, finding that where state law recognizes no property interest in surplus proceeds from a tax-foreclosure sale, there is no unconstitutional taking. The Eighth Circuit also affirmed the district court's finding that Tyler failed to state a claim that the County's retention of the excess funds violated the Excessive Fines clause. Tyler appealed to the Supreme Court, which considered whether the retention of the excessive funds violated the Takings Clause of the Fifth Amendment and whether the County's retention constituted an excessive fine under the Eighth Amendment. In a 9-0 decision, the Court concluded that the County's retention of the $25,000 surplus from the tax sale of Tyler's condominium violated the Takings Clause of the Fifth Amendment. Finding Tyler sufficiently pled a claim under the Takings Clause, the Court declined to make a determination as to whether the seizure of the $25,000 violated the Eighth Amendment.

First, the Court addressed whether Tyler had standing under Article III. Finding that the County's "misappropriation" of the $25,000 constituted a "classic pocketbook injury sufficient to give her standing," the Court concluded that Tyler had standing to challenge the County's retention of the funds. Second, the Court examined whether the surplus from a tax sale represented a property interest protected against unlawful taking by the Fifth Amendment. The Court concluded that a taxpayer has a property interest in the surplus from a tax sale, and that Minnesota's tax sale statute could not extinguish that right. While the County argued that Tyler could have sold her house prior to the taking to pay her tax debt and received her surplus that way, the Court stated that requiring a taxpayer to sell her house to avoid a taking is not the same as providing an opportunity to recover the excess value of her home after the State has sold it.

Addressing the County's argument that Tyler had no interest in the surplus of the property because she "constructively abandoned" her home by failing to pay taxes, the Court noted that the County cited no case standing for the proposition that failing to pay property taxes is itself sufficient for abandonment. The Court noted that its precedent made clear that "[i]t is the owner's failure to make any use of the property"—and for a lengthy period of time—"that causes the lapse of the property right." The Court concluded that failure to pay taxes alone was not abandonment of the property. Finally, the Court declined to determine whether the Eighth Amendment was violated, finding that Tyler plausibly alleged a claim under the Takings Clause.

Writing in concurrence, Justice Gorsuch stated that he agreed with the Court's decision not to address the Eighth Amendment. However, he advised that the district court's Eighth Amendment analysis "contains mistakes future lower courts should not be quick to emulate." First, the concurrence disagreed with the district court's determination that finding the tax statute's primary purpose is remedial indicated that the statute was not punitive. "It matters not whether the scheme has a remedial purpose, even a predominantly remedial purpose. So long as the law 'cannot fairly be said solely to serve a remedial purpose,' the Excess Fines clause applies." Second, the district court's finding that some taxpayers received a windfall due to the tax sale extinguishing a greater amount of debt than the home is worth does not render the statute as non-punitive. Just because "some prisoners better themselves behind bars," "punishment remains punishment all the same." Finally, the concurrence minimized the relevance of the district court's finding that the statutory scheme's outcome turned on the culpability of the taxpayer. The district court found that the tax-forfeiture scheme served as a "deterrent" to all taxpayers given the chance of the loss of property, regardless of their intent or culpability. The concurrence suggested that even if the statutory scheme was agnostic to the taxpayer's culpability, the scheme intended to deter, which might be punitive in nature. Justice Jackson joined in Justice Gorsuch's concurrence.

Lac du Flambeau Band of Sup. Chippewa Indians v. Coughlin, 599 U.S. 382 (June 15, 2023) (opinion by Jackson, J.; concurrence by Thomas, J.; dissent by Gorsuch, J.).

Code §/ Rule: Congress's power to abrogate sovereign immunity, 11 U.S.C. § 106(a), 11 U.S.C. § 101(27), U.S. Const. Amend. XI, 11 U.S.C. § 362(k), 7012(b)(1)

Held: The Bankruptcy Code abrogates the sovereign immunity of all governmental entities; federally recognized Indian tribes are included among the entities for which Congress abrogated state sovereign immunity

History: The United States Supreme Court affirmed the First Circuit, which had reversed the Bankruptcy Court for the District of Massachusetts, which had dismissed Coughlin's motion to enforce the automatic stay.

Facts: Brian Coughlin borrowed $1,100 from Lendgreen, a business owned by the Lac du Flambeau Band of Lake Superior Chippewa Indians, a federally recognized Tribe. Shortly thereafter, he filed for Chapter 13 bankruptcy. Even after the automatic stay went into effect and after being informed of the bankruptcy, Lendgreen continued to attempt to collect the debt from Debtor.

Debtor filed a motion to enforce the automatic stay against four parties: Niiwin, LLC d/b/a Lendgreen ("Lendgreen"), L.D.F. Business Development Corporation ("BDC"), L.D.F. Holdings, LLC ("Holdings"), and the Lac du Flambeau Band of Lake Superior Chippewa Indians (the "Tribe"). Each of those entities "are arms of the Tribe and enjoy the Band's sovereign immunity." Debtor's motion also sought damages for emotional distress. In response, the entities filed a motion to dismiss pursuant to Rule 7012(b)(1), arguing that the bankruptcy court lacked subject matter jurisdiction over the entities because they were immune from suit due to their sovereign immunity. The bankruptcy court concluded that the entities were immune and granted their motion to dismiss. On appeal, the First Circuit reversed, finding that the Code unambiguously stripped the tribal entities of their sovereign immunity in bankruptcy proceedings. The First Circuit's holding continued a circuit split, in which the First and Ninth Circuits found that the bankruptcy code strips tribal immunity, while the Sixth, Seventh, and Eighth Circuits found that the code did not.

Writing for the majority and affirming the First Circuit, Justice Jackson explained that the Bankruptcy Code expressly abrogates the sovereign immunity of "governmental unit[s]" for specified purposes. 11 U.S.C. § 106(a). The key question was whether Congress included tribes within the definition of "governmental unit." 11 U.S.C. § 101(27). Section 101(27) defines governmental unit as "[the] United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government." At issue is whether sovereign tribal governments are included under "other foreign or domestic government." The majority held that tribal governments fell within "other foreign or domestic government[s]," meaning that the Code unambiguously abrogates tribal immunity. Moreover, the majority concluded that the breadth of the Code's language in § 101(27) leaves no government unaffected. TheCode abrogates the sovereign immunity of any governmental unit that might attempt to assert it with no exceptions provided in the statute and an all-encompassing residual provision.

Justice Thomas wrote a concurrence in which he explained that he viewed tribal immunity as distinct from the sovereign immunity provided to states by the Eleventh Amendment, and he did not believe that tribal immunity extended to commercial activity beyond the borders of the

reservation. Writing alone, he concurred in the holding not because he believed that the broad immunity of tribal governments was abrogated by the Code, but because he believed tribes do not possess tribal sovereign immunity.

Justice Gorsuch wrote a dissent in which he disagreed with the majority's clear statement analysis. He argued that in every previous case when the Court found that Congress intended to abrogate tribal sovereign immunity, the legislation expressly mentioned Indian tribes somewhere in the statute. In this case, there is no mention of Indian tribes. And rather than the definition of governmental unit including the residual phrase "any and every government," it states "other foreign or domestic government," which Justice Gorsuch views as less inclusive. Because there is a plausible interpretation of the statute that does not include tribal governments, the statute does not unambiguously abrogate tribal immunity.

Federal Bureau of Investigation v. Fikre, 601 U.S. 234 (Mar. 19, 2024) (opinion for the unanimous Court by Gorsuch, J.; concurring opinion by Alito, J., and joined by Kavanaugh, J.).

Held: The defendant cannot automatically moot a case by stopping the practice at issue after the suit is filed; instead, the defendant has the "formidable" burden to show that the practice at issue cannot reasonably be expected to be repeated before the case will be considered moot. The decision of the Court of Appeals for the Ninth Circuit was affirmed.

Facts: The plaintiff is an American citizen who immigrated from Sudan after fleeing there from Eritrea in his childhood. His factual allegations, which were unchallenged and taken as true because they were not controverted in conjunction with the government's Rule 12(b)(1) motion, established that he traveled to Sudan for work in 2009, where he still had family. He informed the U.S. officials of his arrival for business purposes and was invited to the U.S. embassy for a luncheon but instead was interrogated by two F.B.I. agents and informed he had been placed on the No Fly List. He was placed on the No Fly List (which covered 81,000 individuals by 2016 and the regulations and standards for which are governed by no statute or publicly promulgated authority) so that he could not return to the United States. The agents questioned him about his religious organization back home in Portland and asked him if he would serve as an informant. The agents indicated he could be removed from the No Fly List if he would so serve, but the plaintiff refused. The plaintiff then traveled to the U.A.E. on business, and was there detained, questioned, and tortured at what his interrogator told him was the behest of the F.B.I. He was held for over 100 days and eventually flown to Switzerland where he had relatives. While there, he filed suit to challenge being placed on the list with no notice, with no factual information as to why he was added to the list, and with no way to challenge having been added to the list. He further claimed that he was placed on the list because of his race, national origin, and religious beliefs, all in violation of the Constitution. He asked for a declaration that his rights had been violated and an injunction prohibiting the government from having him on the No Fly List. Without explanation, and before a determination on the merits, the government informed the plaintiff that he had been removed from the list and sought to dismiss the suit as moot. The district court agreed, but the Ninth Circuit remanded. On remand, the government had the burden to show that its conduct at

issue will not "reasonably be expected to recur. The government then attempted to satisfy its burden by saying that it had no current plans to put the plaintiff back on the No Fly List. That satisfied the district court, which again dismissed the case as moot. And, again, the Ninth Circuit reversed. The Fourth Circuit soon thereafter found that a government declaration that it has no current plans to relist a plaintiff under similar facts did meet the government's burden to show the case was moot.

In resolving the circuit split, the Supreme Court agreed with the Ninth Circuit's rationale. The government's statement did not explain why the plaintiff had been placed on the No Fly List in the first instance, and the government did not ensure that he would not be back on the list if he engaged again in whatever conduct had resulted in his being listed. Therefore, the case was not moot. The burden in opposing dismissal on mootness grounds was not on the plaintiff to show anything about his conduct past or future; the burden in seeking to moot the case was on the government to prove that it would not repeat its challenged conduct in the future. The government offered only speculation about the plaintiff's future conduct, which did not meet the burden to establish the unoffensive nature of the government's own future actions. A defendant may not unilaterally moot a case "by the simple expedient of suspending its challenged conduct after it is sued." Voluntarily stopping the conduct that led to the lawsuit will moot the suit only if the defendant meets its burden to show that the challenged conduct cannot "reasonably be expected to recur." This is a "formidable burden" for the defendant to meet. Opinion at 6 (citations omitted).

In the bankruptcy realm, equitable mootness (not constitutional mootness) arguments might be impacted by this decision. When defending against requested relief and raising equitable mootness as a defense (arguing that the relief should be denied because no effective relief can be granted and the bell can't be un-rung without hurting other parties), the conduct at issue perhaps could be repeated in many cases (broad reading), but not by the particular defendant against the particular plaintiff in the same bankruptcy case (narrow reading). It remains to be seen how broadly the logic of the Court in this case might apply in bankruptcy matters.