11TH CIRCUIT CASES UPDATE
June 2015-April 2016

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

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Eleventh Circuit Cases Update
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Northern District of Alabama, Eastern Division[1]

Walston v. PYOD, LLC (In re Walston), 606 Fed. Appx. 543 (11th Cir. June 2, 2015) (Hull, Rosenbaum, and Jill Prior, JJ.) (per curiam).

Code § / Rule: §§ 501, 502, and Rule 3001

Held: A claim that otherwise is prima facie valid, filed in compliance with Rule 3001, does not lose its prima facie validity even if the supporting documents could not withstand a hearsay objection in state court.

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

Facts: PYOD filed 2 proofs of claim in the debtor's chapter 13 bankruptcy, each representing amounts owed on credit card accounts. The claim was supported by documents tracking the transfer of the debt to PYOD from the original holder, Citibank, including an affidavit by PYOD's employee regarding the books and records transferred to Sherman Acquisition and then to PYOD. The debtor objected to the claims on grounds that they were unenforceable under Georgia law because the support for the claims was inadmissible hearsay so that the claims were not entitled to prima facie validity; and alternatively because even if prima facie valid, that validity was overcome by debtor's argument that the support for the claims was inadmissible under state law. The bankruptcy court, district court, and 11th Circuit rejected the debtor's reasoning. There was no dispute that the claim as filed adhered to Fed. R. Bankr. Form 10, as required by Rule 3001(a) and under the provisions of Rule 3001(c)(3)(A) for open accounts. Nothing in those rules requires the claim support to be admissible under state law hearsay rules, and so requiring would defeat the provisions of Rule 3001 insofar as it sets out what must be attached to the claims. The court would not place an additional requirement into the rule by requiring that the claim attachments also be admissible over hearsay objection. The claim was prima facie valid under Rule 3001(f) and the debtor's objection was nothing more than an evidentiary challenge, unsupported by the rules, which did not overcome the prima facie validity of the claim as filed. He offered no evidence to overcome the claims' validity and relied solely upon the "hearsay" challenge, which the court rejected.

[1] These materials were prepared with the assistance of Alyssa Ross, law clerk to Chief Judge Robinson.

Coen v. Stutz (In re CDC Corporation), 610 Fed. Appx. 918 (11th Cir. June 11, 2015) (Tjoflat, Prior, and Baldock, JJ.) (opinion by Baldock, Circuit Judge for the 10th Circuit sitting by designation).

Code § / Rule: *Barton* doctrine; related-to jurisdiction under 28 U.S.C. § 157(a)

Held: *Barton* doctrine applied to court-approved general counsel for the debtor where the bankruptcy court had approved documents that confirmed the defendant as general counsel for the debtor and the liquidating trust, so that the defendant was "at least as connected to the estate as attorneys or investigators hired by the trustee, whom we have deemed covered by the doctrine." Also, a sufficient nexus existed between the suit and the estate to support related-to jurisdiction.

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 CDC Corporation, predecessor to CDC Liquidation Trust, filed a voluntary chapter 11 petition. Watson was approved by the bankruptcy court as chief restructuring officer, with the understanding that Watson would function in most respects similarly to a chapter 11 trustee. Watson then asked Stutz to continue as the general counsel for the debtor corporation, and the bankruptcy court approved a services agreement between the debtor and Stutz. The main asset in the case was ownership of shares of CDC Software. Watson decided that the debtor should sell its shares, but CDC Software resisted. In response, the debtor corporation altered CDC Software's board of directors by installing Stutz as a new board member. Thereafter, CDC Software issued a 6-K report that Coen claimed was defamatory. Some months later, the bankruptcy court confirmed the debtor's plan that included release language for certain parties, including Stutz. A few months after confirmation, Coen sued Stutz and others in federal district court in Georgia, claiming defamation and tortious interference. Upon learning of the plan's release language, Coen sought permission of the bankruptcy court to continue his suit against Stutz, which the bankruptcy court denied based upon the broad language of the release. Alternatively, the bankruptcy court ruled that the *Barton* doctrine would apply and said it would not grant permission to sue under the *Barton* doctrine in any event. The district court found that Coen had conceded the *Barton* doctrine's applicability, and that the release language in the plan barred suit as well. On appeal to the 11th Circuit, Coen argued that the bankruptcy court did not have jurisdiction to hear his suit against Stutz, and that the *Barton* doctrine did not apply.

The 11th Circuit found that the bankruptcy court would have jurisdiction because there was sufficient nexus between the suit and the estate under the "conceivably have an effect" test of *Miller v. Kemira, Inc. (In re Lemco Gypsum, Inc.),* 910 F.2d 784, 788 (11th Cir. 1990). The extremely broad "related to" jurisdiction applied where, as here, the suit targets an estate fiduciary, concerning actions taken to facilitate the debtor's bankruptcy, and which claims could trigger the debtor's Director and Officer insurance if successful, which would diminish the policy's reserve and affect the debtor's rights and liabilities. Also, the circuit court found that the suit fell within the bounds of the *Barton* doctrine, given that the bankruptcy court approved documents that confirmed Stutz as general counsel for the debtor and the liquidating trust, so that Stutz was "at least as connected to the estate as attorneys or investigators hired by the trustee,

whom we have deemed covered by the doctrine." Therefore, the bankruptcy court had to give permission for the suit, which it withheld. Given this ruling, the circuit court did not reach the merits of the applicability of the plan's release language.

McFarland v. Wallace (In re McFarland), 790 F.3d 1182 (11th Cir. June 22, 2015) (Tjoflat, William Pryor, and Baldock, JJ.) (opinion by Baldock, Circuit Judge for the 10th Circuit sitting by designation).

Code § / Rule: § 541; § 522; Georgia exemptions under Georgia Code § 44-13-100 and § 33-25-11(c)

Held: Exemption in life insurance policy was limited to $2,000 under Georgia law; "annuity" did not qualify as such under Georgia law and was therefore not exempt where its purpose was not to replace wages; and constitutional challenge to Georgia exemptions failed.

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: Years ago, the debtor invested in a mutual fund and took out a $30,000 whole life insurance policy. In 2006, at age 64, the debtor transferred $150,000 from the mutual fund into an annuity which designated the debtor's wife as the sole beneficiary and which would begin disbursing payments in January 2032. In 2011, the debtor filed bankruptcy and claimed an exemption for the cash surrender value of the whole life policy and for the annuity. The trustee objected to the exemptions, and the bankruptcy court limited the insurance policy exemption to $2,000 per OCGA § 44-13-100(a)(9), and denied the exemption in the annuity in its entirety. The district court, and then the 11th Circuit, affirmed. After pointing out that exemption statutes are generally construed liberally in favor of debtors, and that the objecting party has the burden of proof, the circuit court found that the annuity purchased by the debtor did not fit the definition of "annuity" in the Georgia statute, citing recent Georgia case law in support for the idea that to qualify, the contract must provide income as a wages substitute. The annuity of the debtor was structured more like an investment, and the debtor had no plans to withdraw funds during his lifetime. The life insurance exemption was the more specifically worded statute cited by the debtor, and that Georgia Code section limited the exemption for debtors to $2,000 (whereas another Georgia statute, which would apply if the debtor were not a debtor in bankruptcy, would allow a larger exemption). The circuit court also eschewed any constitutional challenge to the Georgia legislature's decision to treat bankruptcy debtors differently for exemption purposes.

JPMCC 2006-LPD7 Miami Beach Lodging, LLC v. Sagamore Partners, Ltd. (In re Sagamore Partners, Ltd.), 620 Fed. Appx. 864 (11th Cir. Aug. 31, 2015) (Jordan, Julie Carnes, and Linn, JJ.) (opinion by Linn, Circuit Judge for the Federal Circuit sitting by designation). The opinion was originally issued on July 13, 2015 but was then reissued on August 31, 2015 with one change: to clarify in the conclusion that the case was remanded to the district court as to the

question of fees and costs, the timing of default-rate interest, and any other remaining issues that were unresolved, and that the district court may, in its discretion, remand any of those issues to the bankruptcy court for determination.

Code § / Rule: default rate interest as part of cure under § 1123(d)

Held: A debtor may be required to pay default-rate interest to reinstate the original terms of a loan; creditor's "notice of default" did not preclude default-rate interest; and appeal was not equitably moot.

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

Facts: The contract between the debtor and the creditor required interest-only payments of 6.54% per year until the obligation matured in 2016. In the "event of default" the contract required an interest rate of 11.54%, whether or not the debt was accelerated, and did not require that a notice of default be given by the creditor although it provides that any "required" notices be sent to the debtor and to debtor's counsel. In 2009, the debtor defaulted and a notice of default was sent to the debtor (but not to debtor's counsel). Another notice was sent a few weeks later, accelerating the debt, and the creditor began foreclosure by filing an action in state court in December 2009. The debtor filed bankruptcy in October 2011. The creditor filed a claim for over $31,000,000.00 which included interest at the default rate as well as late fees, attorney fees, and costs. The debtor proposed a plan that sought to cure and reinstate by paying interest accrued at the non-default rate. The bankruptcy court refused to confirm the plan because it did not provide for default-rate interest, but said that the debtor could avoid that if it could prove that the default rate was not otherwise due in accordance with the underlying contract and state law. The debtor filed an amended plan that provided it would pay whatever the court required as interest, and objected to the creditor's claim on grounds that it was not entitled to default interest given that it had also charged late fees. The creditor responded by saying it waived late fees (which amounted to less than $250,000) for any time period for which the court would allow default-rate interest (which creditor claimed exceeded $5,000,000). The bankruptcy court found the notice of default to be defective and disallowed the default-rate interest, attorney fees, and other costs.

Alternatively, the bankruptcy court found that the creditor failed to demand default-rate interest and was precluded from claiming default interest when it had also claimed an entitlement to late fees. The bankruptcy court found the plan was feasible. The district court, on appeal, found that an event of default had occurred notwithstanding the insufficient notice of default, remanded for a determination of entitlement to attorney fees and costs, and affirmed the finding that the creditor had waived default-rate interest, while affirming the finding of feasibility. The circuit court examined the history of § 1123(d), and found that because the contract required the payment of default-rate interest in conformity with Florida law, the debtor must pay default-rate interest to cure the default. This was so because the language of § 1123(d) requires the default amount be determined under the contract and state law, even though § 1124 ignores default-rate interest in determining whether a claimant is impaired for voting purposes. The bankruptcy

court committed clear error in its findings, in part by finding that the creditor's failure to manually update a purely internal database amounted to a meaningful waiver of the default-rate interest. Further, under Florida law, late fees and default-rate interest are consistent remedies, and payments accepted under protest (as were the late fees here) cannot be the basis for waiver in any event. The circuit court further concludes that the district court properly found that the notice of default was legally irrelevant because it was not required under the contract. Finally, the circuit court found that the appeal was not equitably moot, because the plan as confirmed won't even have to be amended to pay the amount of the cure, whatever the bankruptcy court determines that to be on remand.

Lorenzo v. Wells Fargo Bank, N.A. (In re Lorenzo), 606 Fed. Appx. 548 (11th Cir. June 4, 2015) (Ed Carnes, CJ; and Jordan and Jill Pryor, JJ.) (per curiam).

Code § / Rule: § 727(a)(3); FRBP 7055

Held: Bankruptcy court did not abuse its discretion in refusing to set aside an entry of default where the defendant had no meritorious defense and had willfully missed the answer deadline without sufficient justification. Entry of default judgment was not error where the defendant had defaulted, thereby admitting as true the well-pleaded factual allegations in the complaint, and the complaint was sufficient to state a claim for the requested relief.

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

Facts: The debtor was president and sole shareholder for three companies that performed aircraft maintenance, and also owned three holding companies that in turn owned the land where the maintenance companies were located. The three maintenance companies guaranteed the holding companies' mortgage debts. Wells Fargo sued the debtor and the companies in state court. While the state court litigation was ongoing, the debtor used a hammer to physically destroy a computer server that contained some of the companies' records, as well as claiming that other computers containing records had "disappeared" and engaging in the indiscriminate shredding of the paper records of one of the companies. Wells Fargo eventually obtained a multi-million-dollar judgment against the debtor and two of her maintenance companies. As the litigation proceeded, the debtor was having tremendous financial problems and was using one of the companies' accounts to pay her living expenses and personal debts. She eventually filed chapter 7, and Wells Fargo filed an AP to deny the discharge on grounds that the debtor had destroyed financial records, made false oaths about her accounts and property, and attempted to conceal her ownership in certain real property. Wells Fargo made an offer of settlement, which the debtor rejected, while her attorney required a $5,000 retainer with another $5,000 due later before representing her in the AP. After the answer deadline expired, Wells Fargo moved for default, and it was only then that the debtor paid her attorney's retainer. A week after the answer deadline ran, the debtor asked for an extension of the time to file an answer, which motion was denied. The court entered default, and eleven days later, debtor's new counsel filed an answer and moved to vacate the default. The court denied the motion to vacate and entered default judgment following a hearing. The debtor then appealed the entry of default, the denial of the

motion to vacate the entry of default, and the entry of default judgment. The district court affirmed, as did the Eleventh Circuit.

The bankruptcy court did not abuse its discretion in denying the motion to vacate the entry of default, and did not commit error in entering default judgment itself against her. The debtor had no meritorious defense to the § 727(a)(3) claim given that she had, without justification, destroyed records that would have shed light on her financial condition, even though the destruction took place more than a year before the case was filed. Her upset and anger at the state court suit were not sufficient justification. "Because her defense lacked merit, setting aside the entry of default and litigating the adversary proceeding on its merits would simply waste judicial resources to reach exactly the same result." Also, the circuit court found that her failure to answer timely was willful given that she and her counsel were aware of the complaint and the deadline for answering it. Finally, given that the default amounted to an admission of the allegations of the complaint, default judgment was appropriate because the complaint was sufficient, when accepted as true, to form the basis for the entry of the judgment.

Green Point Credit, LLC v. McLean (In re McLean), 794 F.3d 1313 (11th Cir. July 23, 2015) (Ed Carnes, C.J.; Jill Pryor, and Black, JJ.) (opinion by Jill Pryor).

Code § Rule: § 524(a)(2)

Held: The act of filing of a proof of claim in a chapter 13 case, for an unsecured debt that was discharged in a prior chapter 7 case, was a violation of the discharge injunction.

History: 11th Circuit affirms in part, vacates in part, and remands to the District Court for the Middle District of Alabama, which had affirmed the Bankruptcy Court for the Middle District of Alabama (Judge Sawyer).

Facts: Green Tree held an approximately $11,000 claim for an unsecured deficiency balance, which was discharged in the debtors' prior chapter 7 case in 2009. In 2012, the debtors filed chapter 13, and did not list Green Tree as a creditor. Nonetheless, Green Tree filed a claim for the deficiency balance in the 2012 chapter 13, which the debtors claimed caused them emotional distress. The debtors objected to the claim on grounds that the debt had been discharged, and the debtors also filed an AP for damages for violating the discharge injunction in the chapter 7 case. Green Tree then withdrew its proof of claim four days after the AP was filed, acknowledging that an error in its computer system caused the debt to not show as discharged. The bankruptcy court sustained the objection to the claim, and ruled in favor of the debtors in the AP, finding that the filing of the proof of claim violated the discharge injunction. The bankruptcy court awarded compensatory damages for emotional distress and non-compensatory damages labeled as "coercive sanctions" to encourage an improved computer system. The district court affirmed, and further addressed whether the non-compensatory damages were actually punitive, and upholding the sanctions as punitive based on Green Tree's reckless disregard, even if the sanctions could not properly be characterized as "coercive" after the claim was withdrawn.

As an initial matter, the 11th Circuit found that the U.S. Bankruptcy Court for the Middle District of Alabama was the "court" with power to punish contempt against it, and that the power was not limited to the judge who presided over the prior case.

On the merits, and on a matter of first impression, the 11th Circuit found that under § 524(a)(2), a creditor violates the discharge injunction when it files a proof of claim in a bankruptcy case for a debt that was discharged in a prior case. This result is compelled by the court's reading of "ambiguous" language of the statute in light of legislative intent, and the finding that collecting from the estate is equivalent to collecting from the debtor because the intent of the claim filer is to pressure the debtor to repay a discharged debt.

As for the sanctions award, the circuit court discussed the due process protections required when a court sanctions contempt, which are more stringent when criminal contempt is contemplated. Beyond notice and a hearing, the court must also afford the presumption of innocence and the standard of proof beyond a reasonable doubt. Given that the offending claim had been withdrawn, the non-compensatory sanctions were "criminal" rather than "coercive" and so the bankruptcy court had not applied the proper principles in analyzing and awarding the sanctions. The most interesting aspect of this holding may be what was NOT said: it appears, by implication, that the bankruptcy court does have the power to award criminal contempt sanctions, so long it affords due process.

The award of compensatory sanctions for emotional distress was vacated and remanded also, to be considered in light of *Lodge v. Kondaur Capital Corp.*, 750 F.3d 1263, 1271 (11th Cir. 2014), which established a standard for emotional distress damages for a stay violation that the circuit court now says also applies in a proceeding for emotional distress damages as a result of a violation of the discharge injunction as well. Under that standard, "a plaintiff must (1) suffer significant emotional distress, (2) clearly establish the significant emotional distress, and (3) demonstrate a causal connection between the significant emotional distress and the violation of the [discharge injunction.]"

As a final note, the circuit court pointed out that the action was improper in form, and should have been brought as a contested matter under Rule 9014 rather than as a stand-alone adversary proceeding.

Seidling v. Kelly (In re Seidling), 611 Fed. Appx. 668 (11th Cir. Aug. 4, 2015) (Hull, Julie Carnes, and Black, JJ.) (per curiam).

Code § Rule: Rule 3001(f); Rule 8006

Held: The bankruptcy court could rely on the debtor's admission, by virtue of his failure to respond to a request for admission, in allowing and liquidating a creditor's proof of claim.

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

Facts: The debtor, Mr. Seidling, filed chapter 7, and Kelly filed a proof of claim in the debtor's case based upon the debtor's involvement in a bad-faith involuntary bankruptcy against Kelly's son. The debtor failed to respond to a request for admission that he "entered into a conspiracy to file a bad faith involuntary bankruptcy" against Kelly's son, and thereby admitted doing so. The debtor then withdrew his objection to Kelly's claim, which still left pending a different objection to Kelly's claim, which objection was filed by Mrs. Seidling (the debtor's ex-wife). The bankruptcy court granted Kelly's motion to liquidate the claim and held that Mrs. Seidling did not have standing to pursue her objection to the claim. On appeal, the district court affirmed, as did the circuit court. The main issue in the appeal was whether the bankruptcy court erred in relying on the debtor's admission in allowing and liquidating the claim. The use of the admission was not error. Given that Mrs. Seidling did not have standing to object to the claim, and given that the debtor had withdrawn his objection, the bankruptcy court had no basis to disallow Kelly's claim under Rule 3001(f). Further, no other issues were raised on appeal by virtue of Mrs. Seidling's statement of issues under Rule 8006 which recited merely whether "the Court erred" in entering its order. This was sufficient to support the district court's holding that other issues were waived on appeal.

Miley v. Thornburg Mortgage Home Loans, Inc., 613 Fed. Appx. 915 (11th Cir. Aug. 21, 2015) (Marcus, Wilson, and William Pryor, JJ.) (per curiam).

Code § / Rule: § 362(c)(4)(A)(i) & (c)(4)(B)

Held: "[Code] § 362(c)(4)(B) gives a party 30 days to request a stay and allows the court to grant that request, but it does not prohibit her creditors from taking action during that time period."

History: 11th Circuit affirms the District Court for the Northern District of Georgia, which *sua sponte* dismissed the complaint for failure to state a claim.

Facts: The plaintiff had been a debtor in her third bankruptcy case, having had two bankruptcy cases dismissed during the year preceding the filing of her third case. During that third case, and without seeking an order confirming that no stay was in effect, the defendant foreclosed on her house. The debtor, as plaintiff in the district court case, argued that the foreclosure during the 30 days after the filing of her third case violated a "temporary" stay despite the fact that she did not move the bankruptcy court to impose the stay, so that no stay was actually in effect. The court found there was no "temporary" stay during the 30 day period, and no stay came into effect because the bankruptcy court was not asked to (and therefore, of course, did not) impose the stay in its discretion. "Specifically, § 362(c)(4)(B) gives a party 30 days to request a stay and allows the court to grant that request, but it does not prohibit her creditors from taking action during that time period."

Tucker v. Mukamal, 616 Fed. Appx. 969 (11th Cir. Sept. 4, 2015) (Marcus, William Pryor, and Jill Pryor, JJ.) (per curiam).

Code § / Rule: Recusal under 28 U.S.C. § 455 (a); standing to object to closing a chapter 7 case

Held: The bankruptcy judge's annoyance, based upon his interactions with the debtor, were not the type of antagonism that requires recusal. Further, the debtor had no standing to object to the case closing, due to his lack of pecuniary interest, as the standard was set out in the case of *Atkinson v. Ernie Haire Ford, Inc., (In re Ernie Haire Ford, Inc.)*, 764 F.3d 1321, 1325-26 (11th Cir. 2014).

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

Facts: Tucker filed chapter 7 in 2004 and Mukamal was the chapter 7 trustee. Two years later, to resolve a § 727 AP, Mukumal and Tucker agreed that Tucker would make certain payments by November 20, 2007 in exchange for his discharge. The court-approved settlement agreement provided that in the event of default, the trustee could seek revocation of the discharge among other remedies. Tucker did eventually default and in 2011, the trustee moved to revoke the discharge on that basis. The bankruptcy court granted the motion to revoke the discharge. Tucker then filed a motion to recuse the bankruptcy judge, which was denied. Two years later, the trustee moved to conclude the administration of the case, given that it had been almost a decade since filing, the estate was insolvent, and the only remaining issue was between the debtor and a creditor, and did not involve the trustee (the motion sought to have the closing of the case subject to any distributions that might later occur as a result of the ongoing feud with the remaining creditor). The debtor filed a response and complained that the trustee had been neglecting his duty, dragging the case by sitting on his hands, and stated further that the debtor had requested earlier that the case be closed. Taking this as agreement, the bankruptcy court granted the motion to close the case. The debtor then appealed the bankruptcy court's refusal to recuse, and also the case closing order.

The district court affirmed both rulings, and found that the bankruptcy judge's statements about the debtor's credibility, which apparently fueled the recusal request, were "grounded in his experience overseeing the proceedings" and the debtor's conduct therein. The district court further found that the debtor had no standing to challenge the case closing order, given that the estate was insolvent and the debtor therefore had no pecuniary interest in the outcome of that motion. The 11th Circuit affirmed both rulings as well, stating that "a judge is not 'recusable for bias or prejudice [when] his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings.'" (quoting *Liteky v. United States*, 510 U.S. 540, 551 (1994)). The bankruptcy judge's annoyance, based upon his interactions with the debtor, were not the type of antagonism that requires recusal. Further, the debtor had no standing to object to the case closing, due to his lack of pecuniary interest, as the standard was set out in the case of *Atkinson v. Ernie Haire Ford, Inc., (In re Ernie Haire Ford, Inc.)*, 764 F.3d 1321, 1325-26 (11th Cir. 2014).

PSN Liquidating Trust v. Intelsat Corporation (In re PSN, USA, Inc.), 615 Fed. Appx. 925 (11th Cir. Sept. 4, 2015) (Martin, Rosenbaum, and Anderson, JJ.) (per curiam).

Code § / Rule: § 548 constructively fraudulent transfer, what is "reasonably equivalent value"

Held: A party may receive an economic benefit that will establish reasonably equivalent value if it shares in the enjoyment or use of a good or service, even if the party is not obligated under the contract pursuant to which the good or service is provided and pursuant to which the payment at issue was made.

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: PSN Liquidating Trust, on behalf of the bankruptcy estate of the debtor, sought to avoid as constructively fraudulent transfers under § 548(a)(1)(B) certain payments the debtor made to Intelsat under a contract between Intelsat and the debtor's parent company. The real dispute was whether the debtor, who was not a party to the contract pursuant to which the services were provided and the payments were made, nonetheless received an economic benefit from the transfers because it was the debtor company, rather than the contracting parent company, that received and used the services provided pursuant to the contract. The parent company was a non-operating holding company, wholly owned by the debtor. The holding company acquired broadcast rights to certain sporting events, and contracted with satellite providers such as Intelsat. It was the debtor company that actually had the employees and provided all services to prepare, market, and produce the events for broadcast, transmitting the events via satellite to cable and satellite operators, one of which was Intelsat. While the debtor was not a party to the contract with Intelsat, it was the debtor who paid all production expenses, including the contractual obligations of the holding company to Intelsat.

The trust argued that the transfers were not for "reasonably equivalent value" received given that the debtor was not a party to the contract and so did not own or benefit from the satellite services provided pursuant to the contract. The bankruptcy court found that the debtor did receive value because (1) the debtor received and used the satellite services, and (2) the parent holding company and the debtor shared an identity of interests as a single enterprise, so that any benefit under the contract to the parent company also indirectly benefited the debtor. The district court affirmed, as did the 11th Circuit. The trust argued that the term "value" is defined as "property" under the Code, and so value would not be received unless property were received (such as an enforceable right to satellite services, in this case). The circuit court supported a broader definition of value, but stopped short of actually defining the term, relying instead on its precedent of *Gen. Elec. Credit Corp. of Tenn. V. Murphy (In re Rodriguez)*, 895 F.2d 727 (11th Cir. 1990). In *Rodriguez*, the court held that a party may receive an economic benefit that will establish reasonably equivalent value if it shares in the enjoyment or use of a good or service. Given that the debtor actually received the use of the satellite services, which are "property," the test was met in this case and the transferred payments could not be recovered.

Fiandola v. Moore (In re Moore), 619 Fed. Appx. 951 (11th Cir. Sept. 8, 2015) (Marcus, William Pryor, and Dubina, JJ.) (per curiam).

Code § / Rule: § 727(a)(4), (a)(5)

Held: Debtors in their individual case "were under no obligation to explain the loss of corporate owned assets in a single-member limited liability corporation." It was not error for the bankruptcy court to find that the omission of the sale of the two vehicles was not a material misrepresentation, as the vehicles were not retained by the debtors, nor were the proceeds hidden from the court or trustee. The husband debtor's receipt of money from the sale of the LLC's assets was not imputed income that had to be disclosed on the SOFA.

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

Facts: The wife debtor, through her LLC, contracted to provide goods and interior decorating services to the Fiandolas. The Fiandolas paid the LLC $70,000.00 for custom furnishings and work on the project, but the work was not completed and only a portion of the goods and services were delivered. The Fiandolas sued and were awarded a judgment against the wife debtor and her LLC. The debtors (husband and wife) then filed bankruptcy, as did the LLC. In their schedules and statements, the husband and wife debtors did not disclose two vehicles they had sold earlier that year for approximately $35,000.00 and did not disclose moneys received by the husband debtor from the sale of assets belonging to the LLC. They amended to show the vehicle sale, but never showed the funds from the sale of the LLC assets. The Fiandolas sued to deny the individual debtors' discharge under § 727(a)(4) and (5). The bankruptcy court entered judgment in favor of the debtors, and the district and circuit courts affirmed.

Significantly, the 11th Circuit affirmed because the debtors in their individual case "were under no obligation to explain the loss of corporate owned assets in a single-member limited liability corporation." The assets at issue were never owned by the debtors and were not available to them for their use, and so were never within reach of their individual creditors. Even if that were not the case, the debtors explained the disposition of the corporate assets to the satisfaction of the bankruptcy judge, and the Fiandolas never met their burden of proving that the individual debtors ever owned the LLC assets at issue. Further, the evidence showed that the individual debtors used the proceeds from the sale of the LLC assets to pay corporate liabilities. Also, it was not error for the bankruptcy court to find that the omission of the sale of the two vehicles was not a material misrepresentation, as the vehicles were not retained by the debtors, nor were the proceeds hidden from the court or trustee. Finally, the husband debtor's receipt of money from the sale of the LLC's assets was not imputed income that had to be disclosed on the SOFA. Therefore, the failure to so disclose the receipt of the money was not a false oath under § 727(a)(4)(A).

Mantiply v. Horne (In re Horne), 630 Fed. Appx. 908, Case No. 14-12047 (11th Cir. Oct. 28, 2015), *petition for cert. filed* (U.S. April 1, 2016) (No. 15-1229) (per curiam) (Hull, Rosenbaum, and Julie Carnes, JJ.)

Code § / Rule: 28 U.S.C. § 455(a); Code §§ 362(k) and 524

Held: 28 U.S.C. § 455(a) warrants recusal "only if an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality," which was not the case under these facts.

History: 11th Circuit affirms in part and remands in part the District Court for the Southern District of Alabama, which had affirmed the Bankruptcy Court for the Southern District of Alabama (Judge Shulman), and which had ruled in the first instance on attorney fees for the appeal of a recusal order.

Facts: Despite the automatic stay in the debtors' chapter 7 case, the plaintiff filed a civil suit against the husband-debtor during the pendency of the bankruptcy. The plaintiff refused to voluntarily dismiss the suit, even after the debtors received their discharge, and the civil action was eventually dismissed by the state court. The debtors filed a motion in the bankruptcy court seeking damages from the plaintiff for violation of the automatic stay, and later for violating the discharge injunction. The bankruptcy court granted the motion and awarded damages of $81,714.31, including attorney fees of over $41,000.00. The district court affirmed on appeal and further awarded the debtors $34,551.00 in additional attorney fees for defending the appeal. The plaintiff then filed a motion for recusal of the bankruptcy judge, on the basis of newly discovered evidence that the judge was biased, that discovery being that the bankruptcy judge's courtroom deputy is the sister of a paralegal for the debtors' bankruptcy counsel. The paralegal had offered affidavit testimony that contradicted the plaintiff's testimony. The bankruptcy court and district court denied the recusal motion, and the plaintiff appealed to the 11th Circuit. The debtors cross-appealed the district court's refusal to award them further attorney fees for defending against appeal of the bankruptcy court's order denying recusal.

Under an abuse of discretion standard, the 11th Circuit found that 28 U.S.C. § 455(a) warrants recusal "only if an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality." In assessing the facts, the court should not consider the "perceptions of idiosyncratic, hypersensitive, and cynical observers." There was no evidence of a direct connection between the courtroom deputy's sister and the bankruptcy judge, and no case was found to support the idea that a judge's administrative employee having a relationship with a witness should be grounds for recusal.

On the cross-appeal, the 11th Circuit remanded for the district court to reconsider its ruling that the appeal of the recusal motion was limited only to the discharge injunction prong of the complaint, and therefore no attorney fees were appropriate, given that the record demonstrated that the appeal was not so narrowly tailored.

Wallace v. McFarland (In re McFarland), 619 Fed. Appx. 962, Case No. 14-14034 (11th Cir. Oct. 16, 2015) (per curiam) (Jordan, Rosenbaum, and Jill Prior, JJ.)

Code § / Rule: § 548(a)(1) and (c); § 541

Held: Under Georgia law, the circuit court agreed that the debtors could establish neither the purchase money resulting trust theory nor the constructive trust theory, so that in the absence of the 2009 deed of gift, the full ownership interest in the property, both legal and equitable, would have been estate property in the husband's chapter 7 case.

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 debtors married in 1968, and shortly thereafter purchased the property at issue (3 parcels in Chatham County, Georgia). The $15,000 purchase price was financed with a $5,000 loan from the wife's father and a $10,000 loan from a financial institution. Both loans were repaid from a joint banking account into which both debtors deposited their earnings. Only the husband's name is on the purchase documentation (warranty deed, security deed, and the notes). The debtors lived on the property until 1970. The debtors contend that the wife's name was not used as a matter of traditionalist social custom, although their intent was that that the property be jointly owned. They never took any action to put legal title in the wife until 2009 when the husband executed the "deed of gift" at issue in the case. The 2009 deed of gift was triggered by a personal injury suit against the husband, who feared the plaintiff in that suit would "ruin" him financially.

The jury in that suit awarded the personal injury plaintiff approximately $1 million in damages against the husband, and he filed chapter 7 very soon thereafter. The bankruptcy trustee filed an AP to set aside as fraudulent the 2009 deed of gift of ½ interest in the property. The debtors contended that the 2009 deed of gift was not a transfer of any interest in the property, since they believed the wife already owned a ½ interest, and were just "correcting" the legal title to match that belief.

The bankruptcy court found, and the 11th Circuit agreed, that the 2009 deed of gift was indeed a transfer of the husband's interest to the wife and not merely a recognition of an existing equitable interest (the facts did not support a finding of an implied purchase money resulting trust or other equitable interest). State law determined what would have been the nature of the debtor's interest in the property under § 541 had the transfer not been made. Under Georgia law, the circuit court agreed that the debtors could establish neither the purchase money resulting trust theory nor the constructive trust theory, so that in the absence of the 2009 deed of gift, the full ownership interest in the property, both legal and equitable, would have been estate property in the husband's chapter 7 case. The courts also found that the transfer was done with actual fraudulent intent, as well as being constructively fraudulent, having been transferred to an insider, with no exchange of reasonably equivalent value (nothing having been given that would have been of any value to creditors despite love and affection being recited), while the debtor believed he was incurring debts beyond his ability to pay, and in close proximity in time to the personal injury lawsuit. Finally, the bankruptcy court also rejected the wife's counterclaim under § 548(c), finding she was not a good-faith transferee who took her interest in the property for value (which ruling was not part of the appeal).

Pro Finish, Inc. v. Moffa (In re All American Trailer Mfrs., Inc.), 631 Fed. Appx. 699, Case No. 15-10619 (11th Cir. Nov. 9, 2015) (per curiam) (William Pryor, Julie Carnes, and Fay, JJ.)

Code § / Rule: creditor standing to object to *nunc pro tunc* dismissal order

Held: Creditor did not prove immediate, tangible harm so it had no standing to challenge the order.

History: 11th Circuit vacates the order of the District Court for the Southern District of Florida, which had affirmed the Bankruptcy Court for the Southern District of Florida, and remands with instructions for the District Court to dismiss for lack of subject matter jurisdiction.

Facts: All American Trailer filed for chapter 11, and Pro Finish was its largest creditor, having obtained a default judgment in state court for breach of contract and fraud. The United States Trustee moved to dismiss the case, and at the hearing on that motion, the debtor and the UST agreed to a dismissal. Before entry of the order, however, an issue arose regarding whether all creditors had received notice of the hearing, and so the bankruptcy court set the motion for a second hearing. In the interim, the bankruptcy court decided that all creditors had, in fact, received notice of the first hearing. Two days after the original hearing, Pro Finish recorded its judgment lien. A few days later, the debtor assigned its assets to Moffa, and Pro Finish objected, so that the state court dismissed Moffa's petition for assignment. Pro Finish then terminated its judgment lien against the debtor. At the second hearing on the motion to dismiss the bankruptcy case, the bankruptcy court agreed to make its dismissal order effective as of the date of the first hearing, but the order as entered failed to actually do so. Almost a year later, Moffa moved the court to correct the dismissal order to include the nunc pro tunc provision, and the court agreed. Pro Finish appealed and the district court affirmed the bankruptcy court's order with the *nunc pro tunc* provision. The Eleventh Circuit found that Pro Finish lacked standing to appeal the bankruptcy court's corrected order, because that corrected order implemented an earlier ruling and did not affect the rights of Pro Finish as a creditor. To establish standing, Pro Finish had to show an injury in fact, causation, and redressability. None could be shown here. Any damage to Pro Finish's priority as a creditor was a result of its decision to release its judgment lien, and not the result of the *nunc pro tunc* dismissal order.

U.S. v. Freeman, 631 Fed. Appx. 784, Case No. 13-14870 (11th Cir. Nov. 16, 2015) (per curiam) (Martin, Anderson, and Edmondson, JJ.)

Code § / Rule: 18 U.S.C. § 152(a)-concealment of assets in a bankruptcy proceeding

Held: A "notice of voluntary dismissal" was not a self-executing dismissal under the provisions of Rule 1017(f)(2), which provides that voluntary dismissals under § 1307(b) are on motion filed and served under Rule 9013, which in turn controls motions or requests for orders. Accordingly,

the effective date of the voluntary dismissal (and the beginning of the statute of limitations for concealment of assets in bankruptcy) was the date of the entry of the dismissal order, not the date of the notice of dismissal.

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

Facts: Debtor was convicted of concealment of assets in a bankruptcy proceeding, for failure to disclose a joint bank account he owned with his mother. The issues on appeal were (1) when the limitations period began running, and (2) the sufficiency of the evidence. Because the concealment offense is "continuing" in nature, the limitations period begins when the debtor is discharged, or when discharge becomes impossible. The dispute here was whether the case was dismissed, so that discharge became impossible, on the day the debtor filed his "notice of voluntary dismissal" of his chapter 13 case, or on the date the court entered its written order of dismissal on the docket. The circuit court ruled that the "notice of voluntary dismissal" was not a self-executing dismissal under the provisions of Rule 1017(f)(2), which provides that voluntary dismissals under § 1307(b) are on motion filed and served under Rule 9013, which in turn controls motions or requests for orders. Accordingly, the effective date of the voluntary dismissal was the date of the entry of the dismissal order, not the date of the notice of dismissal. With regard to the sufficiency of evidence, the debtor (a forensic CPA) sold a tract of land he owned with his mother one day prepetition, and deposited the sales proceeds into the joint account. He further wrote several large checks from the account for personal and business expenses. At no point did he disclose the existence of the joint account. The jury was entitled to believe this evidence, and to disbelieve the debtor's testimony, on those issues and the verdict would not be reversed. The circuit court further upheld the denial of a new trial, which request was premised upon the debtor's recent diagnosis of having a brain tumor. No evidence established that the tumor existed, or affected his decision making, ten years earlier at the time of the offense.

Tobkin v. Calderin (In re Tobkin), ---Fed. Appx.---, Case No. 15-11693, 2015 WL 7144748 (11th Cir. Nov. 16, 2015), *petition for cert. filed* (U.S. March 22, 2016) (No. 15-8636) (per curiam) (Wilson, Jordan, and Jill Pryor, JJ.)

Code § / Rule: exemption: the definition of "earnings" under Fla. Stat. § 222.11

Held: Proceeds from a debtor's law office business are not "earnings" and do not qualify for exemption under Florida law.

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

Facts: The debtor, an attorney operating as a sole practitioner, listed anticipated contingency fees as exempt. The Chapter 13 trustee timely objected to the exemption, and the case converted to Chapter 7 with a new trustee appointed. The debtor filed a motion in the chapter 7 phase to have the fees deemed "earnings" within the meaning of the Florida exemption statute. The

bankruptcy court and district court denied this request. On appeal, the circuit court examined Florida law, and found that the Florida courts have consistently held that proceeds from the operation of a business are not "earnings" and that a debtor who runs his own business cannot exempt his compensation as "earnings" under the relevant statute, as opposed to a debtor who earns a set salary or wage from an employer. On the separate issue of whether the trustee's objection was proper, the circuit court also found that res judicata came into play upon the dismissal of the debtor's first appeal of the decision finding that the trustee's objections were proper—that dismissal for lack of prosecution was an adjudication on the merits, involving the same parties and issues, and thus barred relitigation or further appeal of that issue.

Wolfe v. Rodriguez (In re Rodriguez), ---Fed. Appx.---, Case No. 14-12361 (11th Cir. Dec. 2, 2015) (per curiam) (Tjoflat, Julie Carnes, and Anderson, JJ.)

Code § / Rule: standing as a "party in interest", inability of *pro se* corporate creditor to appear without counsel

Held: A corporation cannot proceed *pro se* in federal court, and it was not error to strike *pro se* corporate pleadings.

History: 11th Circuit affirms in part, and vacates and remands in part, the District Court for the Southern District of Florida, which had affirmed the Bankruptcy Court for the Southern District of Florida.

Facts: Wolfe, as in individual, held a state-court judgment against the debtor. Wolfe had also taken an assignment of a mechanic's lien, originally held by a corporation. Wolfe, individually and without counsel, filed pleadings in an adversary proceeding related to the claimed mechanic's lien, which lien was actually held by a corporation prior to assignment. Because the corporation could not proceed without an attorney, the bankruptcy court was correct to strike Wolfe's *pro se* corporate pleadings, and enter default judgment against the corporation and against Wolfe individually on the mechanic's lien claims in the adversary proceeding. The assignment of the mechanic's lien claim to Wolfe individually did not circumvent this requirement. However, with regard to the aspects of Wolfe's pro se pleadings that related to a judgment he, as an individual, had against the debtor, Wolfe was a proper party in interest and those portions of the pleadings should not have been dismissed, and that aspect was vacated and remanded. The circuit count points out that the bankruptcy court had jurisdiction over the claims in the AP, because the claims related to a mechanic's lien alleged to encumber the debtor's property, which is a core matter under 28 U.S.C. § 157(b)(2)(A) and(K).

Oswalt v. Sedgwick Claims Management Servs., Inc., 624 Fed. Appx.740, Case No. 15-11540 (11th Cir. Dec. 9, 2015) (per curiam) (Marcus, Wilson, and Rosenbaum, JJ.)

Code § / Rule: standing: debtor has none for a cause of action that was never scheduled and never abandoned

Held: Standing is a "jurisdictional prerequisite to suit in federal court", and the debtor had no standing to pursue an unlisted, unadministered, unabandoned cause of action that he failed to list as an asset when he filed chapter 7.

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

Facts: Oswalt had prepetition claims against BellSouth for alleged employment discrimination, but he did not schedule those claims when he filed chapter 7. The district court dismissed his employment discrimination case because the trustee was the only one with standing to pursue the claims. Oswalt argued that he regained prudential standing when he moved to reopen his case to list the asset, but the courts disagreed. Causes of action belonging to the debtor are estate assets, and the rights of a debtor to pursue a prepetition cause of action are eliminated unless the trustee abandons the asset. When the asset is not administered and not abandoned, as is the case with an unlisted asset under § 554(c), (d) and § 521(a)(1), then the cause of action remains estate property even after the case is closed and the debtor is discharged. Only the trustee has standing to pursue a cause of action that remains estate property. Moving to re-open the case and amend Schedule B to include the cause of action did not, in and of itself, remedy the lack of standing as the trustee to be appointed would then have the standing to pursue the cause of action, but the debtor still would not.

Parker v. Credit Central South, Inc. (In re Parker), ---Fed. Appx.---, Case No. 15-11204, 2015 WL 9240495 (11th Cir. Dec. 17, 2015) (per curiam) (Tjoflat, William Pryor, and Jill Pryor, JJ.)

Code § / Rule: § 362(a) and (k)—punitive damages and attorney fees for willful stay violation, even in the absence of compensatory damages.

Held: Attorney fees and costs for an AP that was filed to force the creditor to desist violating the automatic stay are actual damages under § 362(k)(1), and an award of actual damages is mandatory when the stay violation is willful. Further, punitive sanctions were appropriate because the creditor acted with "reckless or callous disregard for the law or rights of others." *See In re McLean*, 794 F.3d 1313, 1325 (11th Cir. 2015).

History: 11th Circuit affirms the District Court for the Middle District of Alabama, which reversed the Bankruptcy Court for the Middle District of Alabama (Judge Sawyer) as to its award of compensatory damages, but affirmed the bankruptcy court in its award of punitive damages and attorney fees.

Facts: The debtor filed bankruptcy days after the creditor filed a small claims collection action in state court. The debtor informed the creditor that he had filed bankruptcy, and the creditor was on the mailing matrix in the case. The creditor called the state court clerk's office and notified them that the debtor had filed, but was informed that the debtor's attorney would need to provide notice of the bankruptcy case. The creditor also called the state court clerk several other times during the process, but never actually did or filed anything to stop the collection case from proceeding. Despite actual notice of the bankruptcy petition to the creditor, the small claims action continued and the debtor was served process while at work, which upset him for a few days but with no medical treatment being required, and a default judgment was entered against him about a month later. The debtor filed an AP for willful violation of the stay, and it was only a week or so after the AP was filed that the creditor dismissed the state court collection suit. The creditor also denied every aspect of the debtor's complaint in the AP, including the existence and amount of the debt, receipt of notice of the bankruptcy, its service of process on the debtor, and even that it had filed a proof of claim in the case. The bankruptcy court awarded $2,000 compensatory damages for emotional distress; $10,000 punitive damages to discourage the creditor from using unsophisticated employees to pursue its legal remedies; and later awarded attorney fees and costs for prosecuting the AP that was required to stop the ongoing stay violation.

The district court agreed the violation was willful under these facts, and justified punitive and attorney fee damages, but found that the evidence did not establish the kind of significant emotional distress required to support an award for actual damages under that theory. The 11th Circuit agreed. The creditor argued that the debtor suffered no actual damages to support the award of attorney fees. However, the 11th Circuit pointed out that attorney fees and costs are actual damages under § 362(k)(1), and that an award of actual damages is mandatory when the stay violation is willful. Here, the debtor had to file the AP before the violation ceased, and therefore the fees and costs associated with that AP, "to halt the violation of the automatic stay and to prosecute his action for damages constitutes an injury." Further, punitive sanctions were appropriate because the creditor acted with "reckless or callous disregard for the law or rights of others." *See In re McLean*, 794 F.3d 1313, 1325 (11th Cir. 2015). Compare this result to that in *Hutchings v. Ocwen Federal Bank, FSB (In re Hutchings)*, 348 B.R. 847 (Bankr. N.D. Ala. 2006) (Cohen, Bankr. J.), in which Judge Cohen held that the debtor's obligation to mitigate damages, by not filing an AP when the stay violation had *already ceased*, resulted in the denial of any award for attorney fees and costs associated with the unnecessary AP.

Ullrich v. Welt (In re Nica Holdings, Inc.), 810 F.3d 781, Case No. 14-14685 (11th Cir. Dec. 17, 2015) (Ed Carnes, CJ, and Martin and Walter, JJ.) (opinion by Martin)

Code § / Rule: Equitable mootness; Power of an Assignee under an Assignment for the Benefit of Creditors under Florida law to file a voluntary petition in bankruptcy on behalf of the assignor without explicit authorization

Held: Appeals were not equitably moot where substantial consummation had not occurred, and where the transactions were not so complicated that they could not be reversed; effective relief was still possible. Under Florida's Assignment for the Benefit of Creditors law, the authority of

an assignee to file bankruptcy for the entity at issue must be explicit and plain, and will not be "read into" the general language of the statute's templates.

History: Bankruptcy Court for the Southern District of Florida was affirmed by the District Court for the Southern District of Florida, with the 11th Circuit then reversing and remanding.

Facts: Nica once had valuable assets, including partial ownership of a Nicaraguan fish farm, also partly owned by Ullrich. When facing financial problems in 2007, Nica executed an assignment for the benefit of creditors (ABC) under Florida law, with Welt as the assignee for the ABC. There arose a great dispute among Welt, Ullrich, and others, ultimately leading to a suit by Ullrich against Welt in state court, and Welt's suit against his former attorneys in state court. During this litigation, Welt purported to file a voluntary chapter 7 petition for Nica, as a means of efficiently liquidating the corporation's assets, which by that point were nothing more than the litigation claims in state court. Ullrich opposed the bankruptcy and claimed that it was filed by Welt merely as a tactic to block being removed as ABC assignee and to insulate himself from personal liability. Ullrich moved to dismiss the bankruptcy, arguing Welt did not have authority to file the case, and the bankruptcy court denied the motion. An interlocutory appeal followed. In the meantime, the chapter 7 trustee for Nica took over and settled the state court litigation claims. Ullrich objected to the settlement, and the bankruptcy court upheld the settlement without discussing Ullrich's competing settlement offer. This order was also appealed, and was affirmed by the District Court. The bankruptcy court denied a motion to stay the malpractice prong of the settlement, despite Ullrich's request that it do so to avoid equitable mootness.

Equitable mootness permits courts entertaining bankruptcy appeals to dismiss the appeals when effective relief would be impossible. In examining equitable mootness, the court examines whether a stay pending appeal was sought and obtained, and if not, why not; whether there has been substantial consummation of the plan at issue (and the circuit court here assumes without deciding that the doctrine could apply in chapter 7 as well as in chapter 11); what type of relief the appellant seeks and how that relief would affect third parties not before the court; and whether relief would affect the ability of the debtor entity to reorganize effectively. No single factor is determinative, and the question is one of whether effective relief can be granted under all the circumstances of the case. In this case, no third parties were effected and no money was distributed from the estate as a result of the dismissal of the litigation, and the appellant repeatedly sought a stay after he became aware of the malpractice settlement. There had been no substantial consummation. The kinds of transactions involved in the disputed settlements were not complicated nor irreversible, involving the simple settlement of litigation claims for the payment of a sum certain between two parties (in contrast to the types of transactions involving third party investors, partners, and restructurings that have led to equitable mootness rulings in other cases). Effective relief was not precluded, and the appeals were not equitably moot.

With regard to the authority of Welt to file the bankruptcy petition in the first place, the circuit court found that Florida's ABC statute is an alternative to bankruptcy, with certain statutory powers conferred upon the assignee under that law. Notably, the power to put the company into bankruptcy is not set out, and would not be read into, the language of Florida's statute. "To the extent any entity would ever desire to confer [the power to put the entity into bankruptcy] in these circumstances, it must do so explicitly and plainly." The act of filing bankruptcy is an act that requires specific authorization, which was not given in the ABC

agreement in this case. “Absent explicit and plain authorization by the assignor, a Florida ABC assignee cannot initiate Chapter 7 bankruptcy proceedings.”

Houston v. Welt (In re Herman), ---Fed. Appx.---, Case No. 15-11183, 2015 WL 9461756 (11th Cir. Dec. 28, 2015) (per curiam) (William Pryor, Martin, and Julie Carnes, JJ.)

Code § / Rule: Attorney sanctions under § 329; Rules 2014, 2016, and 2017; and suborning false testimony

Held: Even in the absence of an explicit finding of bad faith, the bankruptcy court explicitly set out the rules that were violated by the attorney’s conduct, which empowered it to sanction the attorney under § 105(a). Further, assessing the costs of the investigation against the attorney was not an abuse of discretion.

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

Facts: The debtor paid attorney Houston a total of $35,000 in connection with the debtor’s bankruptcy case, which was paid via wire transfer to the trust account for Houston’s law firm before the case was filed. Houston advised the debtor to show on his SOFA that he had paid $15,000 (which Herman later tried to justify by saying the $15,000 was for the legal services prepetition and $20,000 was for the actual bankruptcy work). Houston disclosed that he had agreed to accept $20,000 for his services. It is not clear how the bankruptcy court became aware of the discrepancy, but somehow the bankruptcy court learned of the discrepancy in the disclosures and learned that Houston had separately taken over $17,000 of the fees from the firm’s trust account for his own personal use, without the knowledge of either the debtor-client or the other members of his law firm. Houston was sanctioned accordingly for filing false statements of compensation and for suborning false testimony from the debtor via the SOFA information regarding what had been paid to the attorney prepetition related to the bankruptcy. Finally, the bankruptcy court relied upon its inherent powers to sanction the attorney without making an explicit finding of bad faith, and also cited its authority under §105. The district court and 11th Circuit affirmed the sanctions, pointing out that even in the absence of an explicit finding of bad faith, the bankruptcy court had explicitly set out the rules that were violated by the attorney’s conduct, which empowered it to sanction him under § 105(a). The bankruptcy court also did not abuse its discretion by requiring the attorney to pay for the investigation against him, which uncovered his acts of embezzlement. Also, the local rules allowed the bankruptcy court to suspend the attorney for “cause” which was present under these facts.

Corrections Corp. of America v. Scharrer (In re Avantair, Inc.), ---Fed. Appx.---, Case No. 15-10303, 2016 WL 403254 (11th Cir. Feb. 3, 2016) (per curiam) (Tjoflat, Rosenbaum, and Restani, JJ.)

Code § / Rule: distribution of proceeds from sale of estate property

Held: Ownership in the estate's fleet of airplanes was not commingled by virtue of an authorized part-swapping scheme among the various planes.

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

Facts: Avantair, Inc. ran a fractional-owner aircraft operation, under which Corrections Corporation of America ("CCA") and others purchased 1/16 or larger shares in specific airplanes under the terms of a purchase agreement. The owners then leased their shares back to Avantair, which then handled scheduling flights and plane maintenance. As its financial troubles increased, Avantair's plane maintenance suffered, and to keep the planes in the air, parts were taken from other planes in the fleet as needed, and safety records were not kept appropriately. When the FAA discovered this, it grounded the fleet and that ultimately led to an involuntary bankruptcy filing for Avantair. The bankruptcy trustee sought to maximize value by selling the planes, paying various creditors, and then distributing any excess to the fractional owners of each particular plane as sold. CCA objected to a distribution to just the particular plane's owners, and demanded a pooling approach to the distributions, arguing primarily that the part-swapping gave each fractional owner of any plane something of an interest in every other plane in the fleet. The bankruptcy court, district court, and 11th Circuit disagreed. The underlying documents unequivocally established a fractional ownership situation, and authorized the part-swapping. While the owner of a plane whose parts were cannibalized would have a claim against Avantair for breach of its obligation to replace the parts, the part-swapping scheme did not commingle any ownership interests.

Evanto v. Federal Nat'l Mortg. Ass'n, 814 F.3d 1295, Case No. 15-11450 (11th Cir. March 1, 2016) (William Pryor, Dubina, and Robreno, JJ.) (opinion by William Pryor)

Code § / Rule: Truth in Lending Act, 15 U.S.C. § 1641(e)(1)(A)

Held: The failure to provide a payoff statement is not "apparent on the face of the disclosure statement provided in connection with [a mortgage] transaction" and, therefore, no cause of action for such failure exists against a voluntary assignee of the mortgage for the servicer's failure to provide a payoff balance .

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

Facts: Evanto obtained a mortgage from Amnet Mortgage in 2003, which was voluntarily assigned to Fannie Mae, and Green Tree serviced the mortgage at all relevant times. After

foreclosure began, Evanto requested a payoff balance from Green Tree, which Green Tree was required by the TILA to provide within 7 days (*see* 15 U.S.C. § 1639g). Green Tree allegedly never did so. Evanto sued Fannie Mae for Green Tree's failure to provide a timely payoff statment, and the district court granted Fannie Mae's motion to dismiss. The text of the statute provides that a civil action against an assignee for a violation of the relevant subchapter can be maintained only if two requirements are met: (1) "the violation for which such action or proceeding is brought is apparent on the face of the disclosure statement provided in connection with such transaction"; and (2) the assignment is voluntary. See 15 U.S.C. § 1641(e)(1)(A) and (B).

Evanto argued that the court should close a "loophole" in the statute, and allow assignees to be sued for violations of 15 U.S.C. § 1639(g) for failure to meet its payoff statement requirements, but given the accepted meaning of "disclosure statement" as a document provided at or before closing (which would not include a payoff request and response at some time after closing), the court refused to do so. Here, while the assignment was voluntary, the failure to provide a payoff statement was not a violation apparent on the face of the disclosure statement, which term refers to a document prepared before the extension of credit. The circuit court declined to extend the scope of possible causes of action against assignees to include the failure to provide a payoff statement on policy grounds, as such would be an extension of the express and particular remedy already provided by the statute. The plain meaning of the statutory text was fatal to the cause of action, and had to be followed even if doing so would allegedly undermine one of the objectives of TILA. *See Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2169 (2015) (quoting *Baker Botts*, 135 S. Ct. at 2170 (Bryer, J., dissenting)).

Slater v. U.S. Steel Corp., ---F.3d---, Case No. 12-15548, 2016 WL 723012 (11th Cir. Feb. 24, 2016) (per curiam) (Tjoflat, William Pryor, and Scola, JJ.; and Tjoflat specially concurring)

Code § / Rule: Judicial estoppel (preclusion of inconsistent positions)

Held: Judicial estoppel applied and prohibited the debtor from pursuing claims in district court that she failed to schedule in her bankruptcy, where she had knowledge of the claims and a motive for concealment.

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

Facts: Slater brought an employment discrimination claim against U.S. Steel. Almost 2 years later, Slater filed chapter 7 bankruptcy and did not list the lawsuit as an asset on Schedule B, nor on the Statement of Financial Affairs. The chapter 7 trustee treated the case as a "no asset", and filed a report of no distribution, but the case was still open when U.S. Steel discovered the bankruptcy and that the lawsuit against it had not been properly scheduled or listed by the debtor. U.S. Steel moved in the district court for dismissal based on the debtor's lack of standing (as only the trustee in her bankruptcy had standing to pursue the cause of action once it became an unadministered estate asset), or alternatively for summary judgment, based on judicial estoppel. Only after U.S. Steel filed those motions did the debtor amend her bankruptcy petition to

disclose the lawsuit. She responded to the motions by saying she did not intentionally omit the lawsuit and that she amended quickly once she realized the problem. While the motions were pending in district court, the bankruptcy court approved the chapter 7 trustee's application to employ special counsel to pursue the claim against U.S. Steel on behalf of the estate and allowed the debtor to convert her case to chapter 13, later confirming the debtor's plan. During the pendency of that plan, the district court ruled on U.S. Steel's motions, mooting the motion to dismiss (because a debtor under chapter 13 does have standing to prosecute claims on behalf of the estate, unlike a chapter 7 debtor), but granting the motion for summary judgment based upon the equitable doctrine of judicial estoppel.

The district court examined the issue under the guidance of *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1292 (11th Cir. 2002), and *Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269 (11th Cir. 2010). The district court found both *Burnes* factors were satisfied: (1) the allegedly inconsistent position was taken under oath in a prior proceeding; and (2) the inconsistencies were "calculated to make a mockery of the judicial system". Under the second prong, a failure to disclose is inadvertent only if the "debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment". *Robinson*, 595 F.3d at 1275. U.S. Steel established both factors as a matter of law. The debtor did not address the case law that controlled the issue, but instead relied solely upon her contention that her failure to disclose was inadvertent, had been cured, with the bankruptcy court having not taken final action based on her failure to disclose, and with U.S. Steel suffering no harm as a result of the nondisclosure. These arguments were nonavailing. Eleventh Circuit precedent indeed requires "intentional contradictions, not simple error or inadvertence" as noted by the district court, but waiting until the omission is caught to amend and schedule the claim is "too little, too late." The district court found, and the Eleventh Circuit agreed, that allowing a debtor to cure an omission and avoid the operation of judicial estoppel, where there is an inconsistent position and a motive for concealment, would encourage omission at the expense of disclosure. There would be no incentive for debtors to disclose assets unless and until they were caught in the omission. The purpose of judicial estoppel is to "prevent the perversion of the judicial process" and "prohibit parties from changing positions according to the exigencies of the moment." *See New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (which the 11th Circuit found to be consistent with its 2-factor approach under *Burnes*). Allowing an amendment to cure all ills after being caught in an omission, where the two factors are present, would diminish the incentive for debtors to provide truthful and accurate disclosures from the outset. In footnote 20 of the opinion, the court points out that its holding in *Parker v. Wendy's International, Inc.*, 356 F.3d 1268 (11th Cir. 2004), to the effect that the chapter 7 trustee was not bound by the debtor's omission of the cause of action and could pursue the prosecution of a Title VII claim on behalf of the estate, is contrary to the prior precedent of the court and so must be disregarded under the prior-panel-precedent rule.

In a lengthy special concurrence, Judge Tjoflat agrees that the result is controlled by prior precedent, but argues that the prior precedent is wrongly decided because it gives the defendant, U.S. Steel, a "windfall" and deprives the debtor's creditors of an asset and the bankruptcy court of its discretion. He argues that the system whose integrity is at stake is the bankruptcy court's, not the district court's, and that inconsistent positions are allowed in the district court under Fed. R. Civ. P. 8. Further, Judge Tjoflat sees the doctrine's purpose as punishment for nondisclosure, and not the encouragement of full disclosure, and posits that there are civil and criminal penalties in place that would accomplish punishment for nondisclosure much more effectively. Applying judicial estoppel under the court's precedent strips the bankruptcy court of its tools to motivate a

debtor to fully disclose all assets, in a case such as this one, where the bankruptcy court allowed the debtor to amend and to convert, and in future cases where the bankruptcy court might be willing to allow the debtor to reopen a closed case and schedule an omitted lawsuit. Instead, judicial estoppel has become a "quasi-criminal sanction" to punish debtors for false oaths about the existence of district court lawsuits. Judge Tjoflat believes "[t]he only solution to this unfortunate predicament is the en banc court."

Marigrove, Inc. v. Pinto (In re Transbrasil S.A. Linhas Aeras), ---Fed. Appx.---, Case No. 15-11596, 2016 WL 827251 (11th Cir. March 3, 2016) (per curiam) (Hull, Carnes, and Black, JJ.)

Code § / Rule: § 107(b) and Rule 9018, authority of Bankruptcy Court to refuse to unseal previously sealed documents

Held: The language of § 107(b) protects "(1) confidential research, (2) confidential development, and (3) confidential commercial information." The word "commercial" should not be read as modifying the first two categories.

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

Facts: At issue were documents including motions and orders that allowed the trustee for the debtor's chapter 15 bankruptcy estate to conduct "confidential discovery" concerning the possible misappropriation of certain assets. The appellants requested the documents be unsealed, and the bankruptcy court denied that request as to documents already sealed but granted it to the extent that future documents not be covered by the existing "gag" order. The issue on appeal was whether the bankruptcy court abused its discretion in refusing to unseal the documents. The district court and circuit court affirm. The appellants' argument was that the statutory language of § 107(b) that allows the bankruptcy court to exclude from the public record documents as needed to protect "an entity with respect to a trade secret or confidential research, development, or commercial information" should be read as applying only to proprietary commercial confidential research. The circuit court disagreed, finding no support in the statute for that reading. The language protects "(1) confidential research, (2) confidential development, and (3) confidential commercial information." The word "commercial" should not be read as modifying the first two categories.

Bishop v. Ross Earle & Bonan, P.A., ---F.3d---, Case No. 15-12585, 2016 WL 1169064 (11th Cir. March 25, 2016) (Marcus, Jordan, and Black, JJ.) (opinion by Black)

Code § / Rule: Fair Debt Collection Practices Act ("FDCPA") 15 U.S.C. §§ 1692g and 1692e

Held: An "initial communication" letter from a debt collector to a consumer's attorney that neglected to include the phrase "in writing" when describing the consumer's right to dispute the

debt was a "communication to a consumer", did not waive the "in writing" requirement, and could be a false representation or deceptive means to attempt to collect the debt.

History: 11th Circuit reverses the District Court for the Southern District of Florida and remands.

Facts: A debt collector sent a letter to a consumer's attorney, which letter omitted the phrase "in writing" in describing the consumer's right to dispute the debt under the FDCPA. The 11th Circuit decided 3 issues of first impression, all in favor of the represented consumer. First, the letter to the attorney did qualify as an indirect "communication to a consumer" based upon the nature of the attorney-client relationship because the attorney will share the contents of the letter with the client. The attorney is treated as a "conduit" to the consumer. A represented consumer does not forfeit all the protections of the "initial communication" restrictions under the FDCPA, and the court does not see any textual basis for treating a represented consumer, who arguably should be protected by the attorney rather than by the FDCPA, any differently from an unrepresented consumer. This ruling follows the lead of the Third, Fourth, and Seventh Circuits and disagrees with the Ninth Circuit.

Second, the court found that the consequence for omitting the "in writing" requirement was not merely that the dispute need no longer be in writing, as argued by the debt collector, who argued that such a waiver would further protect consumers and enhance the purposes of the FDCPA. The 11th Circuit found no support for a waiver argument in the text of the statute, which requires the "in writing" language in the initial communication, and which further requires that any dispute actually be made in writing.

Finally, the court found that the omission of the "in writing" language was sufficient to state a claim, and could amount to false, deceptive, or misleading behavior in connection with an attempt to collect a debt under the "least sophisticated consumer" standard, and that the determination on that issue was one for the jury. The court declined to adopt a "competent attorney" standard under the facts of this case, distinguishing cases where other circuits have adopted that standard, finding that the "competent attorney" standard has been applied to misleading and deceptive behavior, but the "least sophisticated consumer" standard applies to misrepresenations even when made to counsel.

Pinson v. JP Morgan Chase Bank, Nat. Ass'n, ---Fed. Appx.---, Case No. 15-11772, 2016 WL 1179877 (11th Cir. March 28, 2016) (per curiam) (Tjoflat, Martin, and Anderson, JJ.)

Code § / Rule: Fair Debt Collection Practices Act ("FDCPA") 15 U.S.C. § 1692; and Fed. R. Civ. P. 12(b)(6)

Held: At a minimum, a plausible FDCPA claim "must allege, among other things,
(1) that the defendant is a debt collector and (2) that the challenged conduct is related to debt collection."

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

Facts: Chase held a mortgage against Pinson's residence. Pinson, *pro se*, alleged that seven letters sent to Pinson by Chase and one visit made by Chase's lawyer to Pinson's residence violated the FDCPA. The district court converted Chase's motion to dismiss to a motion for summary judgment, and granted summary judgment to Chase. The 11th Circuit agreed that Pinson's complaint failed to state a claim on its face. The second amended complaint did not allege that the defendants attempted to collect a debt. Pinson did not allege any facts about the defendants' conduct that connected the conduct to Pinson or to Pinson's debt. At a minimum, a plausible FDCPA claim "must allege, among other things, (1) that the defendant is a debt collector and (2) that the challenged conduct is related to debt collection." *Reese v. Ellis, Painter, Ratterree & Adams LLP*, 678 F.3d 1211, 1216 (11th Cir. 2012). The evidence showed that Chase was the original lender and so it could not be a debt collector. The district court also did not abuse its discretion in denying Pinson another opportunity to amend his complaint because any such amendment would be futile.

Justice v. United States of America (In re Justice), ---F.3d---, Case No. 15-10273, 2016 WL 1237766 (11th Cir. March 30, 2016) (Tjoflat, Martin, and Anderson, JJ.) (opinion by Anderson)

Code § / Rule: § 523(a) nondischargeability of certain tax debts

Held: Failure to file a timely return, in the absence of a legitimate excuse or explanation, is not an honest and reasonable attempt to satisfy the tax law's requirements and so the taxes at issue are nondischargeable**,** because the fourth factor under *Beard, infra*, includes all the taxpayers' conduct with respect to the tax years at issue,.

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

Facts: The issue was whether the debtor's late-filed Forms 1040 qualified as "returns" under § 523(a) for purposes of dischargeability. If they were "returns" then the tax debt for the years at issue was dischargeable; but the tax debt would be nondischargeable if the forms were not considered "returns". The returns were filed many years late, and only after the IRS issued deficiency notices and assessed the amounts owed for the years 2000-2003. In the debtor's 2011 bankruptcy case, the bankruptcy court found the late-filed forms did not qualify as "returns" and the district court affirmed. The test for whether a document qualifies as a "tax return" is set out in *Beard v. Comm'r of Internal Revenue*, 82 T.C. 766, 777 (1984), *aff'd sub nom. Beard v. C.I.R.,* 793 F.2d 139 (6th Cir. 1986). Under the *Beard* test, a document must do the following to qualify as a return: (1) purport to be a return; (2) be signed under penalty of perjury; (3) contain enough information to allow the tax to be calculated; and (4) be an honest and reasonable attempt to satisfy the law's requirements. Only the fourth prong was analyzed in this case. Three other circuits (the Seventh, Fourth, and Ninth) have indicated that timeliness is relevant to the fourth prong, and indicated that delinquent filing after an IRS assessment is not honest and reasonable.

A "return" is defined as a return that satisfies applicable nonbankruptcy law requirements, including "applicable filing requirements" in § 523(*). Three other circuits – the First, Fifth, and Tenth – have decided that the phrase "applicable filing requirements" includes

filing deadlines and prohibits discharge of tax debts where the purported returns were filed as little as one day late. The 11th Circuit does not reach that issue, holding that even if the one-day late rule is incorrect, the tax debts here were nonetheless nondischargeable under the *Beard* test, as adopted by the Seventh, Fourth, and Ninth Circuits, and now adopted by the Eleventh Circuit. Failure to file a timely return, in the absence of a legitimate excuse or explanation, is not an honest and reasonable attempt to satisfy the tax law's requirements. This approach is contrary to the Eighth Circuit, which does not consider the debtor's subjective intent, but only the compliance with the face of the form itself, to determine the fourth prong under *Beard*. As a policy matter, the court noted that our tax system depends upon taxpayers' timely and honest self-reporting.

Rosenberg v. DVI Receivables XIV, LLC, ---F.3d---, Case No. 14-14620, 2016 WL 1392642 (11th Cir. April 8, 2016) (Marcus, Jill Pryor, and Fay, JJ.) (opinion by Marcus)

Code § / Rule: Bankr. Rule 9015(c); Fed. R. Civ. P. 50(b)

Held: When trying a case under title 11, a district court must apply the 14-day deadline of Bankr. Rule 9015(c) rather than the 28-day rule of Fed. R. Civ. P. 50 (b) in determining the timeliness of a post-trial motion for judgment as a matter of law after a jury trial.

History: 11th Circuit reverses District Court for the Southern District of Florida's ruling on a motion for judgment as a matter of law following a jury verdict, vacates, and remands with instructions to reinstate the jury's award.

Facts: Some issues in an adversary proceeding brought under § 303(i)(2) were tried before a jury in district court following withdrawal of the reference. Other aspects of the AP remained in bankruptcy court and were tried to conclusion there. The jury in the district court matters returned a verdict for the plaintiff, and awarded $1,120,000.00 in compensatory damages and $5,000,000.00 in punitive damages. The district court entered final judgment on March 14, 2013. Twenty-eight days later, the defendants moved for a judgment as a matter of law. This would have been timely under Fed. R. Civ. P. 50(b), which provides 28 days to file such a motion, but was not timely under Bankr. Rule 9015(c), which provides only 14 days to file such a motion. The plaintiffs argued that the bankruptcy rules controlled, but the district court disagreed and found the motion was timely, and further granted the motion reducing the award to only $360,000.00 compensatory damages.

On appeal, the plaintiff argued that the district court should not have considered the merits of the post-trial motion, as it was filed too late under Bankr. Rule 9015(c). The circuit court agreed. The plain language of Bankr. Rule 1001 provides that the Bankr. Rules "govern procedure in cases under title 11 of the United States Code." The advisory committee notes indicate that Bankr. Rule 1001 was amended in 1987 to extend coverage to all courts hearing bankruptcy matters, not just bankruptcy courts. The parties did not dispute that the issue in this case arose under title 11, as it involved a cause of action created by statute in title 11. In addition, Fed. R. Civ. P. 81(a)(2) provides that the Federal Rules of Civil Procedure apply to bankruptcy proceedings to the extent provided by the Bankruptcy Rules, thus establishing the

supremacy of the Bankruptcy Rules for title 11 matters adjudicated in district court. Accordingly, the 14-day timeframe of Bankr. Rule 9015(c) controlled. In support, the court cited two sister-circuit cases that allowed nationwide service of process under Bankr. Rule 7004 for cases arising under title 11 but tried in district court. *See In re Celotex Corp.*, 124 F.3d 619, 630 (4th Cir. 1997); and *Diamond Mortg. Corp. v. Sugar*, 913 F.2d 1233, 1243-44 (7th Cir. 1990); *see also Phar-Mor, Inc. v. Coopers & Lybrand*, 22 F.3d 1228, 1238 (3d Cir. 1994) (holding that the Bankruptcy Rules also govern non-core, related-to proceedings in district court).

The circuit court addressed the tension that then exists between the time for filing post-trial motions in the district court (limited to 14 days under the Bankruptcy Rules) with the time for filing an appeal of the district court's judgment (30 days under Fed. R. App. P. 4(a)(1)(A)) for bankruptcy matters tried in district court. While the timeframes are different, there is no actual conflict and no reason to ignore the plain language of the rules. The circuit court also declined to read the rules in such a way as to lead to an absurd result, which would attain if district courts were required to file their judgments with the clerk of the bankruptcy court (as defendants suggested would be the result of the Bankr. Rules applied, because a judgment would not be entered until it was entered by the "clerk" under Bankr. Rule 5003, and because Bankr. Rule 9001(d) defines "clerk" as being the "bankruptcy clerk"). On separate evidentiary questions, the district court was affirmed.

Potter v. Altman, ---Fed. Appx.---, Case No. 15-11645, 2016 WL 1425944 (11th Cir. April 14, 2016) (per curiam) (Hull, Marcus, and Jordan, JJ.)

Code § / Rule: *Barton* doctrine

Held: The *Barton* doctrine, providing that before one can sue a receiver, leave of the court that appointed the receiver should be obtained, has been extended to bankruptcy trustees in the 11th Circuit, and therefore it was no abuse of discretion to permanently enjoin suit against the trustee without prior court approval.

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 plaintiffs in this case were the debtor, the debtor's mother, and the mother's business. The bankruptcy court enjoined plaintiffs from suing the trustee of the debtor-plaintiff's bankruptcy estate without leave of court. The district court and 11th Circuit affirmed the permanent injunction. The trustee sought and obtained a judgment voiding the transfer of certain real property from the debtor to another of the non-debtor-plaintiffs, and filed a motion to sell the property. The bankruptcy court required the plaintiffs in possession to vacate the property and prohibited them from re-entering except at a specified time to remove any remaining personal property. Finally, the bankruptcy court also entered a final summary judgment that, among other things, enjoined the plaintiffs from pursuing litigation against the trustee without prior leave of court. On appeal, the district court and circuit court affirmed the injunction, finding no abuse of discretion. The *Barton* doctrine, providing that before one can sue a receiver, leave of the court that appointed the receiver should be obtained, has been extended to bankruptcy trustees in the

11th Circuit. *Barton v. Barbour*, 104 U.S. 126, 127 (1991); *Carter v. Rodgers*, 220 F.3d 1249, 1252-53 (11th Cir. 2000). Therefore the injunction was fully authorized under the controlling precedent.

Uberoi v. Supreme Court of Florida, ---F.3d---, Case No. 15-12636 (11th Cir. April 18, 2016) (per curiam) (Ed Carnes, CJ.; and Hull and Marcus, JJ.)

Code § / Rule: *Rooker-Feldman* and sovereign immunity

Held: District court did not have subject matter jurisdiction over a former debtor's case against the Florida Supreme Court under § 525, because of the *Rooker-Feldman* doctrine, where the case was clearly a challenge to a state court judicial proceeding; and further did not err in dismissing, on sovereign immunity grounds, the former debtor's due process claim against the Florida Supreme Court.

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

Facts: The Supreme Court of Florida denied a former chapter 13 debtor admission to the Florida Bar for lack of candor and for refusal to pay her financial obligations, premised upon the dismissal of her earlier chapter 13 case for failure to pay. The former debtor asked the district court to enjoin the Florida Supreme Court from denying her bar admission under § 525(a), but the district court found that such claim was one she had the opportunity to make in the state proceedings, and so the district court had no jurisdiction over that claim under the *Rooker-Feldman* doctrine. The *Rooker-Feldman* doctrine provides that federal district courts have no jurisdiction over claims challenging a state court's judicial decision to deny admission to a particular bar applicant, and it applied here where the plaintiff had a reasonable opportunity to raise her § 525(a) claims in state court. Further, her due process claim against the Florida Supreme Court, which is a department of the State of Florida, was barred by sovereign immunity.

SELECT SUPREME COURT CASES

Wellness International Network, Ltd. v. Sharif, 135 S. Ct. 1932 (May 26, 2015). Justice Sotomayor authored the Court's opinion; Justice Alito filed an opinion concurring in part and concurring in the judgment; Chief Justice Roberts filed a dissenting opinion in which Justice Scalia joined and in which Justice Thomas joined in part; Justice Thomas filed a dissenting opinion. The Court described a "Stern" claim as one over which a bankruptcy court has statutory authority (28 U.S.C. § 157(b)) to enter a final judgment but is prohibited from doing so on constitutional grounds. In *Stern v. Marshall* the claim or cause of action that the Supreme Court held must be adjudicated by an Article III judge was a state common law tortious inference with contract claim that was asserted by the debtor as a counterclaim to the creditor's proof of claim filed in her bankruptcy case. Counterclaims are listed as "core" proceedings in 28 U.S.C. § 157(b).

By drawing on analogies to the functions performed by magistrates, referees and arbitrators, the Court concluded that allowing Article I bankruptcy judges to decide matters submitted to them by consent does not violate the separation of powers so long as an Article III court retains supervisory authority. The parties' consent must be "knowing and voluntary." The consent may be implied, so long as the parties were made aware of the need for consent and their right to refuse to consent, but nevertheless voluntarily proceeded in the case in bankruptcy court (described as the non-Article III adjudicator). The Court encouraged bankruptcy courts to ensure that consent is express, as a matter of "best practice" to ensure the consent is knowing and voluntary and to avoid later litigation over the issue of consent. The case was remanded for the Seventh Circuit to decide if Sharif's actions amounted to a knowing and voluntary consent.[2]

Practical Impact:

Most so called "*Stern*" claims, will be counterclaims filed by debtors and trustees in response to creditors' proofs of claim, where the grounds for the counterclaim did not arise as a consequence of the bankruptcy case – existed before the bankruptcy case was commenced – and is not required to liquidate the creditor's claim or adjudicate whether it should be allowed, and if so in what amount and whether it should be secured or not. Chief Justice Roberts referred to *Stern* claims as those that merely augment the estate. If the counterclaim is part of the claims allowance process and adjusting the debtor-creditor relationship, then it probably is not a *Stern* claim. Strong arguments can be made that avoidance actions (preference, fraudulent transfer), regardless of how presented (i.e. counterclaim) are *Stern* claims.

Many bankruptcy courts, including the Eastern Division of the N.D. Alabama, have already changed their report of parties' planning meeting filed in adversary proceedings to require parties to explicitly state whether they consent to entry of final judgments by the bankruptcy court, even if the proceeding is "core". A declaration of whether issues to be adjudicated in an adversary proceeding are core should be covered in the pleadings (Fed. R. Bankr. P. 7008), but that won't cure the problem with core claims that are also *Stern* claims.

[2] In the *Sharif* case, the underlying issue was whether assets of a certain trust were in fact assets of the estate given that the trust was alleged to be the debtor's alter ego, so that the concealment of those trust assets by the debtor would justify denial of discharge.

Amended Rules have been proposed to require affirmative consent to entry of final orders on Stern claims. But remember, consent does not have to be express so long as it is knowing and voluntary.

My guess is that substantial engagement in the litigation process, or an unreasonable delay, without a challenge to a bankruptcy court's jurisdiction will likely result in a ruling that a party's conduct demonstrated voluntary consent. Nonetheless, historically, most bankruptcy practitioners have been comfortable litigating in front of bankruptcy judges, so this decision changed little for them. It will be the non-bankruptcy lawyers, who often are not comfortable litigating in bankruptcy court, who will unwittingly consent to bankruptcy court jurisdiction because of their failure to timely raise the issue after being made aware that their consent is required.

Too little attention is given to the practical effect of submission of proposed findings and conclusions by a bankruptcy court to a district court on related-to matters, and now *Stern* claims. The review of the bankruptcy court's proposed findings and conclusions by the district court is de novo – there is no statutory or judicial deference given to the bankruptcy court's factual findings, and as with all appeals, legal conclusions are always reviewed de novo. So it's the facts you need to keep in mind, and from a practical standpoint, the district court will likely give considerable weight to the bankruptcy court's findings. If the facts can be construed either way, you're probably stuck with the bankruptcy judge's view of the facts either way. If you don't consent to a final order being entered by the bankruptcy judge, and the final order is entered by the district court after his or her de novo consideration of the proposed findings and conclusions, your appeal from the district court's order is to the circuit court. But, if the bankruptcy court enters the final order, then your appeal is first to the district court (less expensive, quicker, and more likely not to be dismissed on a collateral issue, e.g., as interlocutory, etc.) and then to the circuit court, so you have two more bites at the apple, not just one. Bottom line, know your bankruptcy judge.

Bullard v. Blue Hills Bank, 135 S. Ct. 1686 (May 4, 2015). Chief Justice Roberts wrote for the unanimous Court. The opinion held that the denial of confirmation is not a final, appealable order. Debtors must either have their cases dismissed or confirm a plan they find objectionable 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."

Practical Impact:

In the Eleventh Circuit, this was thought to be the likely rule already, at least by some of us (on a related but distinct issue, see *Neidich v. Salas*, 783 F.3d 1215 (11th Cir. 2015) (voluntary dismissal of a chapter 13 case rendered moot the trustee's appeal of a confirmation issue; dismissal of a chapter 13 case moots an appeal arising from the bankruptcy proceedings)). For a debtor to preserve his right to appeal, *Bullard* puts his attorney in the awkward position of having to (i) propose a plan the debtor finds objectionable and get that plan confirmed while preserving the debtor's objections for appeal or (ii) refuse to propose an alternative plan the court will confirm, and allow the case to be dismissed. Either choice may put the debtor in an

untenable position pending an appeal: paying on a plan he cannot afford or dismissal with the loss of protection from creditors. The Supreme Court stated that debtors may still seek an interlocutory appeal under 28 U.S.C. § 158(a)(3) (which was, in fact first pursued by Bullard and the bankruptcy court certified his interlocutory appeal to the BAP, but the BAP refused to certify the interlocutory appeal to the First Circuit).[3]

Harris v. Viegelahn, 135 S. Ct. 1829 (May 18, 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 stated 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."

Practical Impact:

This decision led to a change in procedure for many courts, including the Northern District of Alabama. NDAL confirmation orders now specifically provide that upon *dismissal* post-confirmation, which triggers § 349 (not *conversion*, which would instead trigger § 348 as addressed in *Harris*) any monies on hand will be distributed per the confirmed plan. The confirmation order fits § 349(b)'s provision that the revesting in the debtor upon dismissal under § 349(b)(3) does not occur "if the court, for cause, orders otherwise." *See In re Hufford*, 460 B.R. 172 (Bankr. N.D. Ohio 2011). *See also In re Kirk*, 537 B.R. 856 (Bankr. N.D. Ohio 2015) (finding that funds on hand with the chapter 13 trustee upon pre-confirmation dismissal should be disbursed per the specific directive of § 1326(a)(2) which controls over the general vesting provision of § 349(b)(3), and which allows payment of attorney fees as an administrative expense by its reference to payment of claims under § 503(b)).[4]

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[3] Interlocutory appeal to the circuit level is also available under 28 U.S.C. § 1292(b), but only under more limited circumstances.

[4] Some courts, including the Eastern Division of the NDAL, also allow payment of an attorney fee out of funds on hand, and specifically include that authorization in the dismissal order, when a case is dismissed prior to confirmation. On the other side of the issue, the U.S. Bankruptcy Court for the Middle District of Alabama has concluded that upon dismissal post-confirmation, any funds on hand should be returned to the debtor. *See In re Murphy*, 2014 WL 2600168 (Bankr. M.D. Ala. 2014).

An unanswered question is whether after *Harris,* courts have the authority to pay attorney fees or filing fees out of undisbursed funds held by the trustee when the case is converted rather than dismissed *pre-confirmation* (*Harris* certainly foreclosed the payment of any fees out of funds on hand if the conversion occurs *post-confirmation*). In the Eastern Division of the NDAL, upon conversion, be it before or after confirmation, all monies on hand with the trustee are refunded to the debtor (even when the filing fee has not been paid in full).[5] A very recent case out of the 1st Circuit B.A.P. made the same distinction, followed the same statutory analysis as did the bankruptcy court in *Brandon*, and pointed out:

> Unlike a case converted from chapter 13 to chapter 7, which is no longer governed by any chapter 13 provision, certain provisions of chapter 13 continue to apply in a chapter 13case that has been dismissed, but not yet closed. If a casehas not been confirmed or converted, the trustee's services are not terminated under § 348(e), and the trustee still has authority to disburse funds pursuant § 1326(a)(2). Thus, a majority of courts have held that the *Harris* holding does not apply in a chapter 13 case that has been dismissed prior to confirmation.

White v. Fessenden (In re Wheaton), 547 B.R. 490, 497 (B.A.P. 1st Cir. 2016) (citations omitted).

Bank of America v. Caulkett, 135 S. Ct. 1995 (June 1, 2015). Justice Thomas authored the opinion of the Court, which was joined in part by Justices Kennedy, Breyer, and Sotomayor. The Court reversed the 11th Circuit and confirmed the continuing validity of *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 won't fit the definition of "not an allowed secured claim" under § 506(d). Thus, § 506(d) does not permit a chapter 7 debtor to *strip off* a completely underwater junior mortgage lien. The Eleventh Circuit had 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*

[5] For an interesting discussion of the effect of conversion before confirmation on the ability to pay attorney fees from the funds on hand with the trustee, see *In re Brandon*, 537 B.R. 231 (Bankr. D. Md. 2015). The *Brandon* court found that even after *Harris*, nothing prohibited the court from paying debtor's counsel out of funds on hand with the trustee upon either dismissal or conversion pre-confirmation. According to *Brandon*, when a case is dismissed, the court has this authority under § 1326(a)(2), which allows the trustee to deduct any unpaid claim under § 503(b), such as attorney fees, prior to refunding amounts on hand to the debtor, and a court is not constrained by the *Harris* interpretation of § 348 in the event of dismissal rather than conversion. *Brandon* distinguished *Harris* on the basis that the conversion took place post-confirmation, and concluded that when the conversion occurs pre-confirmation, part of the trustee's duties include compliance with the same third sentence of § 1326(a)(2) and its requirement that § 503(b) administrative claims such as attorney fees be paid prior to any refund. A different court disagreed with *Brandon* and reached the opposite result in *In re Hoggarth*, 546 B.R. 875 (Bankr. D. Colo. 2016).

States Small Bus. Admin., 862 F.2d 1537 (11th Cir. 1989). The Supreme Court held that the claims were "allowed secured claims" for purposes of § 506(d), inasmuch as the claims were (1) allowed under § 502, and (2) secured by a mortgage, without regard to the lack of value, i.e. equity, in the mortgaged property under § 506(a).

Practical Impact:

As this reversed the Eleventh Circuit, there may be quite a few chapter 7 strip-off AP's in the pipeline that will be determined differently than those that arose during the time after *McNeal* and before this decision. Now debtors and their counsel should consider the use of chapter 13, even when a chapter 13 discharge is not available (i.e., a chapter 20) – thereby utilizing the Eleventh Circuit's ruling in *Wells Fargo Bank v. Scantling (In re Scantling),* 754 F.3d 1323 (11th Cir. 2014) (Tjoflat, Moore, and Schlesinger, JJ.), wherein the circuit court allowed the strip off of a wholly unsecured junior residential mortgage in no-discharge chapter 13 case. If strip off is allowed in a no-discharge chapter 13, it clearly is available in a chapter 13 case where the debtor is eligible for a discharge after fully paying the plan. 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 in *Scantling* found that the claim was not "secured" because there was no value after valuation under § 506(a) and therefore the lien could be stripped off under § 1322(b)(2). The bankruptcy court in *Scantling* further found 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 in its 2014 decision in *Scantling*. Therefore, the strip-off option through a chapter 13 becomes even more important, at least in the Eleventh Circuit, after the reversal of the *McNeal-Folendore* line by the Supreme Court in *Caulkett*. However, after *Caulkett*, it will be interesting to see whether circuit courts, and even district courts expand the Supreme Court's reasoning in *Caulkett* to chapter 13, or adopt another basis for disallowing mortgage strip offs in chapter 13 cases.

Baker Botts L.L.P. v. ASARCO LLC, 135 S. Ct. 2158 (June 15, 2015). Justice Thomas authored the opinion of the Court. Justice Sotomayor filed an opinion concurring in part and concurring in the judgment. Justice Breyer filed a dissenting opinion, in which Justices Ginsburg and Kagan joined. The Court ruled that the bankruptcy code, particularly §§ 327(a) and 330(a)(1), does not permit bankruptcy courts to award fees to professionals for work performed in defending their fee applications. Such defense of a fee award is not "reasonable compensation for actual, necessary services rendered" because defending fees does not serve the estate, and does not aid the administration of the bankruptcy estate. Absent statutory language that allows for fee-defense compensation, which is not in aid of administration of the estate, the American rule controls. Under the American rule, no attorney is entitled to fees from the opposing party for defending the attorney's fee award absent explicit statutory authority. Rule 9011 serves to deter bad-faith fee award challenges. This case, at first glance, appeared to call into question the Eleventh Circuit's recent ruling in *DVI Receivables v. Rosenberg (In re Rosenberg)*, 779 F.3d 1254 (11th Cir. 2015), wherein the circuit court allowed "fees on fees" for the filing of an adversary proceeding to collect fees awarded under § 303(i). However, upon closer reading, the

statutory text of § 303(a)(i) was the authority for the fee-collection fees in DVI Receivables, not §§ 327 and 330, and it is distinguishable on that basis.

Practical Impact:

In larger cases where professional fees are paid from the estate (e.g., fees for debtor's counsel) or included in an over-secured creditor's claim, it is common to find parties challenging each other's professional fees as being excessive. After *Baker Botts,* attorneys who have successfully defended their fees from attack by adverse parties, such as a creditors' committee, will no doubt seek "sanctions" under Rule 9011 in the amount of their attorney's fees incurred in connection with the failed challenge. But Rule 9011 places a higher burden of proof on the claimant and requires a showing of bad faith to succeed.

Husky Int'l Elecs., Inc. v. Ritz (In re Ritz), --- U.S. ---, 2016 WL 2842452 (May 16, 2016); reversing and remanding the Fifth Circuit's decision at 787 F.3d 312 (5th Cir. 2015). Husky was owed a debt by a non-debtor corporation, which corporation was owned in part by the debtor, Ritz, who was the controlling shareholder. Husky filed a nondischargeability adversary proceeding and attempted to pierce the corporate veil under Texas law by proving that the individual debtor Ritz had committed "actual fraud" by structuring constructively fraudulent transfers of the corporation's assets into other entities in which the debtor had at least some ownership interest. The bankruptcy court found the creditor could not pierce the veil under Texas law because no "misrepresentation" was shown to support a finding of actual fraud. The district court found that the veil could be pierced on this evidence under Texas law, and that the debtor was personally liable for the debt, but affirmed the bankruptcy court nonetheless on the basis that the lack of a "misrepresentation" was fatal to the creditor's nondischargeability claim under § 523(a)(2)(A). The Fifth Circuit found that constructive fraud, in the absence of actual fraudulent intent, does not support a claim under § 523(a)(2)(A). This ruling was in contrast to the Seventh Circuit in *McClellan v. Cantrell*, 217 F.3d 890 (7th Cir. 2000), which held that an intentional fraudulent transfer was sufficient under § 523(a)(2)(A).

The Supreme Court disagreed with the Fifth Circuit, and reversed and remanded in a decision authored by Justice Sotomayor, joined by all but Justice Thomas, who dissented. The Supreme Court held that the term "actual fraud" encompasses fraudulent conveyance schemes and other forms of fraud that can be accomplished in the absence of any false representation. This gives the term meaning so that it is not redundant with "false representations" under § 523(a)(2)(A), and recognizes that at common law, the term "actual fraud" was interpreted as a fraud committed with wrongful intent, and did not necessarily require a misrepresentation by the debtor to a creditor. Justice Thomas, in dissent, pointed out that the common law meaning should give way when it does not fit the context of the statute, as he believed the case to be here. Justice Thomas also stressed that the court's opinion ignores the plain meaning of the phrase "obtained by" in its effort to extend the reach of the term "actual fraud" to cover frauds other than fraud at the inception of a particular debt to a particular creditor. In footnote 3 of the opinion, the Court says it is leaving it up to Fifth Circuit to decide on remand whether the debt to Husky was "obtained by" the debtor's fraudulent transfer scheme, and points out the unusual circumstance here, where the debtor is, according to the creditor, both the transferor and the transferee of the fraudulent

transfer. Justice Thomas points out that the bankruptcy court found that there was no evidence that Husky ever communicated with the debtor prior to entering the contract, and also no evidence that the debtor engineered the fraudulent transfer with an aim of avoiding the corporation's debt to Husky. Justice Thomas also says the reliance element of the Court's own jurisprudence is also ignored by the majority's opinion.

Petition for Cert. Pending:

Official Comm. Of Unsecured Creditors v. CIT Grp./ Bus. Credit Inc. (In re Jevic Holding Corp.), 787 F.3d 173 (3d Cir. 2015), *petition for cert. filed* (U.S. Nov. 17, 2015) (No. 15-649). On February 29, 2016, the Supreme Court invited the Solicitor General to file a brief in the case on behalf of the United States, to aid the Court in deciding whether to grant cert in this case. The Third Circuit approved a structured dismissal of the chapter 11 case, which involved a settlement with unsecured creditors for a small distribution but paid nothing to the priority WARN Act employees' class. Although the settlement would have violated the absolute priority rule in the context of confirmation, the Third Circuit ruled that the absolute priority rule did not apply to the settlement agreement, which was not part of the confirmation process. The bankruptcy court had discretion under the facts of that case to approve the settlement even though its distribution did not comply with the requirements for confirming a plan. There was no showing that the settlement was proposed as a scheme to evade the safeguards of the confirmation or conversion process. There was also no real chance of any distribution to anyone but the secured creditors were the settlement not approved (in either a plan or a conversion scenario).