11TH CIRCUIT CASES UPDATE
June 2018-April 2019

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

32nd Annual
Bankruptcy at the Beach Seminar
June 7-8, 2019

[1] Judge Robinson wishes to acknowledge his law clerk, Alyssa Ross, for her contribution in preparing these materials.

Weakley v. Eagle Logistics, 894 F.3d 1244, Case No. 17-14022 (11th Cir. June 29, 2018) (per curiam) (Ed Carnes, C.J.; Marcus and Rosenbaum, JJ.).

Code § / Rule: judicial estoppel under *Slater*

Held: It was no abuse of discretion to apply the doctrine of judicial estoppel and dismiss two unscheduled lawsuits, following the two-prong analysis of *Slater*.

History: Eleventh Circuit affirmed District Court for the Northern District of Alabama (Judge HNJ)

Facts: The debtor filed bankruptcy and failed to disclose two lawsuits that were pending in the district court. As a result of that nondisclosure, the district court granted summary judgment in favor of the defendants in the two suits and dismissed the lawsuits. In examining the district court's ruling, the Eleventh Circuit followed the two-part test in *Slater v. U.S. Steel Corp*., 871 F.3d 1174 (11th Cir. 2017) (en banc). Under *Slater*'s guidance, the judicial estoppel inquiry looks at whether the plaintiff "took a position under oath in the bankruptcy proceeding that was inconsistent with the plaintiff's pursuit of the civil lawsuit," and whether the inconsistency was "calculated to make a mockery of the judicial system." *Slater*, 871 F.3d at 1180-81. Here, the debtor clearly fell under the first prong, because he took inconsistent positions under oath by failing to disclose the two lawsuits in his chapter 13 case despite having already filed the lawsuits seeking damages. Under the second prong, considering the debtor's level of sophistication, the circumstances including what the debtor told his attorney, the explanation for the omission, the ability to benefit financially from the nondisclosure, and the history of his having disclosed much smaller lawsuits as assets while omitting the two largest ones, the district court concluded that the debtor intentionally misled the bankruptcy court. In finding no abuse of discretion, the Eleventh Circuit pointed out that the debtor filed six amendments to the schedules and still never disclosed the assets until the defendants in the lawsuits raised the judicial estoppel issue and sought dismissal on that basis. Finally, the court held that the debtor's voluntary dismissal of the chapter 13 case did not moot the judicial estoppel issue. The judicial estoppel issue is not about what happens in the bankruptcy case, but what happened in the district court case in which it was invoked. Further, it was no abuse of discretion to apply the doctrine even though the chapter 13 had been dismissed because the goal of the doctrine is to "prevent perversion of the judicial process and protect its integrity." *Id.* at 1180. This goal cannot be achieved if one may avoid the doctrine by simply dismissing the bankruptcy once an opponent has invoked the doctrine's application. While the district court issued its decision prior to the en banc ruling in *Slater*, the district court nonetheless followed the analysis required by *Slater*.

Daughtrey v. Rivera (In re Daughtrey), 896 F.3d 1255, Case No. 15-14544 (11th Cir. July 24, 2018) (Tjoflat, Rosenbaum, and Sentelle, JJ.) (opinion by Tjoflat).

Code § / Rule: § 706(a) and (d)

Held: There is no absolute right to convert a chapter 7 case to one under chapter 11; the *Marrama* framework applies so that if the debtor would be subject to dismissal or re-conversion in chapter 11, no exercise in the futility of conversion is required.

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

Facts: "In this case, Cecil and Patricia Daughtrey filed a Chapter 7 bankruptcy petition for the sole purpose of preventing the sale of their property in a public auction to be held pursuant to a state court judgment that foreclosed the mortgage on the property. After the public auction was automatically stayed under 11 U.S.C. § 362(a), the trustee of the bankruptcy estate and the judgment creditor, 72 Partners, LLC, entered into a compromise agreement that would grant 72 Partners all of the property except for a portion the Daughtreys would retain as their homestead. The Daughtreys objected to the compromise agreement and moved the bankruptcy court to convert their Chapter 7 case to a Chapter 11 proceeding on the representation that the property (with the exception of the homestead) could be sold for a sum substantially in excess of the judgment. The Court, concluding that the Daughtreys could not qualify as Chapter 11 debtors, denied their motion and approved the compromise agreement."

The Eleventh Circuit found no merit in the appeal and affirmed in a 53-page published opinion. The lengthy opinion details the case history from the entry of a final judgment in the state foreclosure case involving 2,500 acres of real estate in Sarasota County, Florida mainly used for sod farming and grazing cattle, to the filing of the chapter 7 petition, to the "strategies Debtors' lawyers took to thwart 72 Partners' . . . effort to obtain satisfaction of its judgment." The creditor in the bankruptcy held the note and mortgage against the property by virtue of assignment from the original mortgage creditor. The state court entered a final judgment of foreclosure in excess of four million dollars, and further provided that the property would be sold at public auction on a date certain if the judgment was not satisfied otherwise. Approximately ten days prior to the scheduled foreclosure sale, the debtors filed Chapter 7 pro se. Months of shenanigans and delay ensued. Ultimately, the trustee decided the property was not worth what the debtors believed it was worth, and rather than incur the risk and time delay of selling the property (and the concomitant enormous capital gains tax consequences to the estate), the trustee negotiated a compromise settlement with the creditor. Further delay and redrawing of the portion the debtors would retain free and clear then followed (to include a well in the 160-acre portion they were to retain). At the second compromise hearing, eight months into the case, the attorney then representing the debtors stated that they had a significant investor who would "take out" the creditor and mentioned converting the case to chapter 11, and admitted there were unscheduled unsecured creditors who had no notice of the case at that point. The court agreed to continue the matters to allow another 30 days for the debtors to bring their "deal" to fruition. Alas, no deal materialized and the debtors soon were on their third lawyer in the bankruptcy (in addition to the seven lawyers representing them in the foreclosure action). The debtors moved to convert the case to chapter 11, asserting an absolute right to do so and claiming that unsecureds would fare better in chapter 11 than in chapter 7. At the hearing, the creditor's attorney argued the attempt at conversion was futile because no plan would be confirmable in chapter 11, and also was an abuse of the bankruptcy process and lacked good faith.

The bankruptcy court found that no chapter 11 plan would be confirmable without making any finding regarding good faith or lack thereof, and declined to convert the case despite the debtors' argument that they had an absolute right to do so. The bankruptcy court approved the compromise as it would give the unsecureds at least something and would give the debtors their homestead and well, free and clear, whereas foreclosure would certainly not. The Eleventh Circuit agreed and ruled that the holding of *Marrama*, 549 U.S. at 365, 373-74, applies also to conversions from chapter 7 to chapter 11. The right to convert under § 706(a) is limited by subsection (d), and as *Marrama* dictates, a conversion is thus expressly conditioned upon a debtor's ability to be a debtor under the chapter being sought. Converting a chapter 7 case to chapter 11 when "cause" exists to dismiss or reconvert the case after conversion under § 1112(b)(4) "would place form over substance and defy common sense." In addition, the Eleventh Circuit pointed out that multiple bases for "cause" to dismiss existed here, including lack of good faith. The bankruptcy court did not rely on lack of good faith in its ruling, and the district court also did not consider it, but the circuit court spent 53 pages laying out the facts and history of the Debtors' shenanigans to highlight the debtors' bad faith. "The bare facts of what transpired make that pellucidly clear." "The motion [to convert to chapter 11] was a sham, farcical on its face, and was filed for the sole purpose of thwarting Creditor's effort to obtain satisfaction of its judgment. Debtors had no plan and none on the horizon. . . . The filing was just one more step in Debtors' continuing abuse of the bankruptcy process. Their strategy was to delay the process indefinitely." On the compromise issue, the circuit court found that "[a]s a matter of conscience if nothing else, the Bankruptcy Court, in the exercise of its discretion, had to approve the Compromise. And the District Court had to approve its decision."

Herrera-Edwards v. Bernard Edwards Co., LLC (In re Herrera-Edwards), 745 Fed. Appx. 818, Case No. 17-15353 (11th Cir. Aug. 7, 2018) (per curiam) (Marcus, Rosenbaum, and Hull, JJ.).

"We are Family"—and therein lies the problem.

Code § / Rule: § 363 rejection of executory contracts

Held: In a fact-intensive opinion, the court affirmed the denial of a motion to reject executory portions of a settlement agreement, stating that "rejection does not allow the bankruptcy court to divest a right that has already vested in another party to the agreement or to undo performance that has already occurred."

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

Facts: The debtor was married to Bernard Edwards, well-known singer, songwriter, and producer ("Dance, Dance, Dance," "Everybody Dance," "Le Freak," and "We Are Family" being some of his most popular works). Following Edwards' death in 1996, the debtor (who was his widow and was intentionally omitted from his will), his former wife, and his six children fought over his estate. The three sides ultimately settled the estate matters and entered into a settlement agreement and co-publishing agreement, which provided for division of royalties and copyright income. The

debtor received payments pursuant to the settlement agreement for years, before filing bankruptcy in 2012. She sought to reject portions of the co-publishing agreement, and filed an AP against the childrens' company and the deceased-husband's business manager, seeking additional royalties and challenging the "perpetual fee" to the manager. Following a bench trial, the bankruptcy court granted judgment for the defendants and denied the motion to reject parts of the co-publishing agreement. The district court and Eleventh Circuit affirmed. The bankruptcy court found that even if it had allowed rejection of the portions at issue, it was without the power to "rewrite the terms of the 'related and otherwise binding'" settlement agreement to give the debtor the copyright administration money she was ultimately seeking. "Likewise, the bankruptcy court noted that rejection does not allow the bankruptcy court to divest a right that has already vested in another party to the agreement or to undo performance that has already occurred." The copyright administration rights had already vested in the children, and had then been validly assigned to the management company, and the management fee provided for in the settlement agreement was valid and beyond the statute of limitations for breach of contract or tort claims when the AP was filed in any event. The district court affirmed but did not reach the statute of limitations argument. The circuit court agreed that while the debtor had a property interest in the copyrights, including an income stream from their use and license, she did not have any right to control the use or licensing of those copyrights. That control was vested elsewhere. The circuit court also affirmed the other aspects of the district court's rulings.

Kaye v. Blue Bell Creameries, Inc. (In re BFW Liquidation, LLC), 899 F.3d 1178, Case No. 17-13588 (11th Cir. Aug. 14, 2018) (Martin, Julie Carnes, and Gilman, JJ.) (opinion by Julie Carnes, J.).

Code § / Rule: new value defense of § 547(c)(4) to preference payment recovery under § 547(b)

Held: "[Section] 547(c)(4) does not require new value to remain unpaid."

History: Eleventh Circuit vacated and remanded to the Bankruptcy Court for the Northern District of Alabama.

Facts: The chapter 11 Trustee sought to avoid and recover approximately $563,900 in alleged preference payments received by Blue Bell during the 90 days prepetition. Each payment the debtor made during that time was "for recent shipments of ice cream and other merchandise" that Blue Bell delivered and the debtor then sold to the public. Blue Bell agreed the payments were preferences, but asserted a "new value" defense to the extent of the new product it delivered during the relevant period. The bankruptcy court (Honorable Tamara O. Mitchell) followed the Eleventh Circuit's precedent in *Charisma Inv. Co., N.V. v. Airport Systems, Inc. (In re Jet Florida System, Inc.)*, 841 F.2d 1082 (11th Cir. 1988) and ruled that the new value defense was available only to the extent that the new value remained unpaid on the petition date and allowed avoidance recovery of $438,496 of the preference period payments. Blue Bell appealed and the parties then jointly certified a request for an immediate appeal directly to the Eleventh Circuit, which was granted. On direct appeal, the Eleventh Circuit revisited the panel decision in *Jet Florida System* and found the

language that the new value defense had "generally been read to require . . . that the new value must remain unpaid" was dicta and therefore not binding on a future panel. The language was not necessary to the holding in *Jet Florida System*, and the extent of the panel's ruling therein "was to hold that the appellant had not provided any new value to the debtor subsequent to his payment of almost $12,000." The recitation in that opinion of two other elements: that the new value be unsecured and remain unpaid, was dicta. The court found instead that both the statutory language and history (such as the rejection of the "remaining unpaid" language in the prior version of the statute under § 60(c) of the Act when the Code was drafted) and strong policy considerations (such as encouraging suppliers to continue to do business with struggling companies on short-term credit) supported Blue Bell's position, which was also in line with the Fourth, Fifth, Eighth, and Ninth Circuits' ruling on this issue. The Seventh and Third Circuits have held otherwise. The circuit court also rejected the trustee's argument that "otherwise unavoidable" in § 547(c)(4) meant that the avoidability of the debtor's payment during the preference period must be derived from somewhere in the Code other than § 547 (such as payment via a fraudulent transfer that is avoidable under § 548). The court rejected this argument as being unreasonable and not a logical reading of the statute. The best reading of "otherwise unavoidable" is that it refers to a transfer that is unavoidable for reasons other than the new value defense (such as the ordinary course of business defense).

Tucker v. JP Morgan Chase Bank N.A. (In re Tucker), 743 Fed. Appx. 964, Case No. 17-12020 (11th Cir. Aug. 14, 2018) (per curiam) (William Pryor, Rosenbaum, and Anderson, JJ.).

Code § / Rule: mootness, actual case or controversy requirement

Held: The dismissal of the underlying chapter 13 case mooted an appeal of a stay relief matter that did not include sanctions. *See Neidich v. Salas*, 783 F3d. 1215 (11th Cir. 2015). An exception did not apply because the debtor showed no "reasonable expectation" or "demonstrated probability" that she would face the same issue from the creditor in the future.

History: Eleventh Circuit affirmed the District Court for the Southern District of Florida, which had dismissed as moot an appeal from the Bankruptcy Court for the Southern District of Florida.

Facts: The pro se chapter 13 debtor had been arguing with Chase in a state court foreclosure action concerning property in Florida for almost five years when she filed her bankruptcy petition. The state court case was still pending when the debtor filed her case. The bankruptcy court confirmed a plan that said the debtor would deal with Chase directly, outside the plan. After confirmation, Chase moved for stay relief to allow the state court litigation to continue, which the bankruptcy court granted. The debtor moved the court to vacate the stay relief order, and failing that, moved for relief from the judgment, which was also denied. While those rulings were on appeal to the district court, the debtor moved the bankruptcy court to vacate its order denying her first motion to vacate the stay relief order, and was again denied. She then amended her notice of appeal to include that denial. While the appeal was pending, the underlying chapter 13 case was dismissed

for default in payments to the trustee. Chase then moved the district court to dismiss the appeal of the stay relief order on grounds that it was moot, and the district court agreed.

On appeal to the Eleventh Circuit, the court discussed the mootness doctrine as a component of its jurisdiction over "actual, ongoing cases or controversies." "An issue is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief." *Christian Coal. Of Fla., Inc. v. United States*, 662 F.3d 1182, 1189 (11th Cir. 2011). This involves examining the events in the present timeframe and not just as they existed when the challenged order was entered. The court may retain jurisdiction over an otherwise moot appeal if the claim at issue is "capable of repetition, yet evading review." *Arcia v. Sec'y of Fla.*, 772 F.3d 1335, 1343 (11th Cir. 2014). The court rejected the debtor's arguments that the exception should apply, finding that the state court could well determine whether Chase was a secured creditor and that the debtor did not sufficiently raise the issue of sanctioning Chase for an alleged stay violation and thus abandoned that argument. She showed no "reasonable expectation" or "demonstrated probability" that she would face the same issue from Chase in the future so that the mootness exception did not apply.

A very interesting aspect of this case is thrown into the final paragraph of the circuit court's discussion: "While she points out that the 180-day prejudice period preventing her from filing again in bankruptcy court has since passed, we must 'look at the events at the present time.'" Thus it appears the debtor argued (and the circuit court at least assumed) that under these facts, a dismissal for failure to pay the trustee resulted in a 180-day refiling bar under § 109(g)(1) as a "willful failure to abide by orders of the court, or to appear before the court in proper prosecution of the case." The dismissal of the case was not voluntary, so that § 109(g)(2) regarding a voluntary dismissal following stay relief does not seem to be applicable. There may have been a local practice or rule to that effect, but it is worth noting that the bar on refiling is mentioned as a "given" in this case.

Bennett v. Jefferson County, Ala., 899 F.3d 1240, Case No. 15-11690 (11th Cir. Aug. 16, 2018) (Tjoflat, Martin, and Jordan, JJ.) (opinion by Jordan, J.).

Code § / Rule: equitable mootness, applied for the first time in a chapter 9 context

Held: The prudential doctrine of equitable mootness applied in the chapter 9 context, and under the facts of this case, the ratepayers' appeal was equitably moot.

History: Eleventh Circuit reversed the District Court for the Northern District of Alabama and remanded for dismissal of the appeal of the Bankruptcy Court's order.

Facts: As part of a settlement agreement that involved issuance of new sewer warrants, retirement of existing sewer warrants at reduced amounts, the cutting of over $100 million in general fund expenditures, and the write off of significant debt, the county (or the bankruptcy court, if the county failed to act) would also "implement a series of single-digit-percent sewer rate increases over 40 years." In addition, the county agreed to not decrease its rates unless the difference could be offset in some fashion (such as by increasing the customer base). The total increase in the sewer rates

over 40 years would be 365%, similar to the national increase in inflation over the past 40 years. At confirmation, a group of Jefferson County ratepayers objected on numerous grounds. Judge Bennett confirmed the plan over the objections, and barred anyone "from commencing or continuing any action to assert the claims" raised in the ratepayers' arguments. The confirmation order entered on November 22, 2013 reserved jurisdiction over the validity of actions taken under the plan, such as the implementation of the agreed rate structure. The confirmation order was not stayed for 14 days but instead became effective immediately based on a request by the county that the 14-day stay of Rule 3020(e) be waived, and no objection by the ratepayers. The effective date of the plan was Dec. 3, 2013, and the ratepayers filed their appeal of the confirmation order on Dec. 1, 2013 but did not ask either the bankruptcy court or the district court for a stay pending appeal, or for expedited treatment. The new warrants were issued December 3, 2013. Some of the warrant proceeds retired the prior warrants, while more than $1.454 billion went "into a clearinghouse system to pay individual and institutional investors."

The county moved to dismiss the appeal on grounds of constitutional, equitable, and statutory mootness. The equitable mootness argument was based on the consummation of the plan and the sewer warrant-associated transactions that could not be undone. The district court disagreed and found, among other things, that the failure to seek a stay pending appeal did not create an equitable mootness problem in light of subsequent events because "it held that equitable mootness does not apply to constitutional challenges to a confirmation order in a Chapter 9 proceeding." Further, even if the doctrine did apply, the district court found there was still some possibility of relief by striking the provisions concerning the jurisdiction of the bankruptcy court to set sewer rates in the future.

The Eleventh Circuit agreed the case was not constitutionally moot, but found that it was equitably moot (and did not reach the statutory mootness argument). Equitable mootness is not really mootness at all, but is instead a recognition that the consequences of granting relief would be so severe as to be inequitable. It is a prudential and equitable doctrine that applies equally in chapter 9 as in other bankruptcy contexts, perhaps even more so, because of the number of people affected by a chapter 9 proceeding. In addressing the counterargument that chapter 9 bankruptcies bring with them issues of sovereignty, as opposed to other types of bankruptcy proceedings, the circuit court pointed out that chapter 9 arguably gives *more* protection to entities qualifying as debtors thereunder than to debtors under other chapters of the code. The federalism argument may actually support giving greater consideration to the municipality's position than to its opponent when considering whether an issue is equitably moot. After all, the sovereignty at issue is that of the actual state entity, not the ratepayers. So while federalism concerns should certainly be considered in its application, the doctrine of equitable mootness does apply in a chapter 9 case. Under the particular facts in this case, the failure to ever seek a stay or expedited treatment of the appeal were not "fool's errands" especially given that a bond would not necessarily have been required under the preliminary injunction framework that could be applied in determining whether to stay the confirmation order pending appeal. The debtor and "others have taken significant and largely irreversible steps in reliance on the unstayed plan confirmed by the bankruptcy court." Reversing part of the plan at this point would adversely affect the ultimate holders of the newly issued sewer warrants, at a minimum. If granted, the relief sought on appeal "would be inequitable or practically impossible" and thus was equitably moot. In addressing the sovereignty and federalism concerns that underpinned the district court's analysis, the circuit court stated:

> Elected officials can bind their successors—and consequently also their constituents, the people—to all kinds of unavoidably long-lasting financial effects, sometimes irreversibly . . . We know of no authority for the proposition that such government action, which impinges upon the rights (or at least limits the ability) of future governments to undo, becomes an illegal end-run around constitutional governance. That a Chapter 9 bankruptcy plan subjects the residents of Jefferson County to rate increases over time, instead of forcing them to bear the financial pain all at once, does not transmogrify it into one that per se violates the ratepayers' constitutional rights."

Thus, the circuit reversed the district court and remanded for dismissal of the ratepayers' appeal.

Holyfield v. Aldridge Pite, LLP (In re Holyfield), 740 Fed. Appx. 695, Case No. 18-10983 (11th Cir. Aug. 30, 2018) (per curiam) (Marcus, Branch, and Fay, JJ.).

Code § / Rule: Fair Debt Collection Practices Act, misleading representation under 15 U.S.C. § 1692(e) under the "least sophisticated consumer" standard.

Held: The least sophisticated consumer would not have been misled by the language.

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

Facts: Aldridge Pite sent a letter to "Estate/Heirs of Doris Rhodes," the debtor's deceased mother, and stated therein that "THIS LETTER MAY CONSTITUTE AN ATTEMPT TO COLLECT A DEBT," as well as stating that if discharged, the action would not be "an attempt to collect the debt personally" and that "[i]f you did not sign the . . . Note, we are not seeking to collect the debt from you." The debtor filed suit in bankruptcy court alleging that the letter violated the Fair Debt Collection Practices Act ("FDCPA") because it represented that if there had not been a bankruptcy discharge, then the debt would be collected personally and that the letter suggested that Aldridge Pite was not a debt collector. The bankruptcy court dismissed the complaint, the district court agreed and the Eleventh Circuit affirmed. Assuming that Aldridge Pite was a debt collector under the FDCPA, the court found that the letter more than sufficiently notified even the least sophisticated consumer that Aldridge Pite was attempting to collect a debt. The "least sophisticated consumer" "posses[es] a rudimentary amount of information about the world and a willingness to read a collection notice with some care. However, the test has an objective component in that while protecting naïve consumers, the standard also prevents liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness." *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1194 (11th Cir. 2010) (internal quotations omitted). The circuit court also disagreed with the debtor's argument that the language regarding the effect of a bankruptcy discharge would lead the least sophisticated consumer to believe that she would be

personally liable in the absence of a bankruptcy discharge, even though she had not signed the note. The letter explicitly stated the opposite (that anyone who did not sign the note was not being sought for collection personally), and even the least sophisticated consumer would understand that.

Estate of Caldwell Jones, Jr. v. Live Well Financial, Inc., 902 F.3d 1337, Case No. 17-14677 (11th Cir. Sept. 5, 2018) (Wilson, Newsom, and Vinson, JJ.) (opinion by Newsom, J.).

Code § / Rule: nonbankruptcy case dealing with reverse mortgage under 12 U.S.C. § 1715z-20(j), which provides that the Secretary of HUD may not insure a reverse mortgage unless the mortgage defers repayment until the homeowner (defined to include both the borrowing homeowner AND a non-borrowing spouse) either dies or sells the property

Held: Because 12 U.S.C. § 1715z-20(j) addresses only the Secretary of HUD's authority to insure, it does not impact the mortgagee's rights under the contract.

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

Facts: The opinion explains the history of reverse mortgages and their attempt to balance the needs of the elderly with risk to lenders. The HUD Secretary is to administer a mortgage-insurance program to incentivize lenders to make reverse mortgage loans. To be insurable under the program, a reverse mortgage must not require repayment so long as the homeowner or the homeowner's spouse (even if not a borrower) resides in the property. The mortgage at issue in this case named the husband as the borrower, but did not name the wife as a borrower (the wife was not old enough to qualify in any event). The mortgage was insured under the HUD program. When the husband died, and the debt was not paid, the mortgagee began foreclosure under its power of sale. The estate, under the wife's direction, sought to enjoin the foreclosure arguing that she should be allowed to live in the home without payment because she was a "homeowner" as defined in the statute. The case was removed to district court, and the district court granted the mortgagee's motion to dismiss. The Eleventh Circuit then affirmed, agreeing with the district court that the contract required deferment only as long as a "borrower" lived in the house, and the wife was not a borrower as defined in the contract. While the deal should not have been insurable because of that provision, the statute at issue "speaks only to what the [HUD] Secretary can and cannot do" and does not impact the contractual relationship between the mortgagor and mortgagee. The mortgage was enforceable between the parties according to its terms, even if it had been insured in violation of the statute's requirements.

Gannett v. Erkelens (In re Erkelens), 742 Fed. Appx. 477, Case No. 17-11352 (11th Cir. Sept. 12, 2018) (per curiam) (Jordan, Jill Pryor, and Fay, JJ.).

Code § / Rule: claim preclusion

Held: A judgment in favor of dischargeability, rendered after the plaintiff failed to appear and prosecute, was entitled to preclusive effect, so that the plaintiff's assignee's proof of claim therefore would be disallowed in a subsequent case.

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

Facts: Tammie held a money judgment against Henri as part of a divorce settlement. Henri then filed bankruptcy. Tammie hired an attorney (Gannett) to represent her in an adversary proceeding regarding the judgment's dischargeability. On the eve of trial, Tammie and Gannett parted ways and the bankruptcy court allowed Gannett to withdraw, then entered judgment against Tammie for failure to prosecute. Tammie and Gannett struck a deal regarding Gannett's attorney fees, and Tammie assigned to Gannett 50% of her judgment against Henri as payment in full. Henri then filed for bankruptcy a second time. Gannett filed a proof of claim in Henri's second case. The bankruptcy court disallowed the claim based on the preclusive effect of the discharge order in the first case. The district court affirmed, as did the Eleventh Circuit.

The circuit court discussed claim preclusion (although Gannett's brief discussed issue preclusion almost exclusively). Under the doctrine of claim preclusion, a subsequent claim is barred when "(1) a court of competent jurisdiction (2) has rendered a final judgment on the merits (3) in a prior action between identical parties or those in privity with them, and (4) the same cause of action is involved in both cases." *See Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1238 (11th Cir. 1999). The circuit court disagreed with the second bankruptcy court's "default judgment" description of the first bankruptcy court's judgment against Tammie for failure to appear and prosecute. Tammie was the plaintiff, not the defendant, in that proceeding so that the judgment against her for failure to prosecute was under Fed. R. Civ. P. 41(b) rather than Fed. R. Civ. P. 55. The court then easily found that all 4 elements of claim preclusion were satisfied. The court noted that "dismissals for failure to prosecute may serve as judgments with preclusive effect." Gannett was in privity with Tammie by virtue of the assignment. The substance of the actions was the same even though the form differed, because filing the proof of claim was an attempt to enforce the judgment that the prior adjudication had deemed dischargeable.

Hintze v. Spence (In re Hintze), 739 Fed. Appx. 579, Case No. 18-11720 (11th Cir. Sept. 13, 2018) (per curiam) (Tjoflat, Martin, and Hull, JJ.).

Code § / Rule: § 727(a)(2)(A) transfer of assets prepetition with intent to hinder, delay, or defraud a creditor

Held: The intentional depletion of value of an intangible asset can amount to the destruction of that asset for purposes of § 727(a)(2)(A) when it results in a "significant enough reduction in value such that restoring the [asset's] value would require the same or nearly the same investment of labor and resources as building it from scratch."

History: Eleventh Circuit affirmed following appeal from the District Court for the Northern District of Florida, which had affirmed the Bankruptcy Court for the Northern District of Florida

Facts: In order to save themselves and their failing tutoring company of which they were the 100% owners, the debtors (before they were debtors) struck a prepetition deal with a friend (who was already a creditor of the debtors) to set up a new company, transfer the first company's assets to the new company owned by the friend, and then allow the first company to fail while the second company would continue the business with the debtors as employees. The debtors leased intellectual property and other assets of the first company to the friend in exchange for $75,000 that they used to pay employees. The leased assets included training materials, workbooks, instructional materials, graphics, logos, source codes, desks, computers, and the like. Soon thereafter, the first company sold those same assets to the second company in exchange for $200,000 forgiveness of the $475,000 debt the debtors owed to the friend. The debtors intentionally did not tell their other creditors about the implementation of the plan and the transfer of assets, despite direct requests. The continuous use of the logos, graphics, materials, and so forth made it appear that nothing had changed. Before the transfer of the assets, the original company had a worth of anywhere from $350,000 to $3 million and was the debtors' only non-exempt asset with significant value. After the transfer, the original company was an empty worthless shell. The debtors filed chapter 7 and valued the original company at $100. The debtors' creditors found out about the scheme postpetition, and several of them objected to the debtors' discharge under § 707(a)(2)(A). The bankruptcy court ruled in favor of the creditors, and the district court affirmed.

On appeal, the Eleventh Circuit also affirmed. The issue on appeal was whether the transfer of the company's assets amounted to the "transfer, removal, destruction, mutilation, or concealment of property of the debtor." *See In re Jennings*, 533 F.3d 1333, 1338 (11th Cir. 2008) (per curiam). The bankruptcy court found, and the circuit court agreed, that requirement was met in two alternative ways, but the appeal addressed only the first. First, the transfer of the assets of the first company for no consideration, leaving it a worthless shell, was an act that "destroyed" their 100% membership interest. Second, they also argued that the "reverse veil piercing" employed by the bankruptcy court was in error and that the company's assets should not have been treated as the debtors' personal assets. Under the first argument, the debtors argued that a reduction in value did not equate to a destruction, and that some residual value for the original company still remained as evidenced by their chapter 7 trustee having sold it for $120,000 during their case (which was found to be a "litigation rights" value and not a value of the company itself). The circuit court determined that the membership interest at the very least was an asset of the debtors and that its value was significantly reduced by the transfer of the company's assets under the debtors' control. Also, the circuit court determined that "destroy" as to intangible property of the debtor can mean a "significant enough reduction in value such that restoring the [asset's] value would require the same or nearly the same investment of labor and resources as building it from scratch" and that was met here. The court also rejected the argument that "[the debtors'] fraudulent conduct created a new valuable asset—right to sue for fraudulent transfer—and thus they did not fraudulently destroy the value of their membership interest." That argument gained no traction in a court of equity. The circuit court declined to address the bankruptcy court's alternate holding and did not get into the reverse veil piercing analysis.

O'Halloran v. Harris Corp. (In re Teletronics, Inc.), 904 F.3d 1303, Case No. 16-16140 (11th Cir. Oct. 2, 2018) (Tjoflat, Julie Carnes, and Kaplan, JJ.) (opinion by Kaplan, J., U.S. Dist. J. for the S.D.N.Y. sitting by designation).

Code § / Rule: fraudulent conveyance § 544

Held: The bankruptcy court did not err in holding that the trustee failed to meet his burden of proof that the company was insolvent at the time of the transfer, in large part because it was well within the bankruptcy court's discretion to conclude that the value of certain maintenance contracts should have been included in the solvency calculation but were not.

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

Facts: The case involves Teltronics, a telecommunications business in chapter 11. The trustee of a liquidating trust established by the confirmed chapter 11 plan sued Harris and RPX seeking to avoid certain transfers as constructively fraudulent. Teltronics had a prepetition agreement under which it transferred certain patents to Harris in exchange for a partial credit to the debt Teltronics owed Harris as a result of the purchase of the patents, along with a non-exclusive license to use the patents to make and market digital telephone switches. Teltronics retained certain rights in the patents, including a "blocking right" and a right of first refusal should Harris seek to transfer the patents. While Harris was negotiating with RPX as a potential purchaser for the patents, Harris also negotiated an amendment to its agreement with Teltronics and in exchange for $5,000, Teltronics modified the blocking right and allowed Harris to sell the patents to a non-competitor and also shortened the time frame within which the right of first refusal would become effective (with Harris having not revealed that it was negotiating a sale to RPX). Within days of the amendment, Harris transferred the patents to RPX. A few months later, Teltronics filed chapter 11. The confirmed plan established a liquidating trust, and the trustee sought to avoid as constructively fraudulent transfers the modification of the blocking right and of the right of first refusal, and also sought to recover the value of those transfers (under §§ 544 and 550 as well as Florida law). It is critical to note that the trustee had the burden of proof to show that Teltronics was insolvent at the time of the transfer. The opinion discusses the dueling expert testimony on the issue of insolvency, and rulings on the trustee's *Daubert* motion to strike the opposing party's expert testimony of insolvency as having been based on someone else's analysis rather than his own. The bankruptcy court overruled the trustee's motion.

The bankruptcy court found that the amendment of the blocking rights and right of first refusal were transfers, but found that the trustee had failed to prove by a preponderance that Teltronics was insolvent at the time of the transfer, neither crediting nor relying on the expert testimony at which the *Daubert* motion had been aimed. It was crucial that the bankruptcy court had neither credited nor relied upon the defendants' expert's opinion that Teltronics had been solvent at the time of the transfers, and neither accepted nor rejected that expert's opinion as to value of certain maintenance contracts that were assets of Teltronics at the time of the transfer. The bankruptcy

court was within its discretion to conclude that the value of the contracts, whatever that value was, should have been included in the solvency analysis, but was not, so that the trustee failed to establish insolvency by a preponderance. Alternatively and independently, the bankruptcy court also found that the trustee failed to prove by a preponderance that Teltronics did not receive reasonably equivalent value in exchange for the transfers. The district court affirmed the bankruptcy court, as did the Eleventh Circuit. The circuit court found no error in the conclusion that the trustee failed to prove insolvency, and did not reach the issue of reasonably equivalent value (or the admissibility of the defendants' expert's opinion, upon which the bankruptcy court did not rely).

Bagwell v. Bank of America, N.A. (In re Bagwell), 741 Fed. Appx. 755, Case No. 18-10467 (11th Cir. Oct. 23, 2018) (per curiam) (Wilson, Martin, and Julie Carnes, JJ.).

Code § / Rule: § 362 stay relief; Rule 9024 and Fed. R. Civ. P. 60 reconsideration

Held: The bankruptcy court did not abuse its discretion in lifting the automatic stay nor in denying the debtor's request for reconsideration.

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

Facts: The pro se debtor filed chapter 13, and at his request, converted the case to chapter 7 two months postpetition. Bank of America held the first mortgage on the debtor's condominium and moved for relief from the automatic stay. In its motion, the bank certified service for both the motion and the hearing notice on the debtor at his address of record. The debtor neither filed a response nor appeared at the stay relief hearing, and the motion was granted. The order was also mailed to the debtor's address of record. Eleven days later, the debtor filed a motion to vacate the stay relief order and reinstate the stay. He asserted that he never received a copy of the motion or the hearing notice. The court conducted a hearing on the debtor's motion, at which both sides appeared, and denied the debtor's motion after treating it as a motion to reconsider. The bankruptcy court found that the debtor did not meet the standard for a motion to reconsider. On appeal, the district court and circuit court affirmed. Under the abuse of discretion standard for review of both orders lifting the stay and orders denying reconsideration, the circuit court found no abuse. "An abuse of discretion occurs when a court uses an incorrect legal standard, applies the law in an unreasonable or incorrect manner, misconstrues its proper role, follows improper procedures in making a determination, or makes clearly erroneous findings of fact." Opinion p. 5, (*citing Sciaretta v. Lincoln Nat. Life Ins. Co.*, 778 F3d 1205, 1212 (11th Cir. 2015)). The bankruptcy court's procedure that allowed the movant to serve the motion and notice of hearing were not a violation of due process nor otherwise improper. Further, the bank satisfied the statutory requirements for lifting the stay under § 362. The debtor also challenged, as part of his motion to reconsider, the substitution of the chief judge of the bankruptcy court who ruled on his motion to reconsider (rather than the bankruptcy judge who entered the order lifting the stay). The debtor provided no authority to support his argument that the substitution was unconstitutional as a matter

of law. He also failed to establish that the chief judge committed any error of fact or law. The hope of being able to refinance while holding off foreclosure had "little if any significance in Chapter 7 liquidation proceedings and [was] not legally relevant under § 362(d)(2)." Opinion p. 11. The debtor established no meritorious defense to the motion for relief from stay. Finally, the circuit court also denied the debtor's request for sanctions against the bank's lawyers.

Otero v. Shellpoint Mortg. Serv. (In re Otero), 741 Fed. Appx. 761, Case No. 18-11066 (11th Cir. Oct. 24, 2018) (per curiam) (Tjoflat, Newsom, and Fay, JJ.).

Code § / Rule: § 362(c)(2)(C) automatic expiration of stay upon discharge

Held: A chapter 7 debtor's appeal of an order lifting the automatic stay became moot upon entry of the discharge.

History: Eleventh Circuit affirmed the District Court for the Middle District of Florida, which dismissed appeal of Bankruptcy Court for the Middle District of Florida as moot.

Facts: Shellpoint obtained a prepetition judgment of foreclosure against the debtor's real property in Florida. The debtor then filed chapter 7, and Shellpoint moved for relief from the stay to complete foreclosure. The bankruptcy court granted the stay relief motion and the debtor appealed. The debtor received his discharge on the same day that he filed the notice of appeal of the stay relief order. The district court dismissed the appeal as moot, because the automatic stay would have been dissolved upon entry of the discharge in any event, and the debtor on appeal could thus be afforded no meaningful relief. The circuit court looked at mootness under Article III's limitation of "cases" and "controversies." "A case becomes moot 'when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." Opinion p. 3, *quoting Fla. Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dep't of Health & Rehab. Servs*., 225 F.3d 1208, 1216-17 (11th Cir. 2000). Because the stay dissolved upon entry of discharge, any ruling by the appeals court would be an "advisory opinion" as to whether it was appropriate to lift the stay. The appeal was therefore moot.

Bertram v. HSBC Mortg. Servs., Inc. (In re Bertram), 746 Fed. Appx. 943, Case No. 17-11774 (11th Cir. Nov. 5, 2018) (per curiam) (Marcus, Rosenbaum, and Jill Pryor, JJ.).

Code § / Rule: *Rooker-Feldman* doctrine ("bars a plaintiff from challenging in federal court the validity of a state court judgment")

Held: The foreclosure sale's propriety and HSBC's conduct were not "actually raised or inextricably intertwined with the issues resolved in the state court's final judgment" of foreclosure and so were not subject to the *Rooker-Feldman* doctrine.

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

Facts: The debtors filed chapter 7 after HSBC obtained a final judgment of foreclosure in Florida state court. The debtors had appealed the foreclosure judgment and lost, and had filed a separate appeal aimed at the propriety of the foreclosure sale, and had also lost on that issue—but they filed their chapter 7 case before the mandate from the appeals court issued. The appeals court thus stayed the issuance of the mandate on its order that upheld the foreclosure sale. The debtors then filed an adversary proceeding alleging that the judgment of foreclosure was invalid because (1) the debt to HSBC was unsecured, and alternatively (2) even if the foreclosure was proper, the sale following the judgment of foreclosure was improper. HSBC sought dismissal of the AP under the *Rooker-Feldman* doctrine, arguing the bankruptcy court did not have subject matter jurisdiction. *Rooker v. Fidelity Trust Co.*, 263 U.S. 412 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). The bankruptcy court agreed and dismissed the AP. On appeal, the district court affirmed the dismissal, but the Eleventh Circuit bifurcated the issues further. The circuit court agreed that the *Rooker-Feldman* doctrine mandated dismissal of the claims challenging the state court judgment of foreclosure. The doctrine did not, however, apply to the claims challenging the actual foreclosure sale. The foreclosure sale's propriety and HSBC's conduct related to the sale occurring after the foreclosure judgment were not "actually raised or inextricably intertwined with the issues resolved in the state court's final judgment" of foreclosure and so were not subject to the *Rooker-Feldman* doctrine. The *Rooker-Feldman* doctrine applies to narrow circumstances, and is "confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). "The doctrine is inapplicable if the federal action was commenced before the state proceedings ended." Opinion p. 12, quoting *Nicholson v. Shafe*, 558 F.3d 1266, 1274-75 (11th Cir. 2009). Here, the appeal of the judgment of foreclosure was at an end because the debtors had not appealed the decision beyond the first level, years before. The judgment that upheld the propriety of the foreclosure sale was not an aspect of that appeal, however, and the distinct appeal on that issue had not "ended" when the debtors filed bankruptcy because the state court of appeals had not yet issued the mandate. The fact that the mandate did later issue *after* the AP was filed did not work to retroactively divest the bankruptcy court of the jurisdiction it had when the AP was filed.

Further, even though the certificates of service that HSBC filed related to its motion to dismiss were technically deficient, the debtors had electronic notice of the motion when it was filed, were given a continuance and ample opportunity to prepare a written opposition, and were heard on the merits. Due process was thus satisfied.

Lynch v. Deutsche Bank Nat'l Trust Co. (In re Lynch), 755 Fed. Appx. 920, Case No. 18-10147 (11th Cir. Nov. 15, 2018) (per curiam) (Marcus, Rosenbaum, and Black, JJ.); *petition for cert. filed* (U.S. April 12, 2019) (No. 18-1294).

Code § / Rule: business records exception to hearsay; existence of a claim under § 506(d)

Held: Bank employee's affidavit was admissible as being based on her personal knowledge of the contents of the files and business records for the account, and was properly considered in ruling on summary judgment. Also, the assignee of a secured claim could enforce the note and mortgage even though the allonge completing the transfer of the note was accomplished postpetition.

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

Facts: The chapter 7 debtors filed an adversary proceeding against Deutsche and Ocwen, attempting to invalidate the mortgage against their home. The debtors filed a claim on behalf of Deutsche. They then argued that the mortgage lien was unenforceable under Florida law because the banks showed no proof of an assignment from their original mortgagee. The debtors did not dispute the underlying mortgage or debt's validity. On summary judgment, the banks submitted an affidavit that established the original mortgagee had filed bankruptcy and that the liquidating trustee in that case had issued a power of attorney to Deutsche to execute any documents needed to transfer the loan; that Deutsche had at some point after the debtors filed bankruptcy executed an allonge that assigned the note to itself as trustee for a securitized trust; and that Ocwen, as servicer for Deutsche, was in possession of the note. The bankruptcy court found that the banks were holders in possession of the note with a blank indorsement, alternatively were holders in possession of the note through a special indorsement, and alternatively were nonholders in possession of the note with rights of a holder. The district court affirmed, as did the Eleventh Circuit. The debtors challenged the admission of the bank employee's affidavit, and the circuit court found the bankruptcy court was within its discretion in determining that the affidavit was based on personal knowledge and that the affiant was competent to testify about the matters asserted therein, based on her experience and her review of records that were within the "business rule" exception to the hearsay exclusion.

On the merits of the enforceability of the note and mortgage, the court said the debtors' argument "rest[ed] on a flawed legal premise – that a claim must be disallowed (and a corresponding lien extinguished) if a particular creditor cannot prove it owned the claim on the date the bankruptcy petition was filed." Opinion p. 8. While a "claim" must exist prepetition by definition, a creditor's particular interest in that claim may be acquired later. The Rules specifically contemplate that this is the case, and provide for the transfer of claims postpetition. *See* Rule 3001(e). The banks could enforce the note and mortgage notwithstanding that the allonge was executed postpetition.

Kunsman v. Wall (In re Kunsman), 752 Fed. Appx. 938, Case No. 18-10339 (11th Cir. Nov. 26, 2018) (per curiam) (Marcus, Rosenbaum, and Black, JJ.); *petition for cert. filed* (U.S. March 19, 2019) (No. 18-8465).

Code § / Rule: recusal under 28 U.S.C. §§ 455(a) and 144; dismissal for cause under § 1307

Held: The dismissal of the debtor's chapter 13 case following the denial of confirmation of her 14th amended plan was not an abuse of discretion where the debtor failed to provide a transcript or other record of the ruling; and the denial of the debtor's motion for recusal was also affirmed where the only bias alleged was based on adverse rulings.

History: Eleventh Circuit affirmed the District Court for the Southern District of Florida, which dismissed the debtor's appeal from the Bankruptcy Court for the Southern District of Florida.

Facts: A pro se chapter 13 debtor appealed the district court's dismissal of her appeal of the bankruptcy court's order that denied the debtor's motion for recusal, and that dismissed her case after denying confirmation of her 14th amended chapter 13 plan. Recusal is required under 28 U.S.C. § 455(a) "in any proceeding in which [the judge's] impartiality might reasonably be questioned." Recusal comes into play "only when the alleged bias is personal in nature –that is, it stems from an extrajudicial source." Adverse rulings alone do not meet this standard. Recusal under 28 U.S.C. § 144 can be required when a party makes and timely files an affidavit setting out the judge's personal bias or prejudice for or against a party. The facts alleged in the affidavit must be sufficient to convince a reasonable person of actual bias, and the affidavit must be strictly scrutinized for form and content. The alleged bias must also be from an extrajudicial source, and not from the court's dealings with the party in the current or another case. The only "bias" cited by the debtor were adverse rulings in the case, and the debtor did not follow the affidavit procedure of 28 U.S.C. § 144. Thus the denial of the recusal motion was affirmed.

On the merits of the dismissal order, § 1307 allows the court to dismiss a chapter 13 case "for cause." The Code lists examples of cause, including the denial of a plan's confirmation and denial of more time to achieve confirmation, which appear to have been satisfied here. However, the circuit court affirmed not on that basis, but on the basis that the debtor failed to order the transcripts or provide a record of the confirmation and dismissal proceedings. The order incorporated "the reasons argued and stated on the record." The debtor failed to provide the record, and thus the appeals court could not determine whether there was an abuse of discretion in any event. The dismissal order was affirmed.

***Dukes v. Suncoast Credit Union (In re Dukes*)**, 909 F.3d 1306, Case No. 16-16513 (11th Cir. Dec. 6, 2018) (Jill Pryor, Julie Carnes, and Conway, JJ.) (opinion by Julie Carnes) (Jill Pryor, J., concurred in part and concurred in the judgment).

Code § / Rule: § 1328(a)

Held: Direct-pay mortgages were not "provided for by the plan" and therefore were not discharged in a chapter 13 case. "[T]o be 'provided for' by a plan under § 1328(a), the plan must make a provision for or stipulate to the debt in the plan" so that the repayment terms are governed by the plan and not by the contractual loan documents. Even if it were "provided for," the mortgage was not discharged because to do so would violate § 1322(b)(2) by modifying the contractual right to seek a deficiency judgment. Similarly, the failure of the mortgagee to file a proof of claim did not result in a discharge of the underlying debt because to do so would violate § 1322(b)(2) by modifying the contractual right to seek a deficiency judgment.

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

Facts: The debtor filed chapter 13 and proposed to maintain direct payments on her first and second mortgages, held by the same mortgagee, both of which were current when she filed bankruptcy. The plan did not specify repayment terms, did not set out a repayment schedule, and did not modify the mortgage terms. The mortgagee filed a claim for the second mortgage, but not the first. In no way did the plan payments to the trustee flow through at all to the mortgagees. Three years later, the plan paid out and the debtor received a discharge as to "all debts provided for by the plan" under § 1328(a). During the case, however, the debtor had defaulted on the direct-pay mortgage and after the case was discharged, the mortgagee foreclosed the second mortgage and sought a judgment for the balance owing under the first mortgage. The mortgagee asked that the case be reopened for a determination of whether the debtor had discharged her personal liability on the mortgage. The bankruptcy and district courts found the direct-pay mortgage debt was not "provided for" by the plan, and also found that even it were "provided for," it was not discharged because to do so would violate § 1322(b)(2)'s antimodification provision. The Eleventh Circuit affirmed, holding that "to be 'provided for' by a plan under § 1328(a), the plan must make a provision or stipulate to the debt in the plan." Even if it were "provided for," the mortgage was not discharged because to do so would violate § 1322(b)(2) by modifying the contractual right to seek a deficiency judgment. Similarly, the failure of the mortgagee to file a proof of claim did not result in a discharge of the underlying debt because to do so would violate § 1322(b)(2) by modifying the contractual right to seek a deficiency judgment. Merely referring to a mortgage as being paid directly or outside the plan does not mean the mortgage is "provided for" in the plan. Following the Supreme Court's guidance in *Rake v. Wade*, 508 U.S. 464 (1993), simply maintaining payments directly does not establish a repayment schedule "by the plan" as contemplated when a debt is "provided for" by the plan. Provision for adequate protection payments does not alter that analysis because adequate protection payments "have nothing to do with the repayment of a debt" and are not "payments under a plan." The court pointed out that even if it were to agree that merely saying a long-term mortgage will be paid directly is enough to give it "provided for" status, then the discharge should not have entered at all because the debtor then defaulted under those direct payments and did not complete all payments "under the plan." The circuit court did not address the parties' alternate arguments regarding whether the mortgage was excepted from discharge as a "long-term debt" under § 1322(b)(5).

In footnote 6 of its opinion, the circuit court stated:

> One reason a debtor might choose to make payments directly to a creditor rather than rolling payments into the bankruptcy process is to avoid trustee's fees, which are a percentage of the total amount owed by the debtor over the plan period. As discussed above, a home mortgage loan cannot be modified in bankruptcy, so there would be no benefit in dealing with the debt through the bankruptcy process. Thus, it is generally in the debtor's best interest to pay her mortgage outside the Chapter 13 plan rather than pull it into the plan and owe fees on payments she is obligated to make either way. Nothing in the Code requires such debts to be handled through the bankruptcy process.

In re Dukes, 909 F.3d 1306, 1317 n.6 (11th Cir. 2018). In reality, the benefits of paying the ongoing mortgage payment through the chapter 13 trustee are real and in many cases, far outweigh the trustee's percentage fee on those payments. The benefits include having only one major payment to make each month (that being the payment to the trustee), which single payment can be accomplished via wage deduction, having accurate and complete payment history records for the life of the case (those being the trustee's records), and having a second set of eyes (those being the trustee's) on the amount of the mortgage payment throughout the life of the case. These benefits are concrete and substantial for many debtors, particularly those who enter the case with large prepetition arrears, who have experienced having their payments refused by the creditor, or who have struggled to prioritize their house payment relative to other spending pressures.

United Mine Workers of America Combined Benefit Fund v. Toffel (In re Walter Energy, Inc.), 911 F.3d 1121, Case No. 16-13483 (11th Cir. Dec. 27, 2018) (Martin, Jill Pryor, and Anderson, JJ.) (opinion by Jill Pryor, J.).

Code § / Rule: Retiree Benefits Bankruptcy Protection Act of 1988 ("RBBPA") and the bankruptcy court's authority to terminate benefits thereunder in a liquidation scenario; interpreting § 1114(g)(3), which was added to the Code by the RBBPA

Held: "[T]he RBBPA authorized the bankruptcy court to terminate Walter Energy's obligation to pay premiums [required under the Coal Act for retiree health care benefits], even though the premiums were imposed by statute and Walter Energy was pursuing liquidation under Chapter 11, not a classic reorganization."

History: Eleventh Circuit affirmed the District Court for the Northern District of Alabama (Judge Proctor), which had affirmed the Bankruptcy Court for the Northern District of Alabama (Judge Mitchell).

Facts: Walter Energy and its related entities filed chapter 11 and proposed to sell the companies as a going concern rather than reorganize or liquidate piecemeal. "[T]he sole potential purchaser would acquire the assets only if they were transferred free and clear of Walter Energy's Coal Act obligation to provide retiree health care benefits or pay premiums to the [multi-employer funds established for that purpose]." The bankruptcy court (Judge Mitchell) found authority under the

Retiree Benefits Bankruptcy Protection Act of 1988 ("RBBPA") and allowed the debtor to terminate its retiree health care obligations. The RBBPA explicitly allows for such termination when the bankruptcy court finds that such termination is necessary for the debtor's *reorganization*. The unique issue presented here was whether that authority extended to a *liquidation* scenario. As the circuit court framed it, the issue was "whether the RBBPA authorizes a bankruptcy court to terminate a debtor's statutory obligation under the Coal Act to pay premiums to the Funds when the bankruptcy court finds that such termination is necessary for the coal company to sell its assets as a going concern and avoid a piecemeal liquidation." The short answer was "yes." The opinion setting out the reasoning behind that answer was anything but short. The court examined the history of retiree benefits in the coal industry, the factual and procedural background of the instant case, the standard of review, the Anti-Injunction Act (finding it did not bar the bankruptcy court from terminating the retiree health care obligations), and then set out its holding. The court interpreted the term "reorganization" in § 1114(g)(3) as including both restructurings and liquidations of the debtor under chapter 11. In so doing, the court disagreed with the Funds' argument that a "reorganization" and a "liquidation" are mutually exclusive terms under the Code.

Thakkar v. Noble**,** --- Fed. Appx. ---, Case No. 18-12867 (11th Cir. Jan. 9, 2019) (per curiam) (Jill Pryor, Newsom, and Anderson, JJ.).

Code § / Rule: review of civil contempt order as an exception to the interlocutory appeal general rule; dismissal of appeal for missing the briefing deadline of Rule 8018(a)

Held: Civil contempt order was appealable because it was not purgeable by any action other than payment and payment had already been made. Additionally, the district court did not abuse its discretion in dismissing the appeal of the contempt order based upon the appellant's blatant negligence in missing the briefing deadline, together with a history of dilatory conduct.

History: Eleventh Circuit affirmed the District Court for the Middle District of Florida, which had dismissed an appeal from the Bankruptcy Court for the Middle District of Florida.

Facts: At its core, this was an interlocutory appeal of a civil contempt finding, which would not be reviewed by the circuit court under the general rule (the party could appeal only after a final judgment issued). However, this case presented an exception to the general rule and was a circumstance where the penalty imposed was "noncontingent" and could not be avoided by some other form of compliance. In this case, the bankruptcy court held Thakkar in civil contempt for failure to turn over documents to the trustee, and Thakkar was arrested. Thakkar was released after he partially complied with the court's requirements under the bench warrant. The bench warrant required, in part, that Thakkar reimburse the trustee and the U.S. Marshal for the costs in obtaining the withheld records. Upon his release, the bankruptcy court returned Thakkar's passport only after the posting of a $200,000 bond, which bond was to be returned to Thakkar "upon the re-surrender of [the] passport or by further court order." Despite that language, the bankruptcy court granted the trustee's motion to distribute the $200,000 to the trustee for fees and costs. Because the order required Thakkar to reimburse the trustee, it could be satisfied only by payment and not by any

other form of compliance, the payment of the $200,000 pursuant to the bond was a settled matter, and thus the order here fit the exception to the general rule so that the circuit court found jurisdiction over the appeal. The district court had dismissed the bankruptcy appeal for failure to prosecute, and that was the order being reviewed for an abuse of discretion by the circuit court. The trustee had waited 8 months after Thakkar's briefing deadline ran before filing the motion to dismiss the appeal. Thakkar never asked for any extension of time or justified the delay in filing the brief on appeal. The circuit court, after spending the majority of the opinion discussing its jurisdiction, briefly reiterated that a district court should not automatically dismiss an appeal for failure to meet the briefing deadline, but should do so only where "bad faith, negligence or indifference has been shown … [d]ismissal typically occurs in cases showing consistently dilatory conduct or the complete failure to take any steps other than the mere filing of a notice of appeal." *In re Beverly Mfg. Corp*., 778 F.2d 666, 667 (11th Cir. 1985). Here, the district court found that Thakkar was blatantly negligent at a minimum, and further found that Thakkar had missed the appeal briefing deadline in 3 prior bankruptcy cases. Those factors, combined with the uncooperative and dilatory conduct that underlay the order at issue, supported the district court's dismissal of the appeal.

Jackson v. Schron (In re Fundamental Long Term Care, Inc.)**,** 753 Fed. Appx. 878, Case No. 17-11233 (11th Cir. Feb. 15, 2019) (per curiam) (William Pryor, Branch, and Anderson, JJ.).

Code § / Rule: taxing of costs and expenses; 28 U.S.C. § 1920

Held: The text of 28 U.S.C. § 1920 requires that the transcripts be "necessarily obtained for use in the case" but not that they actually be used in a proceeding or motion, nor that they be relied upon in a dispositive order. While admission into evidence certainly establishes that it was "necessarily obtained," admission or use at trial is not required.

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

Facts: This case has a long litigation history involving the probate estates of certain deceased nursing home patients, which held prepetition judgments against the debtor entity and a real estate investor for wrongful death. The estates and the chapter 7 trustee sought to avoid the transfer of certain assets, and those claims were ultimately dismissed in part. This history includes a published opinion that affirmed the enjoining of the probate estates' pursuit of state court claims (*see Jackson v. Schron (In re Fundamental Long Term Care, Inc.*)**,** 873 F.3d 1325 (11th Cir. 2017)). The instant appeal arose from the bankruptcy court's award of $60,162.19 in costs, including deposition transcripts and related expenses, in favor of the investor who had been dismissed from the proceeding after a finding that his "alleged connection with the transaction was speculative at best." *Id.* at 1329. The estates appealed the award of costs and expenses, and the district court and circuit court affirmed. The primary issue on appeal was whether it was an abuse of discretion to award costs for deposition transcripts and videos that were not used in a dispositive motion by the investor in pursuit of his 12(b)(6) motion, and also for transcripts of the state court actions and the

Rule 2004 examination that preceded the filing of the adversary proceeding. The text of 28 U.S.C. § 1920 requires that the transcripts be "necessarily obtained for use in the case" but not that they actually be used in a proceeding or motion, nor that they be relied upon in a dispositive order. While admission into evidence certainly establishes that it was "necessarily obtained," admission or use at trial is not required. "The operative principle is that such costs are taxable when the party opposing the costs has not demonstrated that any portion of the depositions was not "related to an issue which was present in the case at the time the deposition was taken." *U.S. E.E.O.C. v. W & O, Inc.*, 213 F.3d 600 (11th Cir. 2000) (internal quotations omitted). Nothing in the statute requires that the depositions for which transcript costs are awarded be taken as part of discovery in the same case in which costs are taxed; they need only be "necessarily obtained for use in the case." Although the propriety of the related expenses was not challenged in the bankruptcy court and thus was waived on appeal, the circuit court noted that those type expenses were not categorically beyond the scope of the statute. The "necessarily obtained for use in the case" analysis is fact-intensive in its application to any particular case.

Graddy v. Educational Credit Mgmt. Corp., --- Fed. Appx. ---, Case No. 18-14248 (11th Cir. Feb. 26, 2019) (per curiam) (Wilson, Grant, and Hull, JJ.).

Code § / Rule: Fed. R. Civ. P. 58(a) and 79(a) (discussing Fed. R. Bankr. P. 7058 and 8002(a)(1))

Held: Judgment was not "entered" for purposes of beginning the appeal clock ticking until it was both reduced to a separate written document and also *correctly* noted on the electronic docket.

History: Eleventh Circuit reversed and remanded to the District Court for the Northern District of Georgia, following the district court's dismissal of the appeal as untimely.

Facts: A pro se attorney sought to discharge student loan debt as an undue hardship, and the bankruptcy court ruled against her. On appeal to the circuit court, the issue was the district court's dismissal of her appeal as untimely. The bankruptcy court ruled on July 24, 2017 that the loans were not dischargeable, and docketed a judgment to that effect on July 25, 2017. Unfortunately, when the clerk's office posted the judgment on the electronic docket in CM-ECF, the docket entry erroneously read that judgment was in favor of the plaintiff rather than in favor of the defendant. The clerk corrected that mistake on August 8, 2017, and changed the docket entry to correctly reflect that judgment was in favor of the defendant. The text of the judgment itself, which had been served on all parties when it entered, was at all times correct. The only mistake was the reversal of the party designations in the docket entry. In a cautionary tale to clerks' offices everywhere, the Eleventh Circuit found that the judgment was not "entered" under Rule 58 of the Fed. R. Civ. P., as incorporated into Fed. R. Bankr. P. 7058, for purposes of beginning the appeal time under Fed. R. Bankr. P. 8002(a)(1) until the docket text was corrected. Rule 58 requires two things for judgment to be "entered": (1) the judgment must be set out in a separate document; and (2) the judgment must be entered in the docket under Rule 79(a). The fact that the separate document was correctly executed did not alter the fact that the judgment was not "entered" under Rule 79(a) until the erroneous docket text was corrected to show the actual "substance" of the judgment. Therefore,

instead of being filed 2 days late, her appeal was filed timely. The fact that the correct paper judgment was served on Graddy and that Graddy never actually saw, or in any way relied upon, the erroneous docket text in CM-ECF did not change this outcome under a plain text reading of the rules and what it means to briefly "show the substance" of the judgment in the electronic docket.

***Legum v. Enbar (In re Legum)*,** 756 Fed. Appx. 975, Case No. 18-13132 (11th Cir. Mar. 8, 2019) (per curiam) (Marcus, Rosenbaum, and Edmondson, JJ.).

Code § / Rule: mootness determination when a court on appeal cannot grant effective relief

Held: The entry of the discharge, which was not appealed and thus became a final order, mooted the plaintiff's ongoing appeal of the bankruptcy court's order dismissing his 727 AP because the district court could no longer afford effective relief on appeal in the AP in light of the entry of the discharge.

History: Eleventh Circuit affirmed the District Court for the Southern District of Florida, which had dismissed as moot the plaintiff's appeal of the Bankruptcy Court for the Southern District of Florida's order dismissing his 727 AP.

Facts: The plaintiff was a lawyer proceeding pro se, who objected to the debtor's discharge under § 727. The plaintiff was not scheduled as a creditor but alleged that he held a judgment lien against the debtor's real estate. At trial, the bankruptcy court found not even a scintilla of evidence to support the denial of discharge claim and dismissed the AP. The plaintiff appealed the order dismissing the AP, but critically, did not seek to stay the order of dismissal pending appeal. While the appeal was pending in district court, the discharge entered and became final with no appeal being filed as to the entry of the discharge. At that point the district court dismissed the appeal of the dismissal of the 727 AP as moot. Because the appeal of the dismissal of the 727 AP was in substance an assault on the then-final and unappealable discharge order, the district court could not give the plaintiff the relief he was seeking in appealing the dismissal of the AP. "The district court determined properly that the case was rendered moot and was subject to dismissal."

Kapila v. Davis, Graham & Stubbs LLP (In re Kapila), --- Fed. Appx. ---, Case No. 17-15705 (11th Cir. March 22, 2019) (per curiam) (Marcus, William Pryor, and Grant, JJ.).

Code § / Rule: *in pari delicto* defense under Florida law ("in equal fault")

Held: Corporate officers' wrongdoing was properly imputed to the corporation under the *in pari delicto* defense pursuant to Florida law because the officers necessarily acted within the scope of their employment in attempting to increase profits by virtue of the wrongdoing.

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

Facts: SMF was a publicly traded corporation that provided mobile fuel services for customers who operated large fleets of vehicles, including the United States Postal Service. SMF padded invoices and charged customers for more fuel than was actually delivered. For approximately 7 years, the company engaged in that practice, and hired the defendants (a law firm and one of its members) to advise the company about the practice when its auditor raised questions. Finally, after a new director at SMF stopped the questionable billing practice, profits dropped and the company became overwhelmed with debt. Kapila was appointed trustee for SMF before it filed for chapter 11. Kapila filed an AP against SMF's accountant for negligence and accounting malpractice related to the overbilling scheme. The district court granted partial summary judgment in favor of the accountant on the *in pari delicto* defense. Specifically, the court found that SMF was responsible for its officers' overbilling scheme because the scheme was set up intentionally by the officers and increased company revenue; that SMF and the accountant committed the same wrong; and that the accountant did not have to admit wrongdoing in order to assert the *in pari delicto* defense. Then Kapila filed an AP against the law firm and lawyer defendants, alleging that they had advised that the billing practice was legal. The lawyer and firm also raised the *in pari delicto* defense and the district court accepted the bankruptcy court's recommendation and entered summary judgment against Kapila and in favor of the attorneys on that basis.

The parties agreed that Florida law governed the application of the *in pari delicto* defense. Under that defense, the wrongdoing of corporate officers, in knowingly participating in a scheme that padded billing invoices in order to improve profits, was imputed to the corporate employer under Florida law when the wrongdoing was committed by the officer within the scope of the officer's employment. "[A]n officer who acts to further the interests of the corporation necessarily is acting within the scope of his employment." Here, it was not error to find the claims against the professionals barred by the doctrine because Kapila admitted that the SMF officers who actually implemented the billing scheme did so with the intent, and effect, of increasing profits. Thus, their wrongdoing was necessarily imputed to the company under Florida law. Because the company was as guilty of wrongdoing as the attorneys and accountant, the defense applied here. Further, the district court correctly applied collateral estoppel under federal law to bar relitigation in the proceeding against the lawyers of a fact that was determined in the earlier litigation against the accountant—that fact being that the corporation bore culpability for the officers' misdeeds. The trustee had an opportunity to fully and fairly litigate that issue, the issue was identical in both proceedings, the issue was actually litigated in the first AP, and the issue was a critical and necessary part of the judgment in the first AP.

Kachkar v. Bank of America, N.A. (In re Kachkar), --- Fed. Appx. ---, Case No. 18-10218 (11th Cir. April 11, 2019) (per curiam) (Tjoflat, Jordan, and Rosenbaum, JJ.).

Code § / Rule: 28 U.S.C. § 1334 "related to" bankruptcy jurisdiction; 28 U.S.C. § 1425(a) removal

Held: The bankruptcy court had "related to" jurisdiction over the removed state court cause of action because it centered around the bankruptcy court's own orders.

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

Facts: The debtor (Kachkar) and his wife settled a state court foreclosure action with Bank of America ("B of A") in 2014, consenting to a judgment of foreclosure and release of their counterclaims. The agreement also provided that they could pay $6 million in installments to vacate the foreclosure judgment and satisfy the obligation. They made only one of the agreed installment payments, and so the state court scheduled the foreclosure sale. The wife filed chapter 11 the day before the foreclosure sale, and in that bankruptcy case, the parties again settled their issues involving the foreclosure property and another secured claim. This time, the parties reached another agreement for B of A to accept $7.3 million in satisfaction of its claims. The source of funds was to be an LLC owned by Kachkar's son, and Kachkar also released all interest in the property. If not paid, the stay would lift. The wife's confirmed chapter 11 plan provided that the foreclosure property vested in the wife free and clear of any claim by Kachkar. Again, the payments were not completed as agreed, and the bankruptcy court allowed the foreclosure to be concluded. The wife ultimately converted her chapter 11 case to chapter 7 and received a discharge. Meanwhile, Kachkar filed a state court suit against B of A and others related to the installment payment under the first agreement and related to the ultimately successful foreclosure. The defendants removed the suit to bankruptcy court, because the claims in the suit were intertwined with the wife's bankruptcy. Kachkar moved for remand, or alternatively abstention, arguing that the bankruptcy court lacked subject matter jurisdiction. The bankruptcy court denied both requests, and dismissed the action for lack of standing, due to Kachkar's relinquishment of all interest in the property before the foreclosure sale took place, and also on res judicata grounds because the relinquishment had been memorialized in prior orders. The district court exercised de novo review and affirmed.

On appeal to the Eleventh Circuit, the court discussed the jurisdiction of bankruptcy courts in general, and found the bankruptcy court had subject matter jurisdiction over the removed cause of action here as it was "related to" the wife's bankruptcy case. The usual test is whether "the potential outcome of the dispute … would 'conceivably have an effect' on the bankruptcy estate." *Wortley v. Bakst*, 844 F.3d 1313, 1320 (11th Cir. 2017) (quoting *Matter of Lemco Gypsum, Inc.*, 910 F.2d 784, 788 (11th Cir. 1990)). The Eleventh Circuit has not, however, published a decision addressing the scope of "related to" jurisdiction post-confirmation. The bankruptcy court's jurisdiction "diminishes" at confirmation but does not evaporate completely. Here, the state court complaint alleged B of A had violated the order confirming the chapter 11 plan, the settlement agreement, and the order authorizing the foreclosure. Accordingly, the claims in the complaint were "based on and intertwined with various bankruptcy court orders" and thus the bankruptcy court had related to jurisdiction over the removed cause of action. Similarly, the bankruptcy court correctly declined to abstain because even if not core, the claims in the complaint hit squarely within the bankruptcy court's authority to interpret and enforce its own orders, which were central to the dispute. Further,

Kachkar lacked standing to pursue claims related to the foreclosure sale because he had relinquished his rights in that property at the time the sale occurred. He did have standing as to claims regarding the application of his first installment payment, but the dismissal as to those claims was nonetheless affirmed based on his failure to specify any actual breach of the agreement by B of A, and his other breach claims were vague and conclusory. He could not maintain an unjust enrichment claim because there was an express contract. His other claims were also disposed of quickly as not being supported by his pleadings on their face. Finally, granting leave to amend would have been futile so the failure to grant him leave to amend was not error.

Obduskey v. McCarthy & Holthus LLP, 139 S. Ct. 1029, Case No. 17-1307 (decided Mar. 20, 2019) (unanimous opinion by Breyer, J., and concurring opinion by Sotomayor, J.).

STATUTE: Fair Debt Collection Practices Act, primary definition of "debt collector" at 15 U.S.C. § 1692a(6); and limited-purpose definition of "debt collector" at 15 U.S.C. § 1692f(6)

A mortgagor sued the law firm that conducted the nonjudicial foreclosure of his home in Colorado, despite his having sent a letter invoking what he believed was his right under the FDCPA to demand verification of the debt and thereby halt the pending foreclosure. The foreclosure was instead completed and the mortgagor sued alleging a violation of the verification provisions of the FDCPA. The District Court dismissed, finding that the law firm was not a "debt collector" for purposes of the verification provisions of the Act, and the Tenth Circuit affirmed. The Supreme Court also affirmed.

The FDCPA defines a debt collector as "any person … in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts." 15 U.S.C. § 1692a(6). In addition, the statute also provides that "[f]or the purpose of section 1692f(6)" the definition of "[the term debt collector] also includes any person … in any business the principal purpose of which is the enforcement of security interests." *Id.* The issue in the case was whether a person whose principal business was conducting nonjudicial foreclosures of mortgages was a debt collector only for the limited purposes of § 1692f(6), and not for other provisions of the statute (such as the verification provisions at issue) that would apply only if the person were a debt collector under the primary definition of debt collector given in § 1692a(6). **The Court held that a person who is a debt collector only under the limited purpose definition is not a debt collector under the primary definition.**

This reading of the statute gave effect to every word and avoided rendering the limited-purpose definition mere surplusage. This reading also reflected that Congress may well have chosen to exclude those whose business is nonjudicial foreclosure from the primary definition to avoid a conflict between the requirements of the FDCPA (such as provisions strictly limiting communications with third parties) and the various state nonjudicial foreclosure procedures (which typically require advertising the sale to attract bidders, and might run afoul of the FDCPA's third-party communications restrictions, and which typically also require specific notice to the mortgagor). Finally, this reading was supported by the legislative history of the FDCPA, which

reflected a compromise between the two extremes of including those whose primary business was enforcing security interests in the primary definition, and not including them in the Act's coverage at all. The Court's holding was limited to nonjudicial foreclosures, in states where a deficiency judgment would have to be pursued in state court following foreclosure. In concurrence, Justice Sotomayor pointed out that Congress may want to act to cure the surplusage problem if the Court's ruling does not accurately reflect Congressional intent, and notes that the Court's ruling is not a license for those who engage in nonjudicial foreclosure to engage in abusive collection tactics.