Eleventh Circuit Cases Update
May 2014 through May 2015

James J. Robinson
United States Bankruptcy Judge
Northern District of Alabama, Eastern Division

Lodge v. Kondaur Capital Corp., 750 F.3d 1263 (11th Cir. May 8, 2014) (Hull, Black, and Walter, JJ.)

Code § / Rule: § 362(k)—emotional distress as actual damages

Held: Plaintiffs did not establish a causal connection between their emotional distress injuries and the defendants' violation of the automatic stay; to be entitled to emotional distress actual damages under § 362(k), plaintiff must (1) suffer "significant" emotional distress, (2) clearly establish the significant emotional distress, and (3) establish a causal link between the significant emotional distress and the stay violation. The circuit court also ruled that the district court did not abuse its discretion in refusing to take judicial notice of the defendants' websites when the plaintiffs did not give the court necessary information such as screen shots or website addresses.

History: 11th Circuit affirmed the District Court for the Northern District of Georgia, which granted summary judgment in favor of defendants.

Facts: The defendants were the mortgage holder and law firm, which law firm published a "notice of sale" to begin foreclosure without first obtaining stay relief. The notice ran for one day before being pulled, and the plaintiff-debtors never actually saw the notice. The plaintiffs did receive letters from law firms advising them they were about to be foreclosed, and the plaintiffs realized the sale had been cancelled and would not take place. Ultimately, the chapter 13 plan was completed and discharged. The plaintiffs sued in district court for emotional distress damages as a result of the stay violation, and also claimed the defendants were "debt collectors" under the Fair Debt Collection Practices Act ("FDCPA"). The district court found the emotional distress claim was too speculative and that the evidence was insufficient to support a recovery. The district court also declined to take notice of the defendants' websites for purposes of the FDCPA claim when the plaintiffs put no evidence into the record in support, did not include the website in their statement of material facts, and raised the website's content (and the contents of the Georgia Press Association Public Notice Website) for the first time in their reply brief.

Brook v. Chase Bank USA, 566 Fed. Appx. 787 (11th Cir. May 14, 2014) (per curiam) (unpublished) (Wilson, Jordan, and Rothstein, JJ.)

Code § / Rule: § 553; bankruptcy court's discretion to not allow set-off under Florida Consumer Collection Practices Act ("FCCPA")

Held: It was not an abuse of discretion to refuse to allow the offending bank to set off statutory damages and attorney fees awarded against it under FCCPA against the discharged prepetition credit card debt owed to the bank by the debtor. The bankruptcy court found lack of mutuality

between the prepetition debt and the damages award under the "penal" consumer protection statute, and found that it would be inequitable to allow set off under these circumstances. The Eleventh Circuit emphasized that the right to set off under § 553 was permissive rather than mandatory under the substantive law of Florida, and was therefore entirely subject to the bankruptcy court's discretion.

History: 11th Circuit reverses the District Court for the Middle District of Florida, which had reversed the Bankruptcy Court for the Middle District of Florida, which had denied the bank's request to set off the damages award against the debtors' prepetition debt to the bank, now discharged.

Facts: The debtor owed the bank around $30,000 for prepetition credit card charges, which debt was discharged in chapter 7. The chapter 7 trustee filed an AP against the bank for violation of the FCCPA, and was awarded statutory damages and attorney fees. The bank asked the bankruptcy court to allow set off of the FCCPA damages award against the prepetition credit card debt. The bankruptcy court denied the request, the district court reversed, and the circuit court reversed the district court finding that whether to allow set off is a discretionary decision, nowhere mandated by the substantive Florida law that applied, and the refusal in this case was not an abuse of discretion.

Helmer v. Pogue (In re Pogue), 567 Fed. Appx. 894 (11th Cir. May 30, 2014) (per curiam) (unpublished) (Marcus, Edmondson, and Treadwell, JJ.)

Code § / Rule: § 502(b)

Held: It was not an abuse of discretion for the bankruptcy court to decide that additional attorney fee payments to the appellant *qui tam* counsel would exceed the reasonable value of the services provided, notwithstanding that other *qui tam* counsel had been awarded larger contingency fee awards. Appellant- counsel was not aggrieved by the other fee awards and therefore had no standing to appeal those awards.

History: 11th Circuit affirms District Court for the Northern District of Alabama, which affirmed the Bankruptcy Court for the Northern District of Alabama (Bennett, C. Bankr. J.).

Facts: The debtor filed a federal False Claims Act complaint as a *qui tam* relator against his employer in 1994, and was represented in that action by appellant-counsel Helmer and his law firm. In 2006, the debtor fired Helmer. In 2007, the debtor filed bankruptcy. In 2009, the bankruptcy trustee settled the *qui tam* suit for $28 million, with $8,120,000 being the estate's qui tam relator's share. The *qui tam* defendant also paid Helmer $5,200,000 statutory fees as "reasonable attorneys' fees" and $350,811.32 as costs. Seeking more, Helmer asserted a claim for part of the estate's relator's share as a contingency fee. The debtor maintained he had fired Helmer for cause and that Helmer had no right to any contingency fee. The bankruptcy court agreed and disallowed Helmer's claim, determining that the fee already received by Helmer was at least equal to, if not greater than, the reasonable value of the services he provided under § 502(b)(4). Other attorneys who worked the case had claims allowed for contingency fees out of the bankruptcy estate. Helmer appealed both the denial of his contingency fee and the awarding of contingency fees to the other attorneys, and the district and circuit courts affirmed the bankruptcy court's determination.

Crouser v. BAC Home Loans Servicing, LP (In re Crouser), 567 Fed. Appx. 902 (11th Cir. June 2, 2014) (per curiam) (unpublished) (Wilson, Pryor, and Anderson, JJ.)

Code § / Rule: § 1306(a)(1)-- postpetition cause of action and proceeds as property of the estate

Held: Post-confirmation settlement proceeds from settlement of the debtor's stay violation claim against the debtors' mortgage company are property of the bankruptcy estate under a plain text reading of § 1306(a)(1), which is broad in scope.

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

Facts: The chapter 13 debtor, postconfirmation, settled claims against his mortgage company for violation of the automatic stay. The trustee argued that the settlement funds were estate property under § 1306(a)(1), as having been acquired after the case was filed but prior to closing, dismissal, or conversion. The bankruptcy court agreed with the trustee, as did the district and circuit courts. The result was supported by circuit precedent in *In re Waldron*, 536 F.3d 1239 (11th Cir. 2008) (claims for underinsured motorist benefits that arose postconfirmation but during the case were estate property); and also by *Carver v. Carver*, 954 F.2d 1573 (11th Cir. 1992) (chapter 13 estate includes postpetition property and earnings acquired before the end of the case). The courts rejected the debtor's argument that the estate was not an "individual" that could recover damages for a stay violation, and therefore should not benefit from the debtor's recovery. The debtor, not the estate, pursued and settled the claim, and when the debtor acquired those settlement proceeds, they became vested in the bankruptcy estate at that time.

***Wells Fargo Bank v. Scantling (In re Scantling)**,* 754 F.3d 1323 (11th Cir. June 18, 2014) (Tjoflat, Moore, and Schlesinger, JJ.)

Code § / Rule: § 506(a) and § 1322(b)(2)

Held: Strip off of wholly unsecured junior residential mortgage is allowed in a no-discharge chapter 13.

History: 11th Circuit, on direct appeal, affirms Bankruptcy Court for the Middle District of Florida in allowing the strip off upon plan completion, even in the absence of discharge.

Facts: Chapter 20 debtor proposed to strip off totally underwater second and third mortgages against her residence. The mortgagee opposed the strip off, arguing that the liens should survive until discharge and since no discharge was possible in the chapter 13 due to a prior discharge in chapter 7, the liens should not be stripped in the chapter 13 case. The bankruptcy court ruled that under § 506, the mortgagee did not have an allowed secured claim, given that there was no equity to support the junior mortgages at all, and that § 1322(b)(2) therefore did not prohibit the modification of the mortgagee's rights. Similarly, the bankruptcy court found that § 1325(a)(5) did not apply because the mortgagor did not have "allowed secured claims" given that there was no equity above the first mortgage (NOTE: the finding that § 1325(a)(5) does not apply distinguishes this case from *Colbourne*). Applying *Tanner v. Firstplus Financial, Inc. (In re Tanner)*, 217 F.3d 1357 (11th Cir. 2000) and declining to de-link valuation under § 506(a) from the term "allowed secured claim" under § 1325(a)(5) as was argued by the creditor based on *Dewsnup v. Timm*, 502 U.S. 410 (1992), the bankruptcy court found that the claim was not "secured" because there was no value after valuation under § 506(a) and therefore the lien could

be stripped under § 1322(b)(2) and further that § 1325(a)(5) was not involved in the analysis since there was no "allowed secured claim" whose lien must survive until either payment or discharge. The circuit court agreed.

Stuart v. Mendenhall (In re Mendenhall), 572 Fed. Appx. 858, 2014 WL 3586515 (11th Cir. July 22, 2014) (per curiam) (unpublished) (Pryor, Martin, and Rosenbaum, JJ.)

Code § / Rule: Rule 4007(c); Rule 9006(b)(3); § 523(a) and (c)

Held: Bankruptcy court's interpretation of its own order was not an abuse of discretion, and bankruptcy court properly denied request for extension *nunc pro tunc* of complaints bar date when the request was filed after the expiration of the deadline.

History: 11th Circuit affirms District Court for the Northern District of Alabama, which affirmed the Bankruptcy Court for the Northern District of Alabama (Caddell, Bankr. J.).

Facts: Stuart sued Mendenhall in state court in New York, alleging legal malpractice, fraud, and other things. The action was stayed by Mendenhall's chapter 7 filing prior to an assessment of damages. The complaints bar date in Mendenhall's chapter 7 case was set as January 15, 2013. One day before that date, Stuart filed a *pro se* motion to extend the deadline, and the debtor objected. After a hearing, the bankruptcy court granted a "60 day extension" but did not explicitly state from which date the extension would run: the original bar date (which would give a new deadline of March 15, 2013), or the order date (which would give a new deadline of March 22, 2013). Stuart filed an AP complaint to determine dischargeability under § 523(a) on March 21, 2013. No one asked the court to clarify its order as to the new deadline. The debtor moved to dismiss the AP as being untimely filed. After argument and briefing, the bankruptcy court interpreted its own order as extending the deadline from the original deadline date (having been granted over the debtor's objection, 60 days having been generous when no specific length of extension had been requested, and in light of the creditor's failure to seek clarification). The bankruptcy court also found it had no jurisdiction to extend the bar date further when there was no motion to do so filed prior to the expiration of the bar date as extended under Rule 4007(c).

Brown v. JPMorgan Chase Bank (In re Brown), 572 Fed. Appx. 849, Case No. 13-15422 (11th Cir. July 22, 2014) (per curiam) (unpublished) (Pryor, Martin, and Cox, JJ.)

Code § / Rule: abstention under 28 U.S.C. § 1334

Held: Circuit court has no jurisdiction to consider appeal of decision to abstain; and bankruptcy court did not err in dismissing chapter 13 case once it decided to abstain.

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

Facts: The Browns filed a *pro se* chapter 13 petition, in which Chase filed a mortgage proof of claim. The debtors objected to the claim, and filed an AP, asserting that Chase had no standing to collect the note and enforce the mortgage. The bankruptcy court denied a motion by Chase to dismiss the AP (with which the claim issue was consolidated) but granted Chase's motion for abstention. The bankruptcy court found the claims were matters of state law, the claims were the subject of a state court foreclosure proceeding that was pending when the bankruptcy was filed,

and that proceeding in state court would not negatively impact the debtors. While it agreed that Chase's motion was untimely under the local rule, the bankruptcy court nevertheless found abstention appropriate *sua sponte* under the applicable federal law, denied the debtors' motion to reconsider abstention, and dismissed the case following the debtors' acknowledgement on the record that there was no other reason for them to stay in the chapter 13 given that the state court was deciding the mortgage dispute. The debtors appealed the denial of the motion to reconsider abstention and the dismissal of the case, asserting that the bankruptcy court coerced them into agreeing to the dismissal on the record. The district court affirmed, finding no abuse of discretion in deciding to abstain, and finding that the docket delay, absence of others in the courtroom, an asterisk by their name on the docket, and presence of a federal marshal in the courtroom were not intimidating but simply evidence that court was in session. The circuit court found it did not have jurisdiction to consider the abstention under 28 U.S.C. § 1334(d), and that the bankruptcy court rather than coercing the debtors, offered them a thorough explanation of its decision and gave them opportunity to ask questions and make comments.

Crawford v. LVNV Funding, LLC, 758 F.3d 1254 (11th Cir. July 10, 2014) (Hull, Walter, and Goldberg, JJ.), *cert. denied*, 2015 WL 246891 (U.S. April 20, 2015) (No. 14-858)

Code § / Rule: FDCPA

Held: Debt collector's filing of a proof of claim for amounts owed under a stale debt was a violation of the FDCPA.

History: 11th Circuit reverses District Court for the Middle District of Alabama, which had affirmed the Bankruptcy Court for the Middle District of Alabama (Williams, Bankr. J.).

Facts: LVNV (a consumer debt buyer and not the original creditor) filed a claim in the debtor's chapter 13 case, the basis for which was a "stale" obligation under Alabama law, the statute of limitations having expired prepetition. The debtor filed a counterclaim via AP, alleging the claim was filed as part of a routine business practice of filing claims on stale debts, which practice violated the Fair Debt Collection Practices Act ("FDCPA"). Judge Williams dismissed the AP, and the district court affirmed. The 11th Circuit reversed, finding that the FDCPA language prohibiting "unfair or unconscionable means to collect or attempt to collect any debt" should be applied using the "least-sophisticated consumer" standard. The circuit court also found that filing a proof of claim is an attempt to collect a debt. The court cited many cases dealing with a debt collectors filing collection suits in state court to collect a stale debt, which has routinely been held a FDCPA violation. Another aspect of the decision that is worth noting is footnote 5, which chastened, "[I]t appears the trustee failed to fulfill its statutory duty to object to improper claims, specifically LVNV's stale claim." Perhaps significantly, the circuit did not address whether the Code displaces or precludes portions of the FDCPA, stating in footnote 7 that the issue was not before it. The preclusion issue is now before the 11th Circuit in *Johnson v. Midland Funding, LLC*, 528 B.R. 462 (S.D. Ala. Mar. 23, 2015), *appeal docketed*, NO. 15-11240 (11th Cir. Mar. 24, 2015). In the *Johnson* case, the district court found that the Code's claim provisions were in irreconcilable conflict with the FDCPA and that the Code's provisions controlled so that a claim under the FDCPA based upon the filing of a proof of claim in bankruptcy was precluded.

Escorihuela. v. Faidengold (In re Faidengold), 577 Fed. Appx. 963, Case No. 14-10587 (11th Cir. Aug. 19, 2014) (unpublished) (Pryor, Martin, and Anderson, JJ.) (per curiam)

Code § / Rule: § 523(a)(2)(A)

Held: Bankruptcy court did not commit clear error in its finding that debtor had not made a false representation or committed actual fraud.

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

Facts: Debtor treated money from the Appellants as a personal loan, having guaranteed them full repayment along with a fixed twelve-percent rate of return. Over the course of several years, the Appellants provided the debtor with over $1.2 million total under this arrangement. There were no limitations on how the debtor could use the money and the debtor was not required to provide statements or reports. This evidence convinced the bankruptcy court, contrary to Appellants' protestations that the debtor had misrepresented to them that he would invest their money in the U.S. stock market for a fixed return with zero risk, that the arrangement was a personal loan rather than an arrangement for the debtor to manage the Appellant's equity investments. Accordingly, the court found the debtor had not misled or defrauded the Appellants with regard to their financial dealings.

General Lending Corp. v. Cancio, 578 Fed. Appx. 832, Case No. 14-10838 (11th Cir. Aug. 21, 2014) (unpublished) (Pryor, Martin, and Edmondson, JJ.) (per curiam)

Code § / Rule: § 109(e); laches

Held: It was not error to deny a motion to dismiss premised upon debt-limit ineligibility for chapter 13 under § 109 when creditor had been aware of the case and could have raised the issue for almost 2 years. The equitable doctrine of laches requires a defendant to establish (1) a delay in asserting a right or claim; (2) that the delay was not excusable; and (3) undue prejudice to the party against whom the claim is asserted.

History: 11th Circuit affirms District Court for the Southern District of Florida, which affirmed the Bankruptcy Court for the Southern District of Florida in denying the creditor's motion to dismiss and in overruling the creditor's objection to confirmation and confirming the plan.

Facts: Chapter13 debtors scheduled unsecured debt over the limit established by § 109(e) in a case filed in April 2010. The creditor at issue held a wholly unsecured third mortgage against the debtors' residence. It was not until March 2012, after prolonged discovery and litigation, that the creditor first filed and pursued a motion to dismiss the case on eligibility grounds and objected to confirmation on grounds of bad faith. The bankruptcy court ruled that the doctrine of laches prevented the creditor's eligibility argument, given that it had missed several opportunities to challenge the debtors' eligibility since July 2010 and that the debtors would be greatly prejudiced by a dismissal after being in the case for nearly two years. The creditor conceded that it overlooked the eligibility issue in its zeal to pursue claims of dishonesty against the debtors, and the debtors had already made 2 years of plan payments when the issue was raised, so that the requirements for laches were satisfied. As for good faith, the *Kitchens* factors were applied by the bankruptcy court without clear error, and the circuit court points out that the

bankruptcy court is in the best position to determine good faith, examine motives, and decide credibility.

Wortley v. Chrispus Venture Capital, LLC (In re Global Energies, LLC), 763 F.3d 1341 (11th Cir. Aug. 15, 2014) (Fay, Hodges, Huck, JJ.) (per curiam)

Code § / Rule: FRBP 9024, FRCP 60(b) relief from judgment

Held: Under Rule 60(b)(2), a movant need show (1) "the new evidence was discovered after the judgment was entered," (2) the movant "had exercised due diligence in discovering that evidence, (3) the evidence was not merely cumulative or impeaching, (4) the evidence was material, and (5) the evidence was likely to produce a different result."

History: Eleventh Circuit reverses and remands with instructions, reversing the District Court for the Southern District of Florida, which had affirmed the Bankruptcy Court for the Southern District of Florida.

Facts: An involuntary chapter 11 was filed as a result of bad faith collusion on the part of petitioning co-owner (Chrispus Venture Capital, LLC which is owned 93% by Tarrant) and another of the debtor's co-owners (Juranitch). The debtor's other owner (Wortley) moved for dismissal early in the case as he suspected such collusion between Tarrant and Juranitch was in play, but had only circumstantial evidence to support his motion. The smoking-gun emails that indisputably established the collusion were not provided early in the case, despite having been requested during discovery and despite the attorney for the bad-actors knowing of their existence. The colluding co-owners also gave sworn testimony that they had no plan to put the company in an involuntary case (which testimony was directly contradicted by the email, once it surfaced, and which was known by the attorney to be false when offered). Given the lack of direct evidence, Wortley withdrew his motion to dismiss the case. During the interim, the trustee sold all the debtor's assets to the colluding petitioning entity (Chrispus), which sale was approved by the court once the motion to dismiss was withdrawn. A year later, Wortley renewed his motion to dismiss the case based upon new evidence: certain emails that appeared to show collusion (though not the smoking-gun email, as it was still being improperly withheld). Finding the new emails were circumstantial and insufficient evidence, the bankruptcy court denied the motion to dismiss, this time with prejudice. It was around that time that Wortley, in state court litigation, at last gained the smoking-gun emails and asked the bankruptcy court to grant relief under Rule 60(b) of the Federal Rules of Civil Procedure based upon the newly discovered emails. The bankruptcy court denied the motion saying the evidence of bad faith changed nothing and that the bankruptcy was "done." On appeal, the district court affirmed and said the new emails were insufficient to justify relief under Rule 60(b). The Eleventh Circuit found the bankruptcy court applied the wrong legal standard by requiring a new issue be raised, not just new evidence that supported an issue already raised. Even if it applied the right standard, the bankruptcy court was said to have made clear errors of judgment and abused its discretion. The lawyer who knew of the emails during the case but had knowingly withheld them and who knowingly allowed false testimony to go unchallenged contributed to the problem. The circuit remanded for the bankruptcy court to grant the Rule 60(b) motion, vacate its order approving the sale of assets to the petitioning creditor (without prejudice to rights of innocent third parties), conduct hearings and exercise all of its powers in law and equity to require disgorgement, sanction, garnish, attach and otherwise assure the bad actors do not profit

from this abuse of the bankruptcy system. Wortley is to be compensated for any and all damages sustained including attorney fees and costs. The circuit court ends the opinion by saying it would impose all of those remedies itself but-for the lack of an appropriate hearing, which is to be conducted by the bankruptcy court on remand.

Tobkin v. Florida Bar (In re Tobkin), Case No. 14-10272, 578 Fed. Appx. 962 (11th Cir. Aug. 28, 2014) (unpublished) (Hull, Martin, and Anderson, JJ.) (per curiam)

Code § / Rule: § 523(a)(7)

Held: On an issue of first impression, the State Bar of Florida is held to be a "governmental unit" for purposes of § 523(a)(7). A disciplinary fine and penalty for which a judgment had been entered against the attorney-debtor was therefore nondischargeable as a "fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss" under § 523(a)(7).

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

Facts: Despite having "admitted" a request for admission that the bar was not a "governmental entity", the court looked at the rights and powers of the Florida Bar, and at the clear weight of persuasive authority in ruling that the Bar is a governmental unit when acting in the sphere of attorney discipline. The debtor presented no contrary legal authority, and relied solely upon the "admitted" request. The circuit court points out that the request for admission of a legal conclusion was not proper in any event.

Atkinson v. Ernie Haire Ford, Inc. (In re Ernie Haire Ford, Inc.), 764 F.3d 1321 (11th Cir. Sept. 4, 2014) (Wilson, Pryor, and Rosenbaum, JJ.)

Code § / Rule: person aggrieved standard for appeal

Held: "[F]or a person to be aggrieved, the interest they seek to vindicate on appeal must be one that is protected or regulated by the Bankruptcy Code." "The purpose of the person aggrieved standard is to prevent bankruptcies from being needlessly prolonged by parties whose interests are not central to the process."

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

Facts: Liquidating chapter 11 plan provided a litigation bar date, by which claims such as the fraud and misappropriation claims raised against the appellant Atkinson had to be asserted. Atkinson was a former creditor, but had withdrawn his claim and resigned from the creditors' committee. After the litigation bar date passed, the liquidating agent filed 16 adversary proceedings in which Atkinson was a named defendant, and Atkinson moved to dismiss the AP's on grounds they were filed after the litigation bar date. In response, the debtor moved to modify the plan to allow the claims against Atkinson to go forward. The bankruptcy court allowed and confirmed the modification, finding substantial assets still remained and that substantial consummation had not occurred. The district court affirmed the granting of the motion to modify and confirmation of the modified plan. Atkinson appealed. The circuit court found that the "person aggrieved" standard applies in determining whether a person can appeal a bankruptcy court's order. Atkinson failed to meet this standard, as he had alleged no "direct harm to interests

the Bankruptcy Code seeks to protect or regulate—that is, appeals that do not further the goals of bankruptcy." Allowing an adversary proceeding to proceed against a person, and without a defense that the order sought to be appealed has taken from that person, does not satisfy the "person aggrieved" standard. Even if he suffered direct harm in being deprived of a defense, his interest is not one protected or regulated by the Code.

Lamarca v. Jansen (In re Bifani), Case No. 14-10826, 580 Fed. Appx. 740 (11th Cir. Sept. 11, 2014) (per curiam) (unpublished) (Wilson, Rosenbaum, and Kravitch, JJ.)

Code § / Rule: Florida's Uniform Fraudulent Transfer Act ("FUFTA") and Florida law regarding equitable liens under Florida law

Held: Case is strictly applying Florida fraudulent transfer law. Once the "badges of fraud" were established by the trustee, the burden shifted to the debtor, who failed to rebut them. Further, homestead property obtained with the proceeds of the fraudulent transfer was subject to an equitable lien under Florida law.

History: Eleventh Circuit reverses the District Court for the Middle District of Florida, which had reversed the Bankruptcy Court for the Middle District of Florida, and agreed with the bankruptcy court's imposition of an equitable lien on homestead property acquired with the proceeds of a fraudulent transfer under FUFTA. All courts agreed the elements of FUFTA were met; but the district court had reversed the imposition of an equitable lien.

Facts: Chapter 7 trustee sued the debtor and his partner under FUFTA alleging that debtor had fraudulently transferred certain real property to the partner, and that the homestead property acquired with the proceeds of that transfer should be subject to an equitable lien. The courts all agreed badges of fraud were present and not rebutted. The 11th Circuit agreed with the bankruptcy court that, under Florida law, homestead property acquired with the proceeds of a fraudulent transfer can be subjected to an equitable lien. The reason is to avoid unjust enrichment of the defrauding party.

Hill v. Suwannee River Water Mgmt. Dist., 583 Fed. Appx. 894, Case No. 14-10609 (11th Cir. Nov. 19, 2014) (per curiam) (Ed Carnes, Chief Judge; Wilson and Fay, JJ.)

Code § / Rule: § 1208

Held: Individual chapter 12 debtor's case was dismissed because the case was filed not to adjust debts, but to attempt to stay execution and void state court judgments, which the bankruptcy court had no power to address on the merits. The case was an "unsubtle attempt to relitigate state court judgments."

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

Facts: Prior to the filing of the individual debtor's chapter 12 bankruptcy, the water district sued a corporation, for which the debtor in this case was the president, for modifying a dam without proper permitting. The state court issued an injunction, and then entered a $100,000 judgment

against the corporation as a civil penalty. The corporation then filed a case under chapter 12, which the bankruptcy court dismissed. After that dismissal, the state court awarded another judgment for an additional $280,000 in fees and costs. Writs of execution issued, and notice was given that the sheriff would levy and execute on certain corporate property to satisfy the judgments. The individual debtor, who was not then in bankruptcy, caused the corporation to deed the levied property to him for $1.00 and then filed his own chapter 12 petition on the day of the sheriff's sale. The water district moved to dismiss the case, and the bankruptcy court agreed. The individual debtor did not propose a feasible plan, and did not satisfy the water district's lien. In addition, the individual debtor did not dispute that the only reason he filed the case was to challenge the state court judgments on the merits, which the bankruptcy court was without authority to do.

United States v. Coulton, 594 Fed. Appx. 563, Case No. 13-13871 (11th Cir. Nov. 25, 2014) (per curiam) (Ed Carnes, C.J.; Restani and Merryday, JJ.)

Code § / Rule: § 362(b)(4)

Held: Section 362(b)(4) exempts a contempt proceeding before a magistrate, which proceeding was based upon the failure to comply with a disgorgement order, and failure to submit personal and business financial affidavits.

History: 11th Circuit affirms District Court for the Southern District of Florida, which adopted the magistrate judge's report and recommendation in assessing a sanction against a debtor in bankruptcy.

Facts: In 2007, Coulton was indicted on various drug and money-laundering charges. Unfortunately, Coulton's family hired Roy (who was not admitted to practice in the district where the action was pending and who has since been disbarred and imprisoned) to defend Coulton. The family paid Roy by transferring to him a vehicle, jewelry, and real property, as well as cashier's checks paid by family members who were unaware that the other property had been transferred as payment. After becoming aware of the excessive compensation, Coulton moved for return of unearned fees and the imposition of sanctions. Roy was ordered to return the legal fees, to cooperate in the return of the property, and if he failed to otherwise comply, to submit personal and business financial affidavits. Roy wholly failed to comply, and filed chapter 7 bankruptcy while the contempt proceeding was pending. The magistrate and the district judge found that the imposition of contempt sanctions was necessary to enforce the court's police power and that § 362(b)(4) therefore exempted the contempt proceeding from the automatic stay in Roy's bankruptcy case. The final contempt order then imposed a monetary sanction, without explicitly evaluating Roy's ability to pay. The primary purpose of the contempt sanction was not to protect Coulton's property but to vindicate the court's interest in redressing the willful disregard of its authority. Even though Coulton and not the government moved for the contempt sanction, the judiciary, in effect, "brought" the contempt proceeding to enforce its regulatory power. "[T]he claim for contempt was at all times an action of the court. The court need not move sua sponte for a sanction—either before or contemporaneous with a party's motion—to preserve the court's distinct interest in compliance with a court order. … The pursuit of

compliance is—by the nature of the court and by the purpose and effect of a sanction—an action by the court." Further, Roy waived the argument that he had no ability to pay by not raising it, in the nature of an affirmative defense.

Sportsman's Link, Inc. v. Klosinski Overstreet, LLP (In re Sportsman's Link, Inc.), 591 Fed. Appx. 865, Case No. 14-12606 (11th Cir. Dec. 10, 2014) (per curiam) (William Pryor, Julie Carnes, and Fay, JJ.)

Code § / Rule: standing to appeal

Held: Appellant lacked standing to request a special investigation, given that any further sanctions that might be imposed would flow not to the appellant but to the debtor's estate. To appeal a bankruptcy court order, one must be "directly, adversely, and pecuniarily affected" by the order. *See In re Ernie Haire Ford, Inc.*, 764 F.3d 1321, 1325 (11th Cir. 2014).

History: 11th Circuit affirms the District Court for the Southern District of Georgia, which affirmed the Bankruptcy Court for the Southern District of Georgia in denying the motion for disgorgement of fees and overruling the objection to the distribution of assets.

Facts: Appellant's former business, Sportsman's Link, Inc., had been in bankruptcy and the attorney representing the company in its bankruptcy case was found to have undisclosed creditor connections that led to the imposition of sanctions and reduction of fees as ordered by the bankruptcy court, upon recommendation of a settlement agreement with the U.S. Trustee. Appellant sought further disgorgement of fees, including the $20,000 retainer he had paid to Klosinski on behalf of the debtor, and also sought an investigation by Special Counsel. The district court found Appellant lacked standing given that he had no pecuniary interest in the retainer or in the fees paid by the estate, and further that he could not benefit from any special investigation given his lack of pecuniary interest in any recovery that might result. The 11th Circuit agreed.

Ghee v. Dept. of Human Res. (In re Ghee), 589 Fed. Appx. 486, Case No. 14-11785 (11th Cir. Dec. 23, 2014) (per curiam) (Tjoflat, Jordan, and Anderson, JJ.)

Code § / Rule: § 523(a)(5)

Held: Circuit court of appeals lacks jurisdiction to review bankruptcy court's decision to abstain from determining amount of child support interest owing; but district court was correct in affirming bankruptcy court's determination that any interest on child support arrears that was owed by the debtor was not discharged under § 523(a)(5) and *In re Diaz*, 647 F.3d 1073 (11th Cir. 2011).

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

Facts: The debtor filed chapter 7 bankruptcy in April 2003, listing a debt to the Alabama Department of Human Resources ("DHR") for interest owing on child support arrears. The debtor was discharged in August 2003. Subsequently, DHR pursued various means of collecting the prepetition child support interest debt, and eventually obtained a state court judgment. In 2011, the debtor filed an AP in bankruptcy court alleging that DHR's collection attempts violated the discharge injunction, and seeking a determination of the amount of child support interest, if any, he owed. The bankruptcy court granted DHR's motion for summary judgment, finding that the debt for prepetition child support interest, whatever the amount may be, was nondischargeable under § 523(a)(5), and therefore any attempts at collection were not violations of the discharge injunction. The bankruptcy court further abstained under 28 U.S.C. § 1334(c)(1) from determining the amount of child support interest, if any, that was owed.

Milian v. Wells Fargo Bank, N.A. (In re Milian), 589 Fed. Appx. 522, Case No. 14-11017; (11th Cir. Jan. 7, 2015) (per curiam) (Hull, Marcus, and Anderson, JJ.)

Code § / Rule: abstention; 28 U.S.C. § 1334(c)

Held: 11th Circuit was without authority, under 28 U.S.C. § 1334(c) to review the district court's decision, which agreed with the bankruptcy court that abstention was necessary and appropriate based upon finding that the debtor was using the bankruptcy court to avoid litigating his mortgage foreclosure case in state court. The parts of the district court's order that went beyond the abstention issue were vacated.

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

Facts: Pro se debtor argued that the defendants did not hold the note and mortgage against his property, that the bankruptcy court was biased against him, and that the bankruptcy court denied him procedural due process and equal protection under the law by refusing to exercise jurisdiction over his adversary complaint. He also claimed the district court did not properly review his claims.

Iberiabank v. Geisen (In re FFS Data, Inc.), 776 F.3d 1299, Case No. 14-11473 (11th Cir. Jan. 23, 2015) (Tjoflat, Jill Pryor, and Cox, JJ.) (opinion by Jill Pryor, J.)

Code § / Rule: chapter 11 general release for non-debtor

Held: Language of chapter 11 plan, which was not objected to by Iberiabank or any other creditor, was sufficient to release Iberiabank's claims against Geisen on his personal guaranty of an obligation that the corporate debtor had also guaranteed to Iberiabank.

History: Eleventh Circuit affirms U.S. District Court for the Southern District of Florida, which affirmed the Bankruptcy Court for the Southern District of Florida.

Facts: In 2007, Geisen and the debtor FFS (which was owned 100% by Geisen), among others, guaranteed a $10.6 million loan to Siena Realty Associates, which was owned 48% by Geisen. The loan was in default when FFS filed chapter 11 bankruptcy in December 2009. Iberiabank filed a claim in the case, and negotiated a forbearance agreement to allow Siena time to attempt to sell the real property securing the loan. To resolve a dispute over Iberiabank's claim in the FFS bankruptcy, the parties entered into a settlement agreement that allowed Iberiabank a $2 million general unsecured claim, but did not mention the claims against Geisen on the guaranty. The bankruptcy court approved the settlement. Then, under the chapter 11 plan, Geisen contributed $750,000 to the estate, released over $1 million in unsecured claims against the estate, and an entity partly owned by Geisen compromised a secured claim thereby allowing for some distribution to unsecured creditors in the FFS case. In exchange, the plan provided for a general release of Geisen by all claim holders by providing that "all holders of Claims agree to a general release of Bradford Geisen", and further provided it was in full and final settlement and compromise of all claims and causes of action that any claim holder had against Geisen and other released parties. Iberiabank did not object to confirmation, and no one appealed the confirmation order.

When Iberiabank later sued Geisen and the other guarantors on the deficiency in state court, Geisen defended by citing the release language in the confirmed plan as res judicata on the issue of his liability to Iberiabank. The case was reopened and the bankruptcy court agreed that the effect of the release language was that "every creditor of FFS was, in effect, giving a general release to Bradford Geisen." The district court and 11th Circuit agreed. The circuit court followed general contract principals in construing the chapter 11 plan and rejected the bank's argument that the release applied only to claims against Geisen in his capacity as an officer or director of the debtor, based on the clear and unambiguous release language in the plan. The circuit also found that the release language was specific enough to be given res judicata effect, and reiterated that "a reorganization plan that is incorporated into a confirmation order has the same res judicata effect" as a confirmation order, provided the elements for res judicata are met. Those elements are "(1) the prior decision must have been rendered by a court of competent jurisdiction; (2) there must have been a final judgment on the merits; (3) both cases must involve the same parties or their privies; and (4) both cases must involve the same cause of action." All were met in this case.

Molette v. TitleMax (In re Molette), 591 Fed. Appx. 934, Case No. 14-410835 (11th Cir. Feb. 4, 2015) (per curiam) (Ed Carnes, C.J.; Marcus and William Pryor, JJ.)

Code § / Rule: Bankr. Rule 9024 (Fed. R. Civ. P. 60)

Held: A Rule 60(b) motion may not be used to revisit claims that have been raised and rejected, and that could have been raised on direct appeal

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

Facts: Pro se chapter 7 debtor appealed the denial of punitive damages under 42 U.S.C. § 1983 against TitleMax of Georgia, following the award of actual and punitive damages under 11 U.S.C. § 362(k), flowing from a postpetition repossession of the debtor's car. The debtor moved three times for the bankruptcy court to reconsider its denial of § 1983 damages, and all three motions were denied. The last of the three motions, and the one at issue in the appeal, was a Rule 9024 (Fed. R. Civ. P. 60) motion for relief from judgment. The bankruptcy court's basis for denial was its finding that TitleMax was not a state actor for § 1983 purposes. The 11th Circuit reiterates that a Rule 60(b) motion may not be used to revisit claims that have been raised and rejected, and that could have been raised on direct appeal. In addition, the court confirms that the bankruptcy court did not err in determining that TitleMax was not a state actor under § 1983.

Stewart Title Guaranty Co. v. Roberts-Dude (In re Roberts-Dude), 597 Fed. Appx. 615, Case No. 13-13620 (11th Cir. Feb. 11, 2015) (per curiam) (Marcus, William Pryor, and Martin, JJ.)

Code § / Rule: § 523(a)(2)(A)—issue of justifiable reliance

Held: Title insurance company justifiably relied upon false affidavit showing no prior encumbrances, when its title search did not reveal the transfer outside the chain and recorded under a different "owner's" name.

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

Facts: The plaintiff title insurance company's agent performed three "date down" title searches prior to closing (running the grantor, grantee, and property description). The agent did not find an improperly recorded deed of trust that showed the debtor's husband as grantor rather than the investment company owned by the husband, which was the named owner on the title commitment in front of the agent. The debtor submitted a false affidavit that showed no encumbrances where it should have listed the existing deed of trust. The four elements of a claim under § 523(a)(2)(A) are (1) the making of false representation with the intent to deceive the creditor; (2) the creditor relied upon the false representation; (3) the creditor's reliance was "justified"; and (4) the creditor suffered a loss as a result of the false representation (which are also the elements of common law fraud). The only disputed element here was the issue of justifiable reliance. Justifiable reliance is satisfied when "[t]he plaintiff's conduct [is not] so utterly unreasonable, in the light of the information apparent to him, that the law may properly say that he loses his own responsibility." *In re Vann*, 67 F.3d. 277, 283 (11th Cir. 1995). The reliance does not have to be that of a reasonable person to satisfy the "justifiable" standard. Reliance is not justified only when the creditor can use its own knowledge and intelligence and through the use of its senses appreciate the falsity of the misrepresentation at the time it is made. The bankruptcy court erred when it found that an experienced title company should have performed a more thorough title search and was not justified in relying upon the false affidavit. This was particularly true where the deed of trust was outside the chain of title.

JWL Entertainment Group, Inc. v. Solby Westbrae Partners (In re Fisher Island Investments, Inc.), 778 F.3d 1172, Case No. 12-15595 (11th Cir. Feb. 20, 2015) (Hull, Julie Carnes, and Walker, JJ.) (opinion by Hull, J.)

Code § / Rule: *Stern* claims distinguished; "person aggrieved" standing to appeal

Held: The issue of who owns and has the ability to control a debtor entity is core and is firmly within the bankruptcy court's jurisdiction under the Constitution, so that *Stern* concerns are not implicated. Further, a person must have a financial stake in the order at issue to maintain standing to appeal.

History: 11th Circuit affirms the District Court for the Southern District of Florida, which affirmed the Bankruptcy Court for the Southern District of Florida (three different bankruptcy cases, which resulted in five consolidated appeals of four orders).

Facts: The consolidated appeals concerned the disputed ownership of and control over three involuntary debtors. The procedural history was that of three bankruptcy cases, which resulted in five consolidated appeals of four orders. All orders were affirmed after oral argument. The unexpected death of a wealthy businessman led to global litigation between the businessman's immediate family on one side and his distant relative and former employee on the other. Each side had a different version of the ownership and control of the three entities that were each debtors in the involuntary bankruptcy cases. After actively participating in litigation and expressly requesting the bankruptcy court to determine the ownership issues, the former employee's group later moved to withdraw the reference under 28 U.S.C. § 157(d) and in light of the then-recent decision in *Stern v. Marshall*, 564 U.S. ___, 131 S. Ct. 2594 (2011). The group admitted to the district court that the ownership issue was core, and that it had originally consented to trial in the bankruptcy court prior to *Stern*, but argued it was nonetheless entitled to have that issue determined by an Article III court following *Stern*. The district courts denied the motion to withdraw the reference and found that the ownership issue was not only core, but was firmly within the bankruptcy court's jurisdiction notwithstanding *Stern.*

The ownership issue was "deeply imbedded" in the bankruptcy cases, as opposed to the state law counterclaim in *Stern*, and the bankruptcy court necessarily had to determine who really owned and was entitled to control the debtor entities in order to rule on creditors' claims. The district courts further found that by expressly consenting to trial before the bankruptcy court, the group had waived any right it may have had to trial before and Article III court. The same reasoning applied to the group's argument that the determination of the ownership issue should have proceeded as an adversary proceeding rather than a contested matter, which was raised only after months of litigating the issues as contested matters and was an "invited error" if it was error at all. The group's arguments regarding joinder were also rejected.

On appeal, the 11th Circuit consolidated the three cases. As an initial matter, the circuit court found that the district court was correct insofar as the ownership issue at stake was core, and, even if not core, did not in any event implicate the concerns about Article III adjudication that drove the result in *Stern*. Therefore, they expressly declined to weigh in on whether a party could consent to the bankruptcy court's adjudication of a *Stern* claim (and citing *Exec. Bens. Ins.*

Agency v. Arkison, 573 U.S. ___, ___, 134 S. Ct. 2165, 2175 (2014) in which the Supreme Court similarly declined to answer that question). They point out that the *de novo* review by the district courts mitigated any Article III concerns in any event. The circuit court distinguished the ownership issue from *Stern* issues, primarily because it was necessarily resolved by the bankruptcy court as part of adjudicating the petitioning creditors' claims, even though ownership was not determined by bankruptcy law and did not involve any "public rights" or result from a federal statutory scheme. Thus, the bankruptcy court had both statutory and constitutional authority to enter a final judgment as to the ownership issue and the denial of the motion to withdraw the reference was not error. The "laundry list" of other assignments of error were not remarkable. The circuit court emphasized its "person aggrieved" standard for standing on appeal: the would-be appellant must show a financial stake in the order at issue and could not do so here where the order "did not diminish their property, increase their burdens, or impair their rights." It was therefore unnecessary to decide whether attendance and objection in the bankruptcy proceeding is required for prudential standing to appeal the bankruptcy court's order.

DVI Receiveables, XIV, LLC v. Rosenberg (In re Rosenberg), 779 F.3d 1254, Case No. 13-14781 (11th Cir. Feb. 27, 2015) (Hull, Julie Carnes, and Walker, JJ.) (opinion by Hull, J.)

Code § / Rule: § 303, standing as petitioning creditor

Held: In a case of first impression, the circuit court ruled that nothing in the statute limited the fees that could be awarded to those incurred before the bankruptcy court (as opposed to the district court in the jury trial bad faith matter) and also that nothing in the statute kept the bankruptcy court from awarding fees for defending the appeals of the dismissal order.

History: 11th Circuit affirms in part, vacates in part, and remands for further proceedings, following District Court for the Southern District of Florida ruling that affirmed the Bankruptcy Court for the Southern District of Florida.

Facts: Various DVI entities filed an involuntary petition against the debtor Rosenberg. After the bankruptcy court's dismissal of the involuntary petition, the bankruptcy court awarded costs and attorney fees to the debtor. The DVI entities were special purpose entities that actually obtained loans from and issued notes to noteholders, which notes were secured by leases on certain medical equipment. The securitization transactions were complex, but the key fact for purposes of this ruling was that a successor servicer, Lyon, entered into a settlement agreement to restructure certain obligations of Rosenberg's companies under some of the equipment leases, and did so in its capacity as successor servicer for the DVI entities and as agent for the trustee for the noteholders. Those DVI entities were not parties to the restructuring settlement agreement and did not sign the agreement. As part of the agreement, Rosenberg signed an individual personal guaranty to Lyon as servicer for the DVI entities and agent for the trustee, which superseded all prior guaranties. The obligations under the guaranty ran solely to Lyon and could be enforced solely by Lyon. Approximately three years after the settlement agreement, the DVI entities as petitioning creditors filed an involuntary bankruptcy against Rosenberg, asserting that the amounts owing under his personal guaranty of the settlement agreement supported the petition.

Under § 303, an involuntary petition must be brought by at least 3 eligible creditors, with each holding a separate claim, and which claims must not be contingent or subject to dispute as to amount or validity. Lyon was not named as a petitioning creditor, either as servicer for the DVI entities or as the agent for the noteholders' trustee. The evidence showed, however, that Lyon actually filed the petition on behalf of the DVI entities. The evidence also showed that no one at Lyon ever contacted any of the DVI entities before filing the petition, and that the DVI entities had in fact been administratively dissolved at the time of the filing of the petition. Lyon acted on its own in filing the petition.

The bankruptcy court granted Rosenberg's motion to dismiss, finding that the DVI entities were not creditors of Rosenberg due to the fact that his guaranty was only to Lyon and not to the DVI entities; and further finding that the DVI entities were not real parties in interest but only "pass through" securitization vehicles, so that they had no standing to file the petition. Finally, the bankruptcy court also found that Lyon had taken an inconsistent position in the state court case that led to the settlement agreement and guaranty. Rosenberg filed an AP under § 303(i) to recover attorney fees, costs, and damages as a result of the involuntary petition (and also for bad-faith damages). The bankruptcy court awarded fees not only for the dismissal of the case but also for defending two appeals from the dismissal, which totaled slightly over $1 million. A jury trial was had on the bad-faith damages claim, which was withdrawn from the bankruptcy court, and over $6 million in bad faith damages were awarded. The district court affirmed the bankruptcy court's award.

On appeal, the 11th Circuit looked at four aspects of the attorney fees: (1) fees incurred to obtain dismissal of the involuntary case; (2) fees incurred to defend that dismissal order on appeal; (3) fees on fees, that were fees incurred in the adversary proceeding itself to recover the first 2 sets of fees; and (4) fees incurred to prosecute the bad faith damages claim in the district court jury trial. The subsets at issue in the appeal are the appellate fees (number (2) above) and the bad faith jury trial fees (number (4) above) as well as any fees incurred to recover those two sets of fees. Focusing on the statutory language of § 303(i), in a case of first impression, the circuit court ruled that nothing in the statute limited the fees that could be awarded to those incurred before the bankruptcy court (as opposed to the district court in the jury trial bad faith matter) and also that nothing in the statute kept the bankruptcy court from awarding fees for defending the appeals of the dismissal order. This is contrary to the 9th Circuit, the only other circuit to address the issue with regard to appellate fees, which ruled that the bankruptcy court could not award appellate fees. *See Higgins v. Vortex Fishing Sys., Inc.*, 379 F.3d 701 (9th Cir. 2004). However, the circuit court found that the timing of the bad-faith trial fee award was premature, since it was issued before the conclusion of the bad-faith proceedings in district court. That amount should be deducted, and could be redetermined upon presentation of a motion to supplement the award.

SE Property Holdings, LLC v. Seaside Engineering & Surveying, Inc. (In re Seaside Engineering & Surveying, Inc.), 780 F.3d 1070, Case No. 14-11590 (11th Cir. March 12, 2015) (Martin, Anderson, and Cote, JJ.) (opinion by Anderson, J.)

Code § /Rule: Authority of bankruptcy courts to enter non-consensual, non-debtor releases ("bar orders") and the circumstances under which such orders are appropriate

Held: Third-party releases in chapter 11 plans may be appropriate in unusual cases, when needed to prevent claims against non-debtors that would undermine the operations of, and doom the possibility of success for, the reorganized entity

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

Facts: The debtor Seaside Engineering is an engineering firm whose partners individually branched out into the real estate development business. The partners formed wholly separate entities for that purpose, and personally guaranteed loans by Vision Park Properties, LLC to those entities. When they were sued by Vision under the personal guarantees after default by the real estate entities, three of the principals filed chapter 7 bankruptcy. In one of those individual cases, Vision was the successful purchaser of the principal's interest in Seaside Engineering. Soon after the sale of that stock, Seaside filed chapter 11. In its plan, Seaside proposed to reorganize and continue operations as Gulf Atlantic, LLC, valued at $200,000 and to be managed by four of the original principals and owned by irrevocable family trusts of each of those principals. The new owners would pay for their ownership interest by issuing promissory notes with interest to the outside equity owners in Seaside, including Vision, so that Vision would have no ownership interest in the reorganized entity. Vision objected and the plan was confirmed over its objection. The issues on appeal related to valuation and the composition of the reorganized entity.

The bankruptcy court correctly valued the entity as a going concern while considering future losses as is appropriate in analyzing the discounted cash flow of a going concern, and properly selecting a discount rate to calculate the present value of the company based on cash flow. It was not error to consider the risk of loss of key employees in selecting the appropriate discount rate. In addition, the approval of releases of claims for non-debtors as part of the plan was not in error. The circuit court examined the history of non-debtor releases in this circuit and others, and followed the majority view in allowing the releases where, as here, "the releases prevent claims against non-debtors that would undermine the operations of, and doom the possibility of success for, the reorganized entity." Such "bar orders" are not to be issued routinely and should be used only in those unusual cases where such provisions are necessary for the success of the reorganized company, and where fair and equitable under the totality of the circumstances. As a guide, the circuit recommended the seven-factor analysis set forth in *Behrmann v. National Heritage Foundation*, 663 F.3d 704, 712 (2011 (4th Cir. 2011) and *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002).

George Russell Curtis, Sr. Living Trust v. Perkins (In re International Mgmt. Assoc., LLC), 781 F.3d 1262, Case No. 14-13423 (11th Cir. March 19, 2015) (per curiam) (Ed Carnes, C.J.; Hull and Rosenbaum, JJ.)

Code § / Rule: hearsay; Fed. R. Evid. 1006 and 803

Held: "When deciding whether an exception to the rule against hearsay applies, the court may consider any unprivileged evidence—even hearsay."

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

Facts: The debtor entity was nominally a hedge fund but operated as a Ponzi scheme. The defendants were investors who put $500,000.00 into the debtor entity, and received disbursements of $621,000.00, including a $200,000.00 transfer on January 10, 2006. On March 6, 2006, a state-court-appointed receiver placed the debtor into bankruptcy for which he then served as trustee, and filed a series of avoidance A.P.'s seeking to recover distributions to investors made shortly before the case was filed. The bankruptcy court held a consolidated hearing to determine if the debtor was a Ponzi scheme, at which the trustee was the only witness. The court admitted the trustee's summary charts of the debtor's finances under Fed. R. Evid. 1006. The court found the debtor was a Ponzi scheme, and then separately adjudicated the various transfer claims, allowing the trustee to avoid the $200,000 transfer to the defendants. On appeal, the circuit court examined whether the trustee established the business records exception by showing that the underlying documents were authentic, and that they met the requirements of Fed. R. Evid. 803(6). The trustee was allowed to meet his authentication burden with circumstantial evidence of the documents' authenticity through the testimony of a witness knowledgeable about them. The defendants argued that the trustee's testimony was inadmissible to establish authenticity because it was based on hearsay—his interviews with the debtor's principals and employees. The circuit court pointed out that "when deciding whether an exception to the rule against hearsay applies, the court may consider any unprivileged evidence—even hearsay." "As long as the trustee presented enough circumstantial evidence to establish the trustworthiness of the underlying documents, he did not need to present testimony from the person who actually prepared them; his own testimony would suffice."

Wilmington Trust Co. v. Jefferies Leveraged Credit Products, LLC (In re TOUSA, Inc.), 598 Fed. Appx. 761, Case No. 14-12067 (11th Cir. March 26, 2015) (Martin, Dubina, and Rodgers, JJ.) (opinion by Martin, J.)

Code § / Rule: issue of contract interpretation; § 365(g)

Held: disputed claims were entitled to Senior Debt status as defined under the relevant agreements

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

Facts: Debtor TOUSA Homes, Inc. and its affiliated companies (also debtors) operated a housing construction business for single-family homes, town homes, and condominiums. From 2003 to 2006, the company contracted to sell land while retaining the right to develop and market housing developments on the land, with an obligation to repurchase the land over time. The company had other obligations under the contracts at issue, such as monthly lot option fees, insurance, and taxes. When the debtor affiliate companies filed for chapter 11 in January 2008, they rejected the land sale agreements leaving the landowners with unsecured claims for damages. The parties agreed to the amount of the damages, and a plan was confirmed, giving rise

to the issue on appeal of what priority the landowners' damages claims should have under the confirmed plan. The court examined a subordination contract and determined that under the language of the contracts, the agreements did create "debt" which by the plain language of the subordination agreements qualified as "Senior Debt" so that the noteholders for those obligations must share that status, as a matter of contract interpretation. Of bankruptcy significance, the court points out that § 365(g) is really a timing mechanism, and that its rejection provisions have no "impact on the contractual subordination of debts used to structure claim payments."

Ward v. AMS Servicing, LLC, ---Fed. Appx. ---, Case No. 14-14052 (11th Cir. March 31, 2015) (per curiam) (Rosenbaum, Kravitch, and Anderson, JJ.)

Code § / Rule: judicial estoppel

Held: Debtor was bound by stipulation as to monthly payment amount that was incorporated into an agreed order conditionally denying relief from stay and was judicially estopped from pursuing the creditor in a later proceeding on grounds that the agreed-to payment amount was incorrect.

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

Facts: Ward appealed the district court's dismissal of her FDCPA complaint against AMS. The original residential mortgage transaction at issue was between Ward and Resmae, with a security deed in favor of MERS as nominee for Resmae. Specialized Loan Servicing was the original servicer. Specialized and Ward entered into a modification agreement about a year before the security deed was transferred from MERS to FCDB. AMS, the defendant, acts as servicer for FCDB. Ward then defaulted and filed chapter 13. In the bankruptcy case, FCDB moved for relief from stay in order to foreclose, among other things. The parties entered into a consent agreement, presented to the judge and signed as a conditional denial order, wherein the parties stipulated that the postpetition arrears payments of $1,319.50 each were due and stipulating to an amount certain that needed to be cured. About 6 months later, Ward sued AMC in district court claiming that AMC violated the FDCPA by making a false representation about the amount of her monthly mortgage payments, claiming that her regular payment should be $1,182.89. AMC moved to dismiss asserting, among other things, that Ward had stipulated to the higher monthly payment amount in the bankruptcy. The proceeding was heard by a magistrate who recommended dismissing Ward's claim based on judicial estoppel. He believed Ward was estopped from arguing in the district court case an inconsistent position regarding the monthly payment amount than she stipulated in the bankruptcy, and the district court adopted the report and recommendation over Ward's objections, which led to this appeal.

The factors that generally govern a judicial estoppel determination as discussed in *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001), are: "(1) whether the present position is clearly inconsistent with the earlier position; (2) whether the party succeeded in persuading a court to accept the earlier position, so that judicial acceptance of the inconsistent position in a later position would create the perception that either the first or second court was misled; and (3) whether the party advancing the inconsistent position would derive an unfair advantage." These factors are consistent with 11th Circuit precedent prior to the *New Hampshire* decision, which utilized a 2-factor test in applying judicial estoppel, while allowing for due consideration of the

totality of the circumstances in each case: "(1) that the allegedly inconsistent position was made under oath in a prior proceeding; and (2) such inconsistencies must be shown to have been calculated to make a mockery of the judicial system." *See Taylor v. Food World, Inc.*, 133 F.3d 1419, 1422 (11th Cir. 1998). The circuit court found that the dismissal on judicial estoppel grounds was appropriate under that precedent as applied to the facts of this case.

Porter Capital Corp. v. Haley (In re Haley), ---Fed. Appx. ---, Case No. 14-12557 (11th Cir. April 6, 2015) (per curiam) (Marcus, Rosenbaum, and Ginsburg, JJ.)

Code § / Rule: 28 U.S.C. § 157(c)(1); Bankr. Rule 9033

Held: Bankruptcy and district courts correctly weighed the evidence, and the circuit court would not re-weigh the evidence on appeal; the creditor objecting to discharge did not meet its burden of proof**.**

History: 11th Circuit affirms District Court for the Northern District of Alabama, which adopted without modification the proposed findings and conclusions of the Bankruptcy Court for the Northern District of Alabama (Stilson, Bankr. J.).

Facts: Porter Capital claimed it was entitled to payment from Sobcon Concrete Company for construction materials that were delivered by the debtor's supply company to Subcon. Porter Capital had a factoring agreement with the debtor's company, and wanted double payment from Sobcon for payments that Sobcon made directly to the debtor's company. Porter Capital had paid the usual 80% advance to the debtor's company, and sought payment on 19 invoices directly from Sobcon. The legitimacy of 14 of the invoices was the main factual dispute in the case. Porter Capital filed a nondischargeability AP against the debtor Haley on grounds that the invoices at issue were fraudulent and that his company had never supplied the materials for which it invoiced Subcon. In its fourth amended complaint, Porter Capital then also asserted that Sobcon did receive the invoiced products and was therefore liable on the invoices to Porter Capital and should be liable for double payment under the UCC given that it was aware of the terms of the factoring agreement, which required payment directly to Porter Capital.

The bankruptcy court ruled that Porter Capital had proved neither that the invoices were fraudulent (as would be required for the core nondischargeability claim), nor that the products were ever delivered to Subcon (under the non-core claim added by amendment against Subcon). The bankruptcy court also found that Subcon did not have notice of the factoring agreement and so was not liable for double payment on invoices it had paid directly to the debtor's company. Its rulings as to the non-core claims against Subcon were submitted as proposed findings and conclusions (after a motion to alter the judgment to that effect) and were then adopted by district court over Porter Capital's objection. Porter Capital did not appeal the nondischargeability ruling to the district court (thereby allowing a ruling that the invoices were not fraudulent), and that was fatal to its claim that the products were never delivered. The district court emphasized the intertwined nature of the core and noncore claims, and invoked res judicata to find that the unappealed resolution of the core matter precluded Porter Capital from rearguing those same legal and factual issues as to its non-core claim. Alternatively, the district

court said that upon de novo review of the record, it reached the same conclusions as the bankruptcy court.

On appeal to the 11th Circuit, the circuit court found that the district court properly conducted a de novo review of the bankruptcy court's recommendation, as evidenced by the district court's explicitly saying it had reached the same conclusion as the bankruptcy court following its own de novo review. Quoting the bankruptcy court was not evidence that the district court had failed to review and weigh the evidence anew. Further, the recommendation as adopted by the district court was not clearly erroneous and the correct burden of proof was applied. The circuit court would not reweigh the evidence. By so ruling, the circuit court avoiding opining on whether the district court properly applied the principals of res judicata to the case.

Neidich v. Salas, ---F.3d ---, Case No. 14-13768 (11th Cir. April 17, 2015) (Jordan, Julie Carnes, and Goldberg, JJ.) (opinion by Jordan, J.)

Code § / Rule: dismissal moots appeal of issue that arose in the case

Held: The dismissal of a chapter 13 case moots an appeal arising from the debtor's bankruptcy proceedings.

History: Appeal from the Southern District of Florida; appeal deemed moot and opinions of the Bankruptcy Court and District Court for the Southern District of Florida vacated.

Facts: The issue on the merits was whether the debtor could deduct from disposable income scheduled payments on secured mortgage debt even though he was not making those payments. That question was not answered, as the debtor voluntarily dismissed his case months after briefing the appeal. Accordingly, at the time of the ruling on the appeal, there was no chapter 13 plan in existence that took the objected-to deduction. The Eleventh Circuit joined the Tenth, Ninth, and Seventh Circuits as well as the First and Eighth Circuit BAPs in holding that the dismissal of the underlying case mooted the appeal that arose from that case.

Russell v. Redstone Federal C.U., ---Fed. Appx. ---, Case No. 14-10498 (11th Cir. April 15, 2015) (per curiam) (Jordan, J. Pryor, and Anderson, JJ.)

Code § / Rule: *sua sponte* dismissal by district court

Held: Proper notice and opportunity to respond was not afforded prior to a district court's *sua sponte* dismissal of a former debtor's claims against numerous parties.

History: 11th Circuit vacates and remands to the District Court for the Northern District of Alabama.

Facts: *Pro se* debtor filed suit in U.S. District Court against a credit union and attorneys for the credit union alleging a laundry list of violations in obtaining a state court judgment against him

in 1996 and 1997, which he claimed forced him into bankruptcy in 2011. The debtor also sued the chapter 13 trustee and the trustee's counsel, as well as his own attorneys in the 2011 bankruptcy proceeding. The district court dismissed the complaint against all defendants *sua sponte*, after denying the debtor *in forma pauperis* status, on the basis of res judicata and denied a request for injunctive relief to stop foreclosure on the debtor's home. *Sua sponte* dismissal was inappropriate in light of the circuit court's precedent in *Jefferson Fourteenth Assoc. v. Wometco de Puerto Rico, Inc.*, 695 F.2d 524 (11th Cir. 1983), which prohibits *sua sponte* dismissal in the following instances: (1) the defendant has not filed and answer and so the plaintiff still has the ability to amend the complaint under FRCP 15(a); (2) the plaintiff's claim was brought in good faith and is not vexatious or patently frivolous; and (3) the district court had not provided the plaintiff with notice of its intent to dismiss or an opportunity to respond. Because no such notice was given here, the *sua sponte* dismissal was vacated and the case remanded.

Valone v. Waage (In re Valone), --- F.3d---, Case No. 14-11457 (11th Cir. April 29, 2015) (Wilson, Faye, and Ripple, JJ.) (opinion by Wilson, J.)

Code § / Rule: Florida homestead and wildcard exemption interplay

Held: Florida debtor could still claim wildcard exemption when the benefit of home protection in chapter 13 was a result of the automatic stay rather than of the homestead exemption.

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

Facts: The debtors were homeowners who filed chapter 13. The trustee took the position that under Florida Statute § 220.25(4), since the debtors had the "benefit" of home protection in chapter 13, they should be prohibited from utilizing the personal property wildcard exemption. The debtors had no equity in their home and so had not claimed a homestead exemption. The bankruptcy court cited an opinion by the Florida Supreme Court, *Osborne v. Dumoulin*, 55 So. 3d 577 (Fla. 2011), which held that a debtor may still receive the benefits of the homestead exemption without claiming it on the bankruptcy petition, and thereby be ineligible to claim the wildcard exemption. The circuit court, in reversing, said courts should consider the facts of each case to determine the true source of the protection of the debtors' home, and decide if it is the homestead exemption, or some other source. Under the facts of this case, it was the automatic stay that protected the home from creditors, not the homestead exemption, and so the debtors were eligible to claim the wildcard. Further, if the trustee's argument had prevailed, the debtors would have paid more under the chapter 13 best interest test than the creditors would actually receive in a liquidation.

Davis v. Shepard (In re Strickland and Davis Int'l, Inc.), ---Fed. Appx. ---, Case No. 14-13104 (11th Cir. May 11, 2015) (per curiam) (Tjoflat, Wilson, and Julie Carnes, JJ.)

Code § / Rule: Bankr. Rule 9006, jurisdiction over *pro se* notice of appeal filed by corporation and not by counsel, and equitable mootness

Held: Rule 9006(f) is read as extending any deadline contained in an order, when that order is served by mail on the party subject to the deadline, by three days even when the deadline itself did not run from the date of service but from the date of entry of the order. A corporation's *pro se* notice of appeal is not a jurisdictional defect and the corporation should be given an opportunity to retain counsel before the appeal is dismissed. Appeals were correctly dismissed on grounds of equitable mootness where no stay pending appeal was sought and the distributions under the plan had been completed more than 2 years prior.

History: 11th Circuit affirms the District Court for the Northern District of Alabama, in dismissing appeal from the Bankruptcy Court for the Northern District of Alabama (Caddell, Bankr. J.)

Facts: Three notices of appeal were at issue in this case. One of the notices was originally filed incorrectly. It was then correctly filed more than 14 days after entry of an order by the bankruptcy court that gave the filer 14 days *from entry of the order* to correct deficiencies with the first version of the notice of appeal. The district court dismissed the corrected notice of appeal as untimely because it was filed more than 14 days after entry of the order that gave 14 days to cure the deficiencies with the first notice of appeal. The circuit court found error, and said that because the bankruptcy court's order was served on the filer by mail, Bankr. Rule 9006(f) added an additional 3 days to the deadline contained in the order, which meant the notice was timely after all. The circuit court's discussion of Rule 9006 indicates that this would be its ruling anytime an order was served by mail, without regard to whether the deadline at issue ran from service or, as was the case here, from entry of the order, or from some other triggering event. This broad rule seems to contradict the language of Rule 9006(f) which adds the three days only when the deadline at issue is calculated from the date of service, and which provides: "When there is a right or requirement to act or undertake some proceeding *within a prescribed period after service* and that service is by mail or under Rule 5(b)(2)(D), (E), or (F) F. R. Civ. P., three days are added after the prescribed period would otherwise expire under Rule 9006(a)." Bankr. Rule 9006(f) (emphasis added). The consequences of this unpublished interpretation could be tremendous if applied to every deadline that is served on parties by mail in bankruptcy. For a case dealing with the same deadline and reaching the opposite conclusion, see *Matter of Arbuckle*, 988 F.2d 29 (5th Cir. 1993) (The 3-day extension does not apply to the deadline for filing a notice of appeal because the time to appeal runs from entry of the order and not from service).

The district court found that it could not exercise jurisdiction over the *pro se* corporation's notice of appeal in light of 28 U.S.C. § 1654, which provides that a corporation must be represented by counsel in federal courts. The district court cited *Securities & Exchange Comm'n v. Merchant Capital, LLC*, 486 Fed. Appx. 93, 94 n. 1 (11th Cir. 2012), which stated that the filing of notices of appeal for a corporation by non-attorneys was not sufficient to confer jurisdiction over the appeal. To the contrary, the circuit court said that its other non-binding precedent, along with other published decisions by it and other circuits, indicated that the requirement of counsel does not deprive the court of jurisdiction over matters filed by non-counsel, and that notice and an opportunity to retain counsel should be given before dismissing an appeal for failure to comply with 28 U.S.C. § 1654.

In the end, it mattered not as the circuit court affirmed the district court on the ground that the appeals were equitably moot. The appellants did not seek a stay pending appeal, and the trustee completed his liquidation and distribution of the estate over 2 years before the appeal was decided. Granting relief at this point would require undoing a state foreclosure sale and any resulting sales of certain real property of the estate.

SELECT SUPREME COURT CASES

Executive Benefits and Ins. Agency v. Arkinson (In re Bellingham Ins. Agency, Inc.), 134 S. Ct. 2165 (2014). Justice Thomas authored the unanimous decision allowing bankruptcy courts to issue proposed findings and conclusions, subject to the district court's de novo review, for claims that must be adjudicated by an Article III court. The Court did not answer the question of whether the parties could consent to entry of final orders by the bankruptcy court on claims that would otherwise have to be adjudicated by an Article III court, and whether that consent could be implied. The underlying issue was the chapter 7 trustee's pursuit of fraudulent transfer claims against a non-debtor, which fell directly under the *Stern* classification of core-but-not-constitutionally-permitted-to-be-adjudicated-by-an-Article I judge claims.

Clark v. Rameker, 134 S. Ct. 2242 (2014). Justice Sotomayor authored the Court's opinion holding that an inherited IRA cannot be exempted under § 522(b)(3)(C). The inherited funds did not operate with the same restrictions and rules as ordinary IRA's and thus were not "retirement funds" within the meaning of § 522(b)(3)(C).

Bullard v. Blue Hills Bank, 135 S. Ct. 1686 (2015). Chief Justice Roberts wrote for the unanimous Court. The opinion held that the denial of confirmation is not a final order. Debtors must either have their cases dismissed or confirm a different plan before they can appeal an order denying confirmation. The relevant "proceeding" that must be concluded for appeal is "the process of attempting to arrive at an approved plan that would allow the bankruptcy to move forward." The denial of confirmation leaves that process open and the debtor free to propose another plan and so is not "final."

Harris v. Viegelahn, ---S. Ct.--- (May 8, 2015) (appeal from ***Viegelahn v. Harris***, 757 F.3d 468 (5th Cir. 2014) which is now reversed). Justice Ginsburg authored the unanimous opinion of the Court, which holds that "a debtor who converts to chapter 7 is entitled to return of any postpetition wages not yet distributed by the Chapter 13 trustee." The conversion from chapter 13 to chapter 7 is effective immediately upon filing of notice and the chapter 13 trustee's services are terminated immediately upon filing of the notice of conversion under § 348(e). This result comports with the Congressional design that protects postpetition wages from entering the converted chapter 7 estate under § 348(f)(1)(A) in the absence of bad faith. The chapter 13 trustee has no authority to perform "services" under § 1326(c), including making payments to creditors, upon conversion. Further, the binding effect of a confirmed plan under § 1327(a) and the instruction that the trustee distribute payments in accordance with the plan under § 1326(a)(2) cease to apply upon conversion. The Court states that distributing funds to creditors is not an authorized "winding up" task under Rule 1019. While the postpetition wages held by

the chapter 13 trustee “may have been” property of the estate prior to conversion, “estate property does not become property of creditors until it is distributed to them.”

Wellness International v. Sharif, 727 F.3d 751 (7th Cir. 2013), *cert. granted*, 134 S. Ct. 2091 (July 01, 2014) (No. 13-935). Oral arguments were heard in January 2015. The issues that will hopefully be addressed include whether the underlying presence of a state law claim in a § 541 action brought by a non-debtor to determine if the asset at issue is in fact estate property deprives the bankruptcy court of constitutional authority to enter a final judgment in the § 541 action; and whether the parties can consent to the bankruptcy court’s entry of a final judgment as to a claim over which the bankruptcy court does not otherwise have constitutional authority by virtue of *Stern*; and if so, what actions may result in implied consent. In the *Sharif* case, the underlying issue is whether assets of a certain trust are in fact assets of the estate given that the trust is alleged to be the debtor’s alter ego, so that the concealment of those trust assets by the debtor would justify denial of discharge.

Bank of America v. Caulkett, 566 Fed. Appx. 879 (11th Cir. 2014), *cert. granted*, 135 S. Ct. 674 (Nov. 17, 2014) (No. 13-1421). The Court is expected to determine whether § 506(d) permits a chapter 7 debtor to strip off a completely underwater junior mortgage lien. The Eleventh Circuit has been allowing such strip offs under *McNeal v. GMAC Mortg., LLC (In re McNeal)*, 735 F.3d 1263 (11th Cir. 2012) and following *Folendore v. United States Small Bus. Admin.,* 862 F.2d 1537 (11th Cir. 1989). It is speculated that the Court may take this opportunity to overturn *Dewsnup v.Timm*, 502 U.S. 410 (1992), which held that a chapter 7 debtor could not “strip down” a lien on real property to its judicially determined value, given that the claim was both “allowed” and “secured” and so could not be “not an allowed secured claim” under § 506(d).