11TH CIRCUIT CASES UPDATE
May 2019-July 2021

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

33rd Annual
Bankruptcy at the Beach Seminar
September 10-11, 2021

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

Whigham v. United Asset Holdings Residential, LLC (In re Whigham), 770 Fed. Appx. 540, Case No. 18-13790 (11th Cir. May 10, 2019) (per curiam) (Jordan, Jill Pryor, and Black, JJ.).

Code § / Rule: § 727(a); entry of discharge

Held: The bankruptcy court committed no error in assessing the Debtor's credibility, and not believing her contradictory explanations was a permissible view of the evidence.

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

Facts: The Debtor filed chapter 7 and disclosed on her SOFA that she had received a "2013 lawsuit settlement" of $245,000.00. When asked about the disposition of those funds, she testified that $45,000.00 went to attorney fees; $75,000.00 was deposited into a bank account; and $125,000.00 was used to pay various creditors through a series of cashier's checks. The trustee asked for copies of those cashier's checks and the Debtor agreed, but ultimately failed to provide that documentation. One of the Debtor's creditors then filed an AP under § 727 and subpoenaed the bank that the Debtor had testified had issued the cashier's checks for the $125,000.00 proceeds. Only $9,000.00 worth of checks existed. The creditor moved for summary judgment and the Debtor responded by attempting to explain via an affidavit what had become of the $125,000.00 and contradicting her earlier testimony, and also filed a verified response that contained even further contradictions. For example, in the verified response, she said she had placed around $105,000.00 of the funds into a previously undisclosed bank account she held in trust for her son, while she said in the affidavit that the amount was $90,000.00. Summary judgment was denied. The creditor then amended the complaint and the case proceeded to trial. The bankruptcy court denied the Debtor's discharge on three grounds, all related to the failure to timely and accurately explain what she did with the settlement funds (§ 727(a)(3) concealment and failure to maintain records; (a)(4) false oath or account that was both fraudulent and material; and (a)(5) failure to satisfactorily explain loss of assets). The district court affirmed, as did the Eleventh Circuit. The bankruptcy court committed no error in assessing the Debtor's credibility, and not believing her contradictory explanations was a permissible view of the evidence. The circuit court also pointed out that "false oaths regarding worthless assets may bar the discharge of debts." (citing *Chalik v. Moorefield (In re Chalik)*, 748 F.2d 616 (11th Cir. 1984)).

Smith v. HSBC Bank USA, Nat'l Assoc. (In re Smith), 775 Fed. Appx. 492, Case No. 18-10736 (11th Cir. May 20, 2019) (per curiam) (Martin, Jordan, and Edmondson, JJ.).

Code § / Rule: § 362(c)(2)(C) stay expires upon entry of discharge; res judicata satisfied by privity of parties

Held: Prior judgment satisfied the elements of res judicata and the automatic stay terminated upon entry of the discharge.

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

Facts: The Debtors owned a home in St. Simons Island, Georgia. They defaulted on their security deed and filed bankruptcy in 2007, eventually being discharged in 2016 after pursuing years of litigation. In 2015, the Debtors sued HSBC Bank in an attempt to block foreclosure of the home, attacking the validity of the assignment of the security deed. The district court denied their request for a stay of the writ of possession in August 2017. The district court also ruled that the Debtors' "fraud on the court" claim was barred by res judicata and dismissed their complaint. Meanwhile, in July 2017, the Debtors again sought

bankruptcy court action to stay the writ of possession in favor of HSBC Bank, alleging the writ violated the automatic stay. The bankruptcy court denied the motion on res judicata grounds, finding that the district court's order from August 2017 (denying virtually the same motion) was binding on all issues. The Debtors appealed the district court order that dismissed their complaint and also the bankruptcy court order that denied their motion aimed at the writ of possession. The Eleventh Circuit affirmed both rulings. The district court committed no error in finding that HSBC was in privity with Countrywide, the original holder of the security deed so that the ruling on the "fraud on the court" claim was binding going forward, and no more carefully drafted complaint could have stated a claim for relief. Further, the automatic stay expired in June 2016 when the discharge was entered, and thus was not violated by the writ of possession dated several months post-discharge.

Zadeh v. Waage (In re Zadeh), 772 Fed. Appx. 837, Case No. 18-10172 (11th Cir. June 6, 2019) (per curiam) (William Pryor, Grant, and Anderson, JJ.).

Code § / Rule: Rule 8018(a) and district court's sua sponte dismissal of appeal of bankruptcy court order closing ch. 13 case

Held: The debtor-appellant abandoned his argument that the district court erred in dismissing his appeal sua sponte by failing to address that argument in his brief.

History: 11th Circuit affirmed the District Court for the Middle District of Florida, which dismissed sua sponte an appeal from the Bankruptcy Court for the Middle District of Florida.

Facts: The pro se debtor appealed the bankruptcy court's order that closed his chapter 13 case and failed to address the debtor's claims that his creditors conspired to purchase his homestead. The district court dismissed the appeal sua sponte based on the debtor's failure to file a brief on appeal. The debtor then appealed that dismissal to the Eleventh Circuit. The circuit court affirmed the dismissal. In the bankruptcy context, the filing of a notice of appeal is jurisdictional but the filing of briefs is not a jurisdictional prerequisite. Before dismissing an appeal for failure to file a brief, the district court should consider whether the appellant has shown bad faith, negligence, or indifference. *Brake v. Tavormina (In re Beverly Mfg. Corp.)*, 778 F.2d 666, 667 (11th Cir. 1985). Here, the appellant did not raise any issues in his brief related to the dismissal of the appeal (and did not address whether the district court complied with *Beverly Mfg. Corp.'s* mandate). The debtor thus abandoned any argument that the district court committed error in dismissing his appeal. He addressed the merits of the bankruptcy issues, but failed to address the real issue on appeal, which was the district court's sua sponte dismissal for failure to file a brief.

The circuit court reached a similar conclusion in ***Liebman v. Ocwen Loan Servicing, LLC (In re Liebman)***, 772 Fed. Appx. 839, Case No. 18-10495 (11th Cir. June 7, 2019) (per curiam) (Wilson, William Pryor, and Grant, JJ.). In the *Liebman* case, the pro se debtor also did not sufficiently brief the issues that mattered. "To 'brief' a claim, a party must 'plainly and prominently' raise it by, for example, devoting a discrete section of her argument to that claim." *Id.* at p. 3, *quoting Sapuppo v. Allstate Floridian Ins. Co.,* 739 F.3d 678, 681 (11th Cir. 2014). "A claim is abandoned if the appellant only makes passing references to it or raises it in a perfunctory manner without supporting arguments or authority." *Id*. And while pro se briefs are read liberally, issues not briefed are abandoned. The single sentence reference to the issue in the debtor-appellant's briefs was not sufficient to preserve the issue on appeal.

Another pro se appellant-debtor failed to brief the issue on appeal, instead spending his entire brief on extraneous matters, in ***Worrell v. Emigrant Mortgage Co. (In re Worrell),*** 772 Fed. Appx. 842, Case No.

18-10255 (11th Cir. June 11, 2019) (per curiam) (Jordan, Newsom, and Fay, JJ.). In that case, the pro se debtor appealed a bankruptcy court decision, affirmed by the district court, that neither the automatic stay under § 362, nor a stay under the Servicemembers Civil Relief Act, was in effect when the mortgage company conducted its foreclosure. The debtor's brief on appeal only "comment[ed] in passing on the district court's conclusion that no stay was in effect. *Pro se* or not, this is plainly insufficient to preserve his claims." *Id.* at p. 3 (citing *Sapuppo*, 739 F.3d at 681).

Mohorne v. Beal Bank (In re Mohorne), 772 Fed. Appx. 846, Case No. 18-14776 (11th Cir. June 12, 2019) (per curiam) (William Pryor, Rosenbaum, and Grant, JJ.).

Code § / Rule: § 350

Held: The "other cause" standard under § 350 incorporates the same standard as that employed under Rule 60(b) of the Fed. R. Civ. P (see Fed. R. Bankr. P. 9024) and the bankruptcy court did not err in finding that standard was not met where the appellant raised only an unrelated argument that did not justify reopening the case.

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

Facts: In 2001, the debtor executed a note and mortgage in favor of Beal Bank. The bank moved to foreclose after default. The Florida state court entered a judgment of foreclosure and the bank was the purchaser at the foreclosure sale. After the foreclosure sale, the debtor argued that the mortgage had covered only one vacant lot and did not cover the second lot that contained the dwelling. The state court disagreed, found that both were covered by the mortgage, and that ruling was affirmed on appeal. Later in 2005, the debtor filed chapter 13. The bankruptcy court lifted the stay for the bank to complete what remained of the foreclosure process, and refused to accept Mohorne's partial mortgage theory that the state court had already denied. The case proceeded to discharge in 2010 and was closed in 2013. In 2017, the debtor moved to reopen his chapter 13 case and to stay the original foreclosure action. His argument was that in a prior bankruptcy case (cases filed in 1999 and 2002), a bankruptcy court had accepted his "partial mortgage" theory and so every subsequent court should have been bound by that determination. The bankruptcy court denied the motion, finding no good cause to reopen and finding no jurisdiction to stay the state court. The bankruptcy court denied reconsideration, the district court affirmed, and the circuit court also affirmed.

Under "§ 350(b), 'the bankruptcy court retains broad discretion to reopen a closed case on a motion of the debtor or another party in interest.'" *Id.* at *4 (quoting *Rasbury v. I.R.S. (In re Rasbury),* 24 F.3d 159, 168 (11th Cir. 1994)). "A bankruptcy case may be reopened to administer assets, to accord relief to the debtor, or for 'other cause.'" *Id. (*quoting § 350(b)). The "other cause" standard incorporates the same standard as that employed under Rule 60(b) of the Fed. R. Civ. P (*see* Fed. R. Bankr. P. 9024). "Other cause" may include "newly discovered evidence, fraud or misrepresentation, the judgment is void or has been discharged or vacated, and 'any other reason that justifies relief.'" *Id. (*quoting Fed. R. Civ. P. 60(b)). That standard was not met here. The debtor's argument involved prior rulings aimed at judgment liens of entirely different creditors; the rulings did not involve the bank's mortgage. Nothing he referenced justified reopening the case.

Benkovitch v. Village of Key Biscayne, 778 Fed. Appx. 711, Case No. 18-11601 (11th Cir. June 20, 2019) (per curiam) (Branch, Grant, and Julie Carnes, JJ.).

Code § / Rule: rights to reinstate full amount owing upon breach of stipulation and settlement

Held: Under Florida law, the non-breaching party has the option of treating the contract as void upon the breach of the other party, and that was the city's choice in this case.

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

Facts: The pro se chapter 7 debtor appealed the district court's affirmance of bankruptcy court orders that (1) denied the debtor's motion to dismiss and granted an extension of time for the creditor to perfect service, and (2) overruled the debtor's objection to claim, denied the debtor's motion to dismiss for failure to state a claim, and granted the creditor's motion for summary judgment. The debtor and her husband owned property that had a years-long history of "life-safety issues" and despite repeated requests by the city, repairs were never made and penalties accrued over years. When the debtor filed her chapter 11 case, she and her husband owed the city civil penalties in excess of $5 million under a series of three magistrate orders. The city objected to the chapter 11 plan, and the parties resolved the objection by stipulating that all life-safety issues would be corrected within ten days and that the debtor would pay the city three installments of $89,000.00 in exchange for vacating the penalty in excess of that amount and stopping further accrual. The bankruptcy court confirmed the chapter 11 plan and acknowledged the stipulation. Soon thereafter, the debtor defaulted to another creditor and her case converted to chapter 7. The city filed an AP to determine the dischargeability of the $5 million in civil penalties, alleging that a year into the deal, the debtor still had not abated the life-safety issues and had not made the stipulated payments. Due to that material breach, the city argued the entire $5 million penalty was back in place. The debtor did not dispute her default, but argued that because she no longer owned the property at issue, and because the magistrate orders establishing the penalties were only *in rem*, the city had no claim against her personally. The bankruptcy court disagreed and ruled that the magistrate orders established *in personam* "penalties and fines" so that its claim would be allowed, and the district court on appeal agreed.

On appeal to the Eleventh Circuit, the debtor switched tracks and argued for the first time that it was the stipulation in her chapter 11 phase that doomed the city's claim, rather than the magistrate orders. She argued that the stipulation released her from personal liability beyond the $89,000.00 total payments under the stipulation, regardless of her breach. She alternatively argued that she did not breach the stipulation, and she complained that the bankruptcy court had allowed the city "extra time to perfect service." The circuit court disagreed. "It is a well-established principle under Florida law that when one party materially breaches a contract, the non-breaching party may 'treat the breach as a discharge of his contract liability.'" Opinion p. 6 (quoting *Benemerito & Flores, M.D.'s, P.A. v. Roche*, 751 So. 2d 91, 93 (Fla. Dist. Ct. App. 1999)) (citation omitted). Under Florida law, the non-breaching party has the option of treating the contract as void upon the breach of the other party, and that was the city's choice in this case. The debtor had admitted in her pleadings below that she had in fact breached the stipulation. She made no argument in her brief about the magistrate orders providing only *in rem* rather than *in personam* liability and thus abandoned that argument, although the circuit court pointed out that the argument was flawed in any event as the orders did establish *in personam* liability.

Yerian v. Webber (In re Yerian), 927 F.3d 1223, Case No. 18-10944 (11th Cir. June 26, 2019) (Marcus, Hull, and Grant, JJ.) (opinion by Grant, J.).

Code § / Rule: § 522(b) and exemptions under Florida law (opt-out state)

Held: Under Florida law, when the debtor engaged in self-dealing in violation of his IRA's governing instrument, he lost his right to exempt that IRA even though the IRA was originally exempt as established; the debtor's subsequent violation of the terms of the IRA's governing instrument forfeited his right to the exemption under federal law, which meant he also lost his exemption under state law and thus also in the bankruptcy.

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 chapter 7 debtor had engaged in prepetition self-dealing transactions in violation of the governing instrument of his self-directed IRA. The IRA's main asset was an LLC. The debtor used that LLC to title IRA-owned cars in his and his wife's names and bought a condo in Puerto Rico with IRA funds, which condo he then used for his own personal travel. Those acts constituted "prohibited transactions" under the Internal Revenue Code ("IRC") which meant his IRA was no longer tax exempt as of January 2014. The debtor filed chapter 7 bankruptcy in February 2015 and argued in response to the chapter 7 trustee's objection to his exemption claim that he should nevertheless be allowed the exemption under Florida law because the IRA was "originally established with proper documentation" despite his later abuses. The bankruptcy court considered Florida law and disagreed. Under the IRC, the IRA had to be operated under certain rules to maintain its tax-exempt status. The debtor did not dispute that the IRA lost its tax-exempt status under the IRC when he engaged in self-dealing prohibited transactions. He tried to argue that the IRA remained exempt from creditors regardless of the change in tax status. The circuit court parsed the Florida statute at issue and agreed that the IRA was not maintained in accordance with its own governing instrument (as opposed to not being maintained in accordance with the IRC, as the bankruptcy and district courts had mistakenly framed the issue). Here, the prohibited transactions were prohibited by the governing instrument (and also by the IRC). The decision rested on the plain text of the statute, and the circuit court declined to "second-guess the mercy Florida chooses to show its debtors" because "Congress has specifically authorized states to craft their own creditor exemptions—which may be as generous or as austere as the state deems appropriate." Opinion p. 15.

Harewood v. Miami-Dade County, 780 Fed. Appx. 748, Case No. 18-10842 (11th Cir. July 3, 2019) (per curiam) (Marcus, Rosenbaum, and Jill Pryor, JJ.).

Code § / Rule: judicial estoppel

Held: Judicial estoppel determination was not an abuse and the district court committed no error in finding that the debtor "intend[ed] to make a mockery of the judicial system by attempting to shield potential assets from bankruptcy proceedings, making inconsistent statements in th[e district] court and the bankruptcy court, and … feigning ignorance and attempting to lay blame on his bankruptcy counsel."

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

Facts: In 2015, Harewood sued Alexander, an officer with the Miami-Dade Police Department, alleging federal claims for excessive taser use during an incident in July 2013. Harewood was a debtor in two

different chapter 13 cases, one filed in January 2013 (before the tasing incident) and one filed in 2014. In the pre-tasing bankruptcy, Harewood amended his schedules after the tasing incident to disclose several lawsuits against him, but failed to list the claim he held for the tasing incident. He also failed to list the claim at all in his post-tasing chapter 13 case, either in his original or amended schedules. Alexander moved to dismiss the suit on grounds that Harewood was judicially estopped from maintaining the damages suit in light of his failure to disclose the cause of action as an asset in either of the two bankruptcies. Harewood argued that his attorney in the bankruptcies advised him he did not need to schedule the claim against Alexander because the plan was 100% to unsecured creditors. The district court granted summary judgment in favor of Alexander on judicial estoppel grounds and dismissed the case. On appeal, the Eleventh Circuit examined the judicial estoppel issue under the abuse of discretion standard (and fact findings for clear error). The two-pronged analysis requires the court to assess "whether (1) the party took an inconsistent position under oath in a separate proceeding, and (2) these inconsistent positions were calculated to make a mockery of the judicial system." *Slater v. U.S. Steel Corp.*, 871 F.3d 1174, 1180 (11th Cir. 2017) (en banc). Failure to schedule the cause of action as an asset (including the failure to amend the schedules in the case that was pending when the claim arose) satisfies the first prong. Harewood did not dispute the first prong was satisfied here.

The real issue was the second prong, and the factors that the district court could consider, including the entire record and the plaintiff's level of sophistication, whether the attorney knew about the claims, and whether the plaintiff identified other lawsuits on the schedules. The district court is not required to accept the plaintiff's denial of intent as true and may infer intent from the entirety of the record. Here, the district court found the debtor ran a real estate business doing more than just trivial maintenance on the properties, that the debtor's testimony was inconsistent regarding what he told his attorney about the claim and regarding what his attorney told him, and that he clearly knew he had an ongoing obligation to amend schedules (having done so in each case) but that he only added lawsuits in which he was a defendant, and not a plaintiff, to his advantage. The district court found that he "intend[ed] to make a mockery of the judicial system by attempting to shield potential assets from bankruptcy proceedings, making inconsistent statements in th[e district] court and the bankruptcy court, and … feigning ignorance and attempting to lay blame on his bankruptcy counsel." Opinion p. *4 (quoting district court opinion). The Eleventh Circuit affirmed this determination.

Sims v. Wells Fargo Bank, N.A. (In re Sims), 781 Fed. Appx. 884, Case No. 18-13123 (11th Cir. July 16, 2019) (per curiam) (Martin, Rosenbaum, and Newsom, JJ.).

Code § / Rule: effect of mortgagee's entering into a master pooling and servicing agreement

Held: The language of a master pooling and servicing agreement ("PSA") did not make Wells Fargo a guarantor of the debtor's mortgage loan and the payments made by Wells Fargo to the trust under the PSA did not impact Wells Fargo's right to foreclose when the debtor defaulted in her payment obligations.

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

Facts: The debtor defaulted on her mortgage and Wells Fargo began foreclosure. The debtor alleged that Wells Fargo had transferred the mortgage to a pass-through trust so it "could be securitized and sold to investors." Opinion p. *1. The alleged arrangement with the pass-through trust included a master pooling and servicing agreement ("PSA") that required Wells Fargo in its role as servicer to "advance all principal and interest payments of the underlying mortgage to the trust." *Id.* While the debtor admitted she did not make her payments, her contention was that the PSA essentially made Wells Fargo a guarantor of her

obligation, and that Wells Fargo's payment into the trust (which held the mortgage) should be credited as payments on her behalf so that there was no default under the mortgage. Wells Fargo apparently disputed that it had entered into a pooling agreement with the debtor's mortgage. The bankruptcy court ruled that even if that were the case, the debtor failed to state a claim. The bankruptcy court granted Wells Fargo's motion to dismiss the debtor's adversary proceeding against it, and the debtor appealed. The district court and Eleventh Circuit affirmed the dismissal. The Eleventh Circuit interpreted the unambiguous language of the PSA and the mortgage. The mortgage defined "default" as failure of the borrower to pay, and the fact that the debtor failed to pay was undisputed. The language of the PSA did not make Wells Fargo a guarantor and the advance payments made to the trust did not satisfy the debtor's obligation to repay the mortgage debt. In fact, the PSA not only had no language indicating that a borrower's obligation under the note and mortgage would be reduced by amounts paid to the trust by the servicer, but instead contained several terms showing that was not the intent (including not listing mortgagors as parties or beneficiaries, providing for no reduction of a borrower's liability if a servicer advances funds, authorizing a servicer to enforce the mortgage if the borrower defaults, and allowing reimbursement from the foreclosure proceeds for expenses of servicers that are advanced to the trust related to foreclosure). The language of the documents did not make Wells Fargo a guarantor of the debtor's mortgage loan and the payments made by Wells Fargo to the trust under the PSA did not impact Wells Fargo's right to foreclose when the debtor defaulted in her payment obligations.

Hines v. Regions Bank (In re Hines), 782 Fed. Appx. 853, Case No. 18-14799 (11th Cir. July 29, 2019) (per curiam) (Ed Carnes, C.J.; Jill Pryor and Anderson, JJ.).

Code § / Rule: service on a bank under Alabama R. Civ. P. 4 and *Espinosa*

Held: Actual notice does not excuse compliance with the procedural rules governing the service of process.

History: Eleventh Circuit affirmed District Court for the Northern District of Alabama (Haikala, Dist. J).

Facts: Postpetition, the debtor filed suit against Regions in state court alleging RESPA violations. Regions removed the suit to federal court and moved to dismiss. The debtor then filed a motion for default judgment against Regions, and supported that motion by showing service by certified mail to Regions at a P.O. Box without listing an officer or individual, and without the return of a signed receipt (required by Ala. R. Civ. P. 4(i)(2)(C)). The debtor also served an attorney who had begun the foreclosure for Regions. The district court in the removed action found that the debtor's failure to direct service to a named officer or agent, and failure to have a signed receipt were service problems that justified denying the motion for default judgment. The district court also found that the attorney who began foreclosure did not thereby become Regions' general agent for service of process. The RESPA claims were then dismissed as barred under an exemption provision in RESPA. The debtor appealed the denial of his motion for default judgment, and the Eleventh Circuit affirmed.

The circuit court applied Alabama law to examine the sufficiency of service before removal. Under Alabama law, a corporation such as Regions may be served by serving an officer or agent and if certified mail is used, a signed receipt must evidence the service. The debtor did not have good service, the circuit court agreed. Further, the court rejected the debtor's argument that he did not have to comply with Alabama's civil procedure rules so long as he gave Regions "adequate notice that did not violate its due process rights" and relied upon *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010) in support of that position. The Eleventh Circuit disagreed with that reading of *Espinosa*. In *Espinosa*, the Supreme Court was addressing whether a creditor could set aside as void a final judgment under Rule 60(b)(4) and found that the creditor could not do so where it had actual notice that it had been deprived of a right granted

it by a procedural rule and nonetheless failed to timely appeal although it could have done so. *Espinosa*'s rationale did not entitle the debtor to a default judgment just because Regions had actual notice of the complaint and failed to file a timely answer. Instead, *Espinosa* stood for the more limited proposition that the violation of the procedural rules was a deprivation of a right, which deprivation the creditor knew about and could have addressed on direct appeal rather than waiting to attack the final judgment under Rule 60(b)(4). Actual notice does not excuse compliance with the procedural rules governing the service of process, even in light of *Espinosa*, as the district court correctly concluded.

Henderson v. Franklin, 782 Fed. Appx. 866, Case No. 18-14739 (11th Cir. July 31, 2019) (per curiam) (William Pryor, Branch, and Grant, JJ.).

Code § / Rule: party in interest; judicial estoppel

Held: Plaintiff was judicially estopped from asserting claims because he failed to schedule them in his original bankruptcy schedules as well as in his various amendments, even though he had scheduled other claims of a similar nature when it benefited him, and he was sophisticated enough to realize that the claim against his employer should have also been listed.

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

Facts: Henderson filed a chapter 13 bankruptcy in March 2017 and failed to schedule any lawsuits or claims that he had against third parties. In June 2017, he amended his schedules to list a potential injury claim against MARTA. In September 2017, he moved to convert his case to chapter 7 and the same day, filed the complaint at issue in this appeal. He again amended his schedules in January 2018 to add creditors, and received his discharge later that same month. In the complaint filed in district court during the bankruptcy case, Henderson sued USSA (his employer) alleging violations of the Fair Labor Standards Act and also retaliatory firing. USSA filed a motion for summary judgment, asserting judicial estoppel and that Henderson lacked standing because the bankruptcy trustee was the real party in interest and the only person who could assert the claims. The district court granted the motion for summary judgment, finding that Henderson was judicially estopped from asserting the claims because he failed to schedule them in his original schedules as well as in his various amendments, even though he had scheduled the unliquidated MARTA claim and was sophisticated enough to realize that the claim against his employer should have also been listed. The district court also found that the bankruptcy trustee had exclusive standing to pursue the claim. The district court then granted USSA's motion for costs, and Henderson timely appealed the rulings.

On appeal, the Eleventh Circuit reiterated that property of the estate under § 541(a)(1) includes "all legal or equitable interest of the debtor in property as of the commencement of the case." In a chapter 7 case, the debtor's prepetition assets are subject to liquidation in exchange for an immediate fresh start. Causes of action that belong to the debtor when a case is filed become property of the bankruptcy estate, and in a chapter 7 case, the trustee is the only party with standing to pursue a civil cause of action unless and until the cause of action is abandoned under§ 544. When a cause of action is not scheduled, it is not administered or abandoned upon closing of the case and remains vested in the bankruptcy estate. On the judicial estoppel issue, the two-part test of *Slater v. United States Steel Corp*., 871 F.3d 1174, 1180 (11th Cir. 2017) (en banc) requires an examination of (1) whether the party against whom judicial estoppel is being asserted took inconsistent positions under oath in distinct cases, and (2) whether that inconsistency was "calculated to make a mockery of the judicial system." *Id.* The first prong was satisfied here when Henderson omitted the cause of action from his original and amended schedules. It was no abuse of discretion for the district

court to find the second prong was satisfied under all the facts and circumstances of the case. Importantly, the argument that Henderson relied on his attorney in failing to list the cause of action did not save him from judicial estoppel—although the circuit court notes that it may have given him a claim against his attorney for malpractice. The circuit court did not address the arguments that the claim had in fact been abandoned by the trustee while the appeal was pending, declining to rule on that issue and deciding the appeal on judicial estoppel grounds only. Finally, the circuit court also upheld the award of costs under Fed. R. Civ. P. 54(d)(1), which creates a "strong presumption that the prevailing party will be awarded costs" up to the limit imposed by 28 U.S.C. § 1920. Opinion p. 13 (quoting *Mathews v. Crosby*, 480 F.3d 1265, 1276 (11th Cir. 2007)). The federal rules provide no time limit for filing a bill of costs, although the local rules here required it be done within 30 days of judgment, which the defendant did in this case. Also, a party who wins on summary judgment is a prevailing party and Rule 54 does not require a showing of bad faith or frivolity before costs may be awarded.

Szanto v. Jurgens (In re Jurgens), 780 Fed. Appx. 839, Case No. 18-15151 (11th Cir. Aug. 6, 2019) (per curiam) (Marcus, William Pryor, and Grant, JJ.).

Code § / Rule: res judicata

Held: Res judicata is satisfied where (1) the claims were resolved in a prior settlement agreement, which the bankruptcy court had approved; (2) the claims were between the same parties; and (3) the claims involved the same cause of action.

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

Facts: In a prior bankruptcy case, the creditor (Szanto) mediated and entered into a settlement agreement regarding his cause of action against the debtor. A final judgment and amended final judgment were then entered in Szanto's favor. In this subsequent case, Szanto again filed an adversary proceeding against the debtor based on the same claims that had been settled in the prior action, and the bankruptcy court dismissed the complaint as being barred by res judicata. Szanto appealed and argued that the settlement agreement in the prior case should not bind him here. The district court affirmed, as did the Eleventh Circuit. "[A] settlement agreement is sufficiently final for purposes of res judicata." Opinion p.2 (citing *In re Martin*, 490 F.3d 1272, 1276-77 (11th Cir. 2007)). Additionally, here there was a final judgment issued in the prior adversary proceeding in Szanto's favor. Therefore, under *In re Piper Aircraft Corp*., 244 F.3d 1289, 1295 (11th Cir. 2001), the elements of res judicata were satisfied: (1) the claims were resolved in the settlement agreement, which the bankruptcy court had approved; (2) the claims were between the same parties; and (3) the claims involved the same cause of action. Finally, any errors in the district court's order that affirmed the bankruptcy court were harmless and did not affect substantial rights, so under the civil plain error rule, any such errors were not prejudicial.

Creech v. Viruet (In re Creech), 782 Fed. Appx. 933, Case No. 18-12584 (11th Cir. Aug. 7, 2019) (per curiam) (Tjoflat, Carnes, and Jordan, JJ.).

Code § / Rule: issue-preclusive effect of default judgment in state court (Illinois)

Held: Default judgment, entered as a discovery sanction under Illinois law, was entitled to issue-preclusive effect in § 523(a)(19) action.

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

Facts: The Viruets were Illinois residents who invested in a company owned by the Creeches, who were residents of Florida. The Viruets sued the Creeches in Illinois state court alleging material misrepresentations and the violation of both Illinois and Florida securities laws regarding the sale of unregistered securities without a license, as well as common law fraud. The Creeches answered the complaint, asserted affirmative defenses, and filed motions, but refused to respond to discovery requests despite being ordered to do so. As a sanction, the state court entered default judgment against the Creeches for over $980,000.00. The Creeches' appeal was eventually dismissed for lack of prosecution. Thereafter, the Illinois Secretary of State's Securities Department commenced an administrative action against the Creeches and their companies based on the same facts as the Viruets' suit. The administrative action ended with an order that barred the further sale of securities by the Creeches and fined Mr. Creech and the companies $10,000 each. The Creeches filed bankruptcy after the default judgment, but before the entry of the Illinois Secretary of State's administrative order. The Viruets filed a § 523(a)(19) complaint, seeking to have the state court default judgment in their favor declared nondischargeable, and arguing that issue preclusion prevented the relitigation of the matter. The bankruptcy court, district court, and Eleventh Circuit agreed with the Viruets.

"When asked to determine the preclusive effect of a judgment, we 'refer to the preclusion law of the State in which the judgment was rendered.'" Opinion at *2 (quoting *Marrese v. Am. Acad. Of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985)); *see also* 28 U.S.C. § 1738 (2018). By contrast, the case of *In re Bush*, 62 F.3d 1319 (11th Cir. 1995), which held that issue preclusion would apply only if the action had been "substantially participated in" prior to the default judgment, was inapposite because *Bush* was decided based upon the federal common law of issue preclusion and the judgment at issue had not been entered in state court. Illinois state law treats a default judgment as a final judgment on the merits of the "ultimate claim or demand presented in the complaint" and where, as here, the default judgment was entered not based upon a failure to appear but rather as a sanction after appearing and defending the case but then refusing to obey discovery obligations, the issue had been "actually litigated" despite the fact that the judgment was styled as a "default judgment." Opinion at *2-3. Finally, the debt at issue was for a violation of securities laws as pled in the state-court complaint, and the debt was established by the state court's default judgment. Therefore, the two elements of § 523(a)(19) were satisfied and the debt was nondischargeable.

Elam v. Bank of New York (In re Crawford), 780 Fed. Appx. 853, Case No. 18-13030 (11th Cir. Aug. 19, 2019) (per curiam) (Branch, Grant, and Julie Carnes, JJ.).

Code § / Rule: § 330; bankruptcy court's inherent authority to sanction and discipline attorneys

Held: Attorney's payment to himself from client's funds held in trust, without court approval, was a misappropriation of the client's funds and justified sanctions under the court's inherent authority to discipline attorneys practicing before it; but the bankruptcy court's finding of a false misrepresentation was not supported by record evidence and was clearly erroneous.

History: Eleventh Circuit vacated and remanded in part, affirmed in part the Bankruptcy Court for the Southern District of Florida, which had been affirmed by the District Court for the Southern District of Florida

Facts: Elam was debtor's counsel in this chapter 11 case, and requested approval of a $40,000 attorney fee. Before the court ruled on the fee request, the debtor paid $34,000 to Elam's trust account in what the bankruptcy court found to be an attempt to show that money was available for creditors to encourage confirmation, but which Elam was found to have misrepresented to the court as having been for attorney fees. Without court approval, Elam spent the money for his personal use. The bankruptcy court ordered Elam to pay the attorney fees of the creditor who discovered his misconduct by reviewing the monthly operating reports, and also barred Elam from practicing in the bankruptcy court for one year. Those sanctions were not appealed. The issue in the appeal was the bankruptcy court's further sanctions, which required him to return to the debtor the $34,000 along with the amount of interim fees he had been awarded earlier in the case, which the bankruptcy court imposed for misappropriating a client's funds and for making false statements regarding the status and purpose of the $34,000. Elam argued that the $34,000 was for attorney fees, contrary to the bankruptcy court's findings, so that they were not misappropriated even though he withdrew them from trust before he should have. Elam also argued that he was entitled to attorney fees for the work he did in the case.

The Eleventh Circuit found that the bankruptcy court clearly erred in its finding that Elam made a false representation by describing the $34,000 as being "for attorney fees." The record established that Elam, the creditor, and the debtor all believed the payment was, in fact, for attorney fees rather than in aid of confirmation. The circuit court went so far as to state there was no record evidence supporting the bankruptcy court's finding. Because the sanctions were based in part on that erroneous finding, the disgorgement of the prior interim fees awarded to Elam was vacated and remanded. The Eleventh Circuit affirmed the bankruptcy court's determination that Elam misappropriated his client's funds when he paid himself out of trust without court approval in violation of § 330 and affirmed the return of the $34,000 which was never "earned." Those funds were not his until they were earned, and fees for a debtor-in-possession's counsel are not "earned" until a bankruptcy court approves them. Therefore, under its inherent powers to sanction attorneys practicing before it, the bankruptcy court did not err in sanctioning Elam for that misconduct. The circuit court also left it to the bankruptcy court to determine what compensation, if any, Elam deserved for the work he performed in the case, pointing out that his conduct may require total disgorgement, but that it was error to find that he made a false representation as to the nature of the $34,000 payment.

In re Gamboa, 778 Fed. Appx. 829, Case No. 18-14367 (11th Cir. Aug. 19, 2019) (per curiam) (Jordan, Fay, and Hull, JJ.).

Code § / Rule: Florida's Constitutional homestead exemption from forced sale (not to be confused with Florida's statutory provision regarding homestead exemption for tax purposes)

Held: Under Florida homestead exemption from forced sale, acreage and trailer home were exempt even though the debtor was living in the trailer home in violation of zoning ordinance and had not claimed ad valorem homestead exemption; the trailer was affixed and he occupied it with the intent to permanently reside there.

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

Facts: Gamboa (the debtor in the chapter 13 case at issue in this appeal) bought a 14-acre parcel of land in Florida while living in Illinios in 1995. The Florida land was considered agricultural for ad valorem purposes. In 2008, Gamboa moved a trailer onto the land and poured a concrete patio, but continued to reside in Illiniois. In 2011 and 2012, creditors in Illinois obtained judgments against Gamboa and foreclosed

on his Illinois property, leaving the Florida property as Gamboa's only remaining real estate. The judgments became liens against the Florida property in 2015. During that series of events, Gamboa moved to Florida and began living in the trailer in 2013, receiving mail there since 2014. The trailer had several rooms including a kitchen and bathroom, was on a septic tank, accessed water from a well, was connected to the electric utility, and had satellite television. In 2016, the county notified Gamboa that he could not live in a trailer on the agricultural property and he then applied for a permit to build a small house on the site. Soon thereafter, in September 2016, Gamboa filed chapter 13 and exempted the land as his homestead under Florida Constitution Article X, Section 4, which provides protection from a forced sale. This exemption is distinct from the homestead tax exemption, which is provided in a different section of the Florida Constitution. The judgment creditors objected to the exemption claim, based upon the undisputed fact that when their liens attached, the property was zoned agricultural for ad valorem purposes, and Gamboa was living on it in violation of the county zoning ordinance. The bankruptcy court ruled that the violation of the zoning ordinance and the failure to claim the property as homestead-exempt for ad valorem purposes had no impact on the ability to claim the exemption from forced sale when it was shown that the debtor had no other residence and actually lived on the property. The bankruptcy court also found that Gamboa had established an intent to permanently reside on the property when the judgment liens were perfected in 2015. The district court affirmed following de novo review of the purely legal question, as did the Eleventh Circuit. The result might have been different had the trailer been a motor home or similar and not permanently affixed to the realty.

Roth v. Nationstar Mortgage, LLC (In re Roth), 935 F.3d 1270, Case No. 17-11444 (11th Cir. Aug. 28, 2019) (Wilson, Branch, and Anderson, JJ.) (opinion by Branch, J.).

Code § / Rule: § 524 and Fair Debt Collection Practices Act ("FDCPA")

Held: Post-discharge mortgage statements violated neither the FDCPA nor the discharge injunction where the statements included the amount due, due date, and payment instructions along with a disclaimer that the statements were not demanding payment or attempting to collect but were instead for informational purposes given that the debtor still occupied the property and the creditor would allow her to voluntarily repay in order to continue to do so.

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

Facts: Nationstar sent monthly billing statements (post-discharge) on property that was surrendered in the chapter 13 case but had not been foreclosed. The plan explicitly provided that the secured creditors retained their liens. The billing statements contained language to the effect of "this is not an attempt to collect a debt" but also stated an amount due and due date. The debtor and Nationstar settled claims that the billing statements violated § 524 and the Fair Debt Collection Practices Act ("FDCPA"). Thereafter, Nationstar sent an "informational statement" that had an amount due and directions on how to pay with a lengthy disclaimer explaining that the statement was not an attempt to collect a discharged debt but that the creditor's rights still existed in the property. The debtor sued again under the FDCPA and moved for sanctions under § 524 again. The bankruptcy court found the informational statement was not an attempt to collect the debt and the district court agreed. Significantly, the district court refused to apply the "least sophisticated consumer" standard when deciding the effect of the informational statement under § 524, although that was the standard to apply under the FDCPA. The 11th Circuit on appeal took this opportunity to point out that the

Supreme Court's decision in *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) explicitly overruled 11th Circuit precedent of *In re Hardy*, 97 F.3d 1384 (11th Cir. 1996) as to the standard for willfulness with regard to § 105 contempt sanctions for § 524 violations. Under *Hardy*, willfulness was a strict-liability standard met when the actor knew of the discharge and intended the act that then violated the discharge; under *Taggart*, the standard for a willful discharge violation is now met when the actor knows of the discharge and has "no fair ground of doubt" that the act at issue would violate the discharge. In this case, the objective effect of the informational statement was not to collect the debt, as it boldly and conspicuously explained in plain language. The fact that the statement also used the terms "amount due" and "due date" did not overcome that. The debtor's argument, had it been accepted, would lead to an outcome where the act of telling a debtor how much to pay to keep surrendered property that had not been foreclosed would be a discharge violation. That would mean a creditor could not give any information that would help a debtor know what was secured and how to pay to keep the property without violating the discharge.

The Eleventh Circuit declined to open the door so widely to contempt sanctions and refused to import the "least sophisticated consumer" standard into § 524. The Bankruptcy Code and the FDCPA have different purposes and objectives and the standard under one is not necessarily the standard under the other (as stated by the Supreme Court in *Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407, 1414 (2017)). Even if the circuit were wrong about that, and the informational statement did violate § 524, sanctions under § 105 for that violation would not be appropriate under the *Taggart* standard because Nationstar had an objectively reasonable basis to conclude that its actions and the language of the informational notice were lawful. Finally, the bankruptcy court did not err in failing to hold an evidentiary hearing sua sponte to determine the debtor's subjective belief (she did not request a hearing) before ruling that the debtor could not have really thought Nationstar was trying to collect the discharged debt because the bold, copious language in the informational statement explained at length that such was not the case while trying to show her what she could do to keep the property if she wanted to pay voluntarily.

Thompson v. Gargula (In re Thompson), 939 F.3d 1279, Case No. 18-11885 (11th Cir. Oct. 7, 2019) (Marcus, Wilson, and Branch, JJ.) (opinion by Branch, J.).

Code § / Rule: § 727(d)(2)

Held: Unlike § 727(d)(1), which explicitly has a "lack-of-knowledge" requirement, § 727(d)(2) contains neither an explicit nor implicit "lack-of-knowledge" requirement, so that even assuming the trustee had pre-discharge knowledge of the relevant conduct, that knowledge would not preclude revocation of the discharge under § 727(d)(2).

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

Facts: This appeal involved a purely legal issue of first impression at the circuit court level, to wit: whether § 727(d)(2) required the trustee lack actual knowledge of the relevant acts prior to the entry of the discharge. The debtors filed a case under chapter 13, which they then voluntarily

converted twice—once to chapter 11, and finally to chapter 7. The debtors also filed a chapter 11 case for their corporation while their individual case was in chapter 11. During both cases, an employee of the corporation reported that the debtors were stockpiling cash, traveling for pleasure, and paying for plastic surgery. The debtors were discharged before the trustee's investigation was completed. Almost a year after the discharge entered, the trustee sought to revoke the discharge based on the fraudulent activity and incomplete or erroneous financial records. The debtors moved for summary judgment, asserting that the trustee could not revoke the discharge due to the trustee's pre-discharge knowledge of the alleged facts substantiating the fraud. The bankruptcy court agreed that as to § 727(d)(1), the prior knowledge was fatal to the trustee's complaint because the statute only allowed revocation under (d)(1) if the complaining party did not know about the fraud before the discharge entered, and granted summary judgment in favor of the debtors. The result was different under § 727(d)(2), however, because the language of the statute contains no express "lack of prior knowledge" requirement, in contrast to (d)(1). The facts alleged were sufficient to survive summary judgment, and following trial, the court revoked the discharge under § 727(d)(2). The debtors appealed. The district court affirmed, as did the Eleventh Circuit. The courts "declined to take the lack-of-knowledge requirement of § 727(d)(1) and read it into § 727(d)(2)." The statutory text was clear and determinative. "Where Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Opinion at *4 (quoting *Keene Corp. v. United States*, 508 U.S. 200 (1993)).

Smith v. Haynes & Haynes P.C., 940 F.3d 635, Case No. 17-14150 (11th Cir. Oct. 15, 2019) (Tjoflat, Newsom, Antoon, JJ.) (opinion by Antoon, U.S. Dist. J. for M.D. Fla. sitting by designation).

Code § / Rule: judicial estoppel post-*Slater II*

Held: Judicial estoppel determinations require an examination of the full facts and circumstances surrounding the plaintiff's failure to amend to schedule a post-confirmation asset in her prior chapter 13 case.

History: Eleventh Circuit reversed the District Court for the Northern District of Alabama.

Facts: Smith sued her former employers (a law firm and its named partners, for whom she had been a legal assistant) under the Fair Labor Standards Act. Smith had worked as a regular, salaried employee during one phase of her employment, then again as a contract employee who worked 8 hours a day with an hour for lunch, five days a week. In between the two phases of employment, Smith filed chapter 13 bankruptcy and listed no claim against the defendants, which was accurate as she had no claim at that time. Her plan was confirmed a few months after she began working for them under the "contract" employee scenario and proposed to pay all creditors 100%. Her case was later dismissed for failure to pay while she still worked for the defendants. Soon thereafter, Smith sued the defendants under the FLSA for unpaid overtime, during the second phase of her employment. Smith never amended her schedules to disclose this claim while her case was still pending. The defendants brought this failure to the attention of Smith's counsel and tried to

leverage the judicial estoppel argument, along with other counterclaims they threatened to bring, in seeking dismissal of the suit. In response, Smith hired other lawyers and made claims of threat and retaliation against the defendants. There were issues involving lawyers on both sides having professional affiliation with the same plaintiffs' attorney lawyer group. The defendants soon moved for judgment on the pleadings based on the judicial estoppel defense, as well as on the retaliation aspect. The district court (Proctor, J.) granted summary judgment in favor of the defendants as to most of the claims (all except the retaliation claim) based on judicial estoppel as a result of Smith's failure to schedule the claims. Smith responded that she did not realize she had a claim for the overtime until after she left the defendants' employment. The district court granted the motion as one for summary judgment and found that judicial estoppel barred the claims (other than the retaliation claim, which was addressed separately) because Smith did not amend to list the claims in her schedules during the bankruptcy case, and because of inconsistencies between two versions of her complaint. Notably, the district court ruled prior to the issuance of the Eleventh Circuit's opinion in *Slater v. U.S. Steel Corp*., 871 F.3d 1174 (11th Cir. 2017) (en banc) ("*Slater II*"). On appeal, and based on the judicial estoppel framework as set out in *Slater II*, the Eleventh Circuit reversed. While Smith did have a statutory duty to amend post-petition to reflect the claims against the defendants, it was error for the district court to make an inference from that failure to amend (as the *Burnes-Barger* line of cases dictated prior to *Slater II*) rather than looking at the full facts and circumstances of the case to determine whether Smith knew of the duty to amend, and whether she intended to make a mockery of the judicial system in failing to list the asset. The district court also failed to satisfactorily examine what motive Smith would have had for concealment in a 100% repayment case. The district court's reliance on the inconsistent pleadings was also misplaced, given that the Federal Rules of Civil Procedure expressly allow that practice. *See* Fed. R. Civ. P. 8(d)(3). "We want parties to challenge the authenticity and credibility of their adversaries" but not to the point that inconsistent pleadings can defeat otherwise potentially meritorious claims. Opinion at *8. Thus, under the guidance of *Slater II*, the judicial estoppel determination was vacated and the case remanded to the district court.

Sellers v. Rushmore Loan Management Servs., LLC, 941 F.3d 1031, Case No. 18-11420 (11th Cir. Oct. 29, 2019) (Wilson, Jill Pryor, and Thapar, JJ.) (opinion by Jill Pryor, J.; concurrence by Thapar, J.).

Code §/ Rule: Class certification; Fed. R. Civ. P. 23(b)(3) predominance requirement

Held: Whether the Bankruptcy Code precluded or preempted claims under the FDCPA and Florida consumer statutes that relied on an alleged violation of the discharge injunction was a common issue, to be considered for all members of the putative class.

History: Eleventh Circuit reversed and remanded to the District Court for the Middle District of Florida.

Facts: The debtors received a chapter 7 discharge and did not reaffirm on the home they continued to occupy. Rushmore, as mortgage servicer, continued to send mortgage statements post-discharge.

The debtors alleged the mortgage statements were false, deceptive, and misleading representations, and they sued seeking class certification under the Fair Debt Collection Practices Act ("FDCPA") as well as under Florida consumer protection statutes. The district court denied class certification on the basis that individual issues predominated over issues common to the class. The district court so ruled based, at least in part, on its determination that the issue of whether the Bankruptcy Code precluded or preempted the FDCPA and Florida statutes at issue was an individual but not a common issue. Rushmore had also argued that individual questions predominated because some debtors remained in their homes while others did not, and the district court found that § 524(j)— and thus the pre-emption argument-- was relevant only to the debtors who still occupied their homes (in other words, § 524(j) –if it preempted the FDCPA--would determine the propriety of Rushmore's contact with the debtors who remained in their homes but would not be relevant in making that same assessment for those who had vacated their homes).

The debtor-plaintiffs sought and received permission of the Eleventh Circuit for an interlocutory appeal of the denial of class certification and the Eleventh Circuit reversed. The circuit court found that the issue of preclusion or preemption between the Bankruptcy Code and the FDCPA and state consumer statutes was a common issue across the class, not limited solely to the debtors who remained in their homes, and thus that the preemption issue had to be addressed across the class and was not an individualized inquiry. The plaintiffs' argument was that Rushmore "engaged in false or deceptive conduct when it tried to collect a mortgage debt that had been discharged [and that] the monthly mortgage statements Rushmore sent to each class member contained false statements because in each statement Rushmore asserted that the class member was personally liable for a debt that the bankruptcy court's discharge injunction prohibited Rushmore from collecting." Opinion *17. Rushmore, in defense, argued that the Bankruptcy Code precluded or displaced any claims under the FDCPA that rely upon a violation of the discharge injunction for their existence, because any claims relating to violation of the discharge injunction must be brought as contempt proceedings in bankruptcy court. Under *In re Roth*, 935 F.3d 1270, 1276 (11th Cir. 2019), the contempt analysis in bankruptcy court would then involve application of an objective standard (not a least sophisticated consumer standard).

Because the plaintiffs' claims alleged that the mortgage statements to those debtors who continued to occupy their homes and to those who had vacated their homes were an attempt to collect a discharged personal liability in violation of § 524(a)(2), the district court erred in finding that the preclusion defense was only applicable to those who continued to occupy their homes. The case was remanded for the district court to reassess whether the common issues had predominance with regard to the FDCPA claim under Fed. R. Civ. P. 23(b)(3) in light of the circuit's ruling that preclusion was an issue to be considered for all members of the putative class. The circuit court expressed no opinion on the merits of the preclusion issue, noting a circuit split. But the circuit court did go further and pointed out the issue as to whether Rushmore violated the discharge injunction at all when it sent the mortgage statements was indeed an individualized inquiry because the legal issues to consider would differ for those who remained in their homes compared to those who had vacated. For those who still occupied the homes, § 524(j) would be relevant to that inquiry, although the same evidence could nonetheless be relevant under both § 524(a) for those who vacated and § 524(j) for those who still occupied, which would then suggest that common questions could predominate despite a different legal issue.

Regarding the Florida consumer statute claim, the plaintiffs' argument was that the discharge of their personal liability meant the mortgage debt was no longer "legitimate" and that Rushmore knew this but nonetheless sought to "enforce" the discharged debt *in personam* by sending the mortgage statements. Because this defense also implicated the preclusion / preemption argument vis-à-vis the Bankruptcy Code, it too was a common issue and should have been analyzed as such. In concurrence, Judge Thapar of the Sixth Circuit, sitting by designation, stressed that the circuit court's holding was a narrow one and that the district court was best positioned to determine predominance (considering the preclusion issue as common and considering the "many other individual questions apparently raised by the class") despite the temptation to resolve the broader issue immediately.

Mass. Dept. of Rev. v. Shek (In re Shek), 947 F.3d 770, Case No. 18-14922 (11th Cir. Jan. 23, 2020) (Grant, Anderson, and Royal, JJ.) (opinion by Anderson, J.).

Code § / Rule: § 523(a)(*)—is a late-filed "return" a "return"

Held: Under both the *Beard* test and Massachusetts law, a "return" need not be timely filed to qualify as a "return."

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 debtor filed his Massachusetts state income tax return for 2008 seven months late. He owed the state over $11,000 for that year, which remained unpaid when he filed bankruptcy and received a chapter 7 discharge in 2016. The state attempted to collect the tax debt post-discharge, and the debtor filed an AP to determine dischargeability. Section 523(a)(1) essentially "provides that a tax debt is not dischargeable if a return (1) was not filed at all, or (2) was filed after the date on which the return was due, and that filing was within two years before the debtor's bankruptcy was filed." Opinion at 774. This is the case provided no fraud was involved and that the tax return was due at least three years prepetition. In this case, the late return at issue was filed more than five years before the bankruptcy petition was filed, so the focus was on whether the late-filed return qualified as a "return" at all for purposes of §523(a)(1).

The bankruptcy court ruled that the late-filed tax return was a return, and allowed the debt to be discharged, and the district court and Eleventh Circuit agreed. The Eleventh Circuit discussed the cases of *Beard v. Comm'r of Internal Rev*., 793 F.2d 139 (6th Cir. 1986) and *In re Justice*, 817 F.3d 738 (11th Cir. 2016). The *Beard* test, as applied in the Eleventh Circuit pre-BAPCPA, focused on whether a filing, even if not in the proper form and even if not complete, nonetheless purports to be a return, is sworn to under penalty of perjury, has enough information to allow calculation of the tax, and is "an honest and reasonable attempt" to satisfy the law. *Justice*, 817 F.3d at 741. Post-BAPCPA, the code now defines a "return" as meaning "a return that satisfies the requirements of applicable nonbankruptcy law including applicable filing requirements." § 523(a)(*) (a hanging paragraph added by BAPCPA to the end of § 523(a)). The issues in this case were whether the late return satisfied the "applicable filing requirements" (in other words, is timeliness an applicable

filing requirement so that the one-day-late rule would lead to nondischargeability) and also whether Massachusetts law was the "applicable nonbankruptcy law" to examine in assessing the requirements for a "return."

The Eleventh Circuit interpreted the language of § 523(a)(*) to give meaning to the word "applicable" as meaning something less than the full universe of all filing requirements, to avoid rendering the word "applicable" superfluous, which distinguishes its analysis from that of the Tenth Circuit. The word "applicable" is best read in the context of the entire statute as meaning those requirements that deal with what a return "is" (contrasted with the broader definition urged by the state that would include all filing requirements that apply to the particular taxpayer, including timeliness). In particular, this more limited definition of "applicable" is necessary to give room for § 523(a)(1)(B)(ii) to operate in more than a minute number of instances—if no late-filed return could ever lead to a dischargeable obligation, there would be no need to provide in (a)(1)(B)(ii) that in order to be *dischargeable*, a late return must have been filed more than two years before the bankruptcy. On the second issue, the debtor also prevailed. Massachusetts law also provided that a late-filed "return" is treated as a "return" under several distinct provisions, as analyzed by the circuit court. Having decided that the late-filed return is nevertheless "a return" under the facts of this case under both the *Beard* test and under Massachusetts law, the Eleventh Circuit declined to decide which of the two controlled under § 523(a)(*) as the outcome would be the same either way.

Perez v. Yip (In re Perez), 791 Fed. Appx. 167, Case No. 19-12111 (11th Cir. Jan. 23, 2020) (per curiam) (Jill Pryor, Newsom, and Branch, JJ.).

Code § Rule: fraudulent transfer, unjust enrichment claims brought by ch. 7 trustee

Held: The trustee does not have to plead that alleged fraudulent conveyances were not made in good faith or for lack of value; those elements must be pled and proved as an affirmative defense but negating them is not necessary to establish a fraudulent conveyance.

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

Facts: This opinion addressed basic civil procedure and pleading. The chapter 7 trustee filed an AP against Perez and his company seeking the return of a commission paid to the appellant on an alleged Ponzi scheme on fraudulent transfer and unjust enrichment grounds. The bankruptcy court entered a judgment against Perez and in favor of the trustee, finding that Perez managed only $1.1 million in funds and that his commission based on that amount had been excessive to the extent of $176,000, which amount the trustee was entitled to recover. The district court affirmed. On appeal to the Eleventh Circuit, Perez argued that the bankruptcy court did not have subject matter jurisdiction to enter the judgment against him under Fed. R. Civ. P. 7 and 8 because the trustee had not alleged that the commissions were excessive, and also that the court erred in calculating the amount of funds he managed (and thus also erred in calculating his commission percentage). The Eleventh Circuit found the jurisdictional argument "meritless" because "[t]he bankruptcy

court indubitably had jurisdiction over the underlying dispute as a [proceeding to recover a fraudulent conveyance under 28 U.S.C. § 528(b)(1), (2)(H)]." Perez, not the trustee, had the burden of proving that the commissions were for value and in good faith under 11 U.S.C. § 548(c) as an affirmative defense, to the extent he gave value in exchange for the commissions. In other words, the trustee did not have the burden of proving (nor did the trustee have to allege) that the commissions were excessive; Perez had to prove they were not excessive as part of his affirmative defense. Additionally, Perez failed to designate a record on appeal and he did not argue any fact-finding errors to the district court, so any claims of fact-finding error were not preserved.

Hines v. Scottsboro Inv. Grp., LLC (In re Hines), 799 Fed. Appx. 743, Case No. 18-13808 (11th Cir. Jan. 27, 2020) (per curiam) (Ed Carnes, C.J.; Rosenbaum and Boggs, JJ.).

Code § / Rule: § 522(f) lien avoidance calculation

Held: The bankruptcy court correctly applied *Lehman* to calculate partial impairment and the resulting un-avoided lien amount.

History: Eleventh Circuit affirmed the District Court for the Northern District of Alabama (Coogler, Dist. J.), which had affirmed the Bankruptcy Court for the Northern District of Alabama (Jessup, Bankr. J.).

Facts: The debtor and his non-debtor wife owned their home as joint tenants. Scottsboro Investment Group held a judicial lien against the home for $896,818.20; and the first mortgage was $77,387.49. The debtor claimed a $5,000 homestead exemption. The dispute was over how much of the lien could be avoided, applying *In re Lehman*, 205 F.3d 1255 (11th Cir. 2000) (holding that § 522(f) was absurd if applied literally to determine impairment for property owned by the debtor and others but instead had to be applied proportionally considering the debtor's proportion of equity after subjecting the entire value of the property to the entire first mortgage amount and then multiplying that result by the debtor's proportion of ownership before determining the extent to which a judgment lien can be avoided as impairing the homestead exemption). First, the debtor moved to avoid the lien by valuing the home at $200,000 (with his share of value being $100,000) and an order was entered without objection, granting the motion but not specifying to what extent the lien was avoided or to what extent the lien continued.

Years later, the debtor moved again in the same case to avoid the lien down to $17,612.51, because he had used the wrong formula the first time. This time the lien creditor did object, and said the lien could only be avoided down to $103,502.57 based on a value of $288,000 under the rationale of *Lehman*. The bankruptcy court denied this second motion to avoid the lien, but did consider to what extent the original order had avoided the lien. Because the creditor had not objected to the first motion, the court used the value set out therein and calculated the avoidance by taking the value of $200,000 and subtracting the first mortgage, then dividing the resulting equity in half to represent the debtor's percentage ownership (the result being $61,306.25). The court then reduced this available equity by the debtor's $5,000 homestead exemption, resulting in $56,306.25 of equity available for the judgment lien's attachment. The bankruptcy court also rejected the

debtor's argument that Rule 1009(a) could be used to amend a motion to avoid lien, because a motion is not a "petition, list, schedule, or statement" as described in that rule, which issue the debtor abandoned on appeal to the Eleventh Circuit after the district court affirmed the bankruptcy court.

The Eleventh Circuit affirmed, ruling that even if the first order avoiding the lien was not a res judicata bar to the second motion, the debtor's challenge to the application of the *Lehman* formula by the bankruptcy court was in vain. The bankruptcy court correctly applied *Lehman* to the facts before it, which fact findings, such as value and mortgage amount, were not challenged on appeal. The circuit court also pointed out that *Lehman*'s logic applies not only when the avoidance would otherwise be total, but also to partial avoidance as in this case.

Loder v. Icemakers, Inc. (In re Loder), 796 Fed. Appx. 698, Case No. 19-10891 (11th Cir. Feb. 25, 2020) (per curiam) (Wilson, Grant, and Anderson, JJ.).

Code § / Rule: violation of the discharge under § 524

Held: Without assessing whether the attempt to collect actually violated the discharge, there was an objectively reasonable basis for the creditor to conclude that its behavior did not violate the discharge, and thus it was not liable for contempt of the discharge order.

History: Eleventh Circuit affirmed Bankruptcy Court for the Northern District of Alabama (Crawford, Bankr. J.), which was also affirmed by the District Court for the Northern District of Alabama (Coogler, Dist. J.)

Facts: The debtor and Icemakers consented to judgment against the debtor in Icemaker's favor in state court prepetition, to be paid in installments, with a default rate of interest, costs, and fees. The debtor defaulted soon thereafter and filed a chapter 7 petition. Icemakers filed a nondischargeability complaint against the debtor, and a consent judgment was entered in the A.P. providing for judgment in an amount certain that matched the principal amount of the state court judgment, but not providing for interest, costs, or fees; and further providing that the judgment was nondischargeable as a willful and malicious injury under § 523(a)(6). After several years, Icemakers attempted to collect on the state court judgment along with its 12% default rate of interest, costs, and fees. The debtor moved in bankruptcy court for contempt sanctions against Icemaker for violation of the discharge injunction, on grounds that the state court judgment Icemakers was attempting to enforce had been discharged, and that the judgment in the A.P. replaced the prior state court judgment. The bankruptcy court (Judge Crawford) ruled that the consent judgment was not a replacement for the prior state court judgment but instead meant that the prior state court judgment was not discharged. Thus, the attempt to collect the state court judgment, including the interest, costs, and fees therein, was not sanctionable as contempt. The district court affirmed, as did the Eleventh Circuit.

"A 'court may hold a creditor in civil contempt for violating a discharge order if there is *no fair ground of doubt* as to whether the order barred the creditor's conduct. In other words, civil contempt may be appropriate if there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful.'" Opinion p. 4 (quoting *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1799 (2019)) (emphasis in original). The debtor did not dispute that he owed the principal amount and that said amount was nondischargeable. The only issue was the interest, costs, and fees set out in the state court judgment but not set out in the AP judgment. Without deciding whether the interest, costs, and fees were in fact discharged, the Eleventh Circuit agreed with the bankruptcy court that Icemakers had an objectively reasonable basis to believe that those components of the state court judgment were not discharged. The circuit court cited res judicata principles in its own case law, as well as its own § 523(a)(6) case law to the effect that the entire liability arising from the willful and malicious injury being covered by the nondischargeability ruling as objective support for Icemaker's position. Therefore, it was no abuse of discretion to deny civil contempt sanctions.

Olds v. Bedizel (In re Bedizel), 805 Fed. Appx. 841, Case No. 19-12292 (11th Cir. Mar. 5, 2020) (per curiam) (Jordan, Newsom, and Luck, JJ.).

Code § / Rule: § 544(a)

Held: Because the fraudulent transfer claim at issue could have been asserted by the chapter 7 trustee as a hypothetical lien creditor, the claim was property of the bankruptcy estate and the trustee had the ability to settle the claim, so that the state-court judgment holders who wanted to pursue the claim were without ability to do so.

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

Facts: Bedizel transferred real property to a corporation he owned while he was being sued individually in state court. The state court suit resulted in a judgment against Bedizel for around $3 million. The judgment holders moved to bring the corporation into the state-court action so they could go after the transferred property in an attempt to satisfy the judgment, by seeking to avoid the transfer as fraudulent under Florida law. Bedizel then filed his chapter 7 bankruptcy petition. He scheduled his stock in the company as exempt, on grounds that he and his wife owned the stock as tenants by the entirety. The chapter 7 trustee objected to the exemption on grounds that the stock had been fraudulently transferred to the debtor and the wife, and the trustee sued to avoid the transfer of the stock. While these matters were pending, the debtor was discharged and the judgment holders asked the bankruptcy court to rule that the attempt to satisfy their judgment was not covered by the automatic stay. The bankruptcy court took the issue under advisement, and in the meantime, the trustee settled the fraudulent transfer claim with Bedizel, his wife, and the corporation in a settlement approved by the bankruptcy court. Although the trustee was only pursuing the transfer of the stock, the settlement agreement also released any claims the trustee had regarding the real property as well.

The bankruptcy court then ruled that the discharge barred the state-court judgment holders from pursuing the attempt to recover the transferred property from the corporation to satisfy the judgment against the debtor. The bankruptcy court also ruled that only the trustee could seek recovery of the fraudulent transfer and the trustee had released all claims, including any fraudulent transfer claim, related to the real property as part of the exemption settlement. The district court on appeal disagreed that the attempt to recover the property from the corporation was "discharged" because the corporation was not a debtor. However, the district court agreed that the fraudulent transfer claim was property of the bankruptcy estate and had been settled and released by the trustee.

The Eleventh Circuit affirmed. The fraudulent transfer claim was property of the bankruptcy estate because the trustee, as a hypothetical creditor on the petition date, could have voided the transfer under Florida law under § 544(a). The judgment holders' argument that the trustee could not have pursued the claim was based on a flawed reading of the Florida statute of limitations that overlooked the "savings" clause for actually fraudulent transfers, running from the date the fraud was or should have been discovered. The trustee had not abandoned the claim, and was not estopped from settling it. Therefore, the motion to confirm the absence of the stay was properly denied.

Gordon v. Wells Fargo Bank, Nat'l Assoc. (In re Krieg), 951 F.3d 1299, Case No. 18-15243 (11th Cir. Mar. 10, 2020) (Wilson, Grant, and Martinez, JJ.) (opinion by Grant, J.).

Code § / Rule: § 544(a)(3); state supreme court's interpretation of the state's statutes

Held: Georgia's recording statutes explicitly allowed attestation of a security deed by an unofficial witness and by acknowledgement before an officer, exactly as had been done in this case, and as had been ruled on repeatedly by the Supreme Court of Georgia in cases brought by this same trustee.

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

Facts: The chapter 7 trustee sought to avoid Wells Fargo's interest in the debtor's real property on the basis that the security deed was attested by one unofficial witness and acknowledged before an officer. The trustee argued that under Georgia law, the security deed had to be attested by no less than two witnesses. The bankruptcy court granted the bank's motion for summary judgment, and the district court affirmed. On appeal to the circuit court, the trustee also asked the circuit court to certify a question to the Supreme Court of Georgia. Unfortunately for the trustee, the Georgia statutes explicitly allowed attestation of a security deed by an unofficial witness and by acknowledgement before an officer, exactly as had been done in this case. But the real flaw in the trustee's argument, and apparently the reason this decision was chosen for publication, was that the Supreme Court of Georgia had applied the "common-sense" reading of the statute to functionally equivalent facts not just once, but twice, and both times in cases involving this same

trustee. "We decline to accept [the trustee's] invitation to certify the question before us so that the Supreme Court of Georgia – the final arbiter of Georgia law – may consider whether it wrongly decided Georgia law the first (and second) time he put the issue before it." The Eleventh Circuit went on to criticize the trustee's further arguments aimed at confusing the issue with irrelevant and unrelated statutory provisions.

Medley v. Dish Network, LLC, 958 F.3d 1063, Case No. 18-13841 (11th Cir. May 1, 2020) (Jill Pryor, Grant, and Royal, JJ.) (opinion by Royal, J.).

Code § / Rule: § 365 executory contract rejection when contract not scheduled; and Telephone Consumer Practices Act ("TCPA").

Held: The failure to list the executory contract service agreement on Schedule G did not keep the service agreement, and its Pause program component, from being deemed rejected under the facts of this case. When express consent to telephone collection is given in a bilateral bargained-for contract, it cannot be unilaterally revoked by the consumer (agreeing with Second Circuit).

History: Eleventh Circuit reversed and remanded in part, affirmed in part the District Court for the Middle District of Florida.

Facts: Prior to bankruptcy, the debtor had a two-year service agreement with DISH. As part of the service agreement, she authorized collection calls to her cell phone number. She also participated in the DISH Pause program, which had its origins in the service agreement and which allowed her to pay a $5 monthly fee and suspend her service and other charges during that month, for up to nine months during the term of the service agreement (which would then be extended by the same length as the suspension). The debtor chose to participate in the Pause program when she called to cancel her service agreement after eleven months and did not want to pay the early termination fees for doing so. A couple months after starting the Pause program, the debtor filed chapter 7. She listed DISH as an unsecured creditor on Schedule F, but did not list DISH as a holder of an executory contract on Schedule G, and in fact stated that she had no executory contracts or unexpired leases. The debtor received her discharge including the discharge of the $831.74 prepetition debt to DISH under the service agreement. However, DISH did not treat the Pause program obligation as having been discharged and emailed and called the debtor repeatedly to collect the Pause fees. The debtor's bankruptcy attorney informed DISH that it represented her with regard to her debts that had been involved in the bankruptcy and purported to revoke the debtor's authorization for DISH to contact her by telephone to collect. DISH nonetheless sent four more emails directly to the debtor, made six automated collection calls to the debtor's cell phone, and continued to bill the Pause program monthly charges. When the nine months of the Pause program expired, DISH stopped the $5 per month Pause charge, restored the debtor's service, and disconnected the account for nonpayment, adjusting her post-discharge account balance down to zero.

The debtor sued in Florida federal district court asserting claims under the Florida Consumer Collection Practices Act ("FCCPA") and the Telephone Consumer Practices Act ("TCPA"). The

district court analyzed the service charges part of the service agreement and the Pause program provisions as separate debts, with only the charges for services provided having been discharged. The district court found that the Pause program amounts survived discharge because the service agreement (which included the Pause program provisions) was an executory contract that was not rejected due to the failure to list it on Schedule G, despite the debt for services provided having been listed on Schedule F. Because the attempts to collect post-discharge were limited to the Pause program amounts accruing postpetition, which had not been rejected or discharged, and because the attorneys said they represented the debtor only with regard to the debts that were discharged, the district court found the FCCPA was not violated. The district court further found that the debtor could not unilaterally revoke her consent to telephone collection when that consent was given as part of a bargained-for contract. On appeal, the Eleventh Circuit affirmed the TCPA ruling but reversed and remanded on the FCCPA claims.

The circuit court found that the Pause program debt was discharged in the debtor's bankruptcy and reversed on that issue. The agreement was deemed rejected as a matter of law, which meant DISH only had a prepetition, general unsecured, dischargeable claim for its breach. The parties, and thus the court, accepted the district court's determination that the service agreement was an executory contract. Because the trustee neither assumed nor rejected the contract within 60 days of the order for relief, it was deemed rejected under § 365(d)(1). The failure to list the executory contract service agreement on Schedule G did not keep the service agreement, and its Pause program component, from being deemed rejected under the facts of this case for three reasons: (1) DISH was disclosed as an unsecured creditor on Schedule F and the trustee had notice of the contract; (2) DISH had notice of the case and an opportunity to object to the dischargeability of its debt; and (3) there was no evidence of any attempt to conceal the service agreement. Rejection then gives rise to prepetition breach of contract claim under § 365(g)(1), which is what DISH had here for both the services and the Pause program obligations, both of which were discharged. The FCCPA claims were remanded for the district court to determine whether the otherwise inappropriate attempts to collect a discharged debt and inappropriate contact with a represented party were taken by DISH despite actual knowledge or without any bona fide error defense. On the TCPA claim, the Eleventh Circuit agreed with the district court's adherence to the reasoning of the Second Circuit in *Reyes v. Lincoln Auto Fin. Servs*., 861 F.3d 5l, 56 (2d Cir. 2017). When express consent to telephone collection is given in a bilateral bargained-for contract, it cannot be unilaterally revoked by the consumer. The Second and Eleventh Circuits are the only two circuits to address this issue directly.

Judge Grant wrote a separate concurrence to stress that the consent provision for telephone collections given by the debtor to DISH as part of the bargained-for exchange did not grant DISH an "unrestricted right to contact [the debtor] for any reason, for eternity." Opinion p.20. Because the debtor no longer had any outstanding personal liability or obligation to DISH following discharge, Judge Grant believes it would be relevant to inquire whether DISH had any right under the contract to contact the debtor at all, even in the absence of an effective revocation of consent (which point he agrees was correctly decided), after the rejection and discharge. This was not raised or briefed and thus was properly not considered, but Judge Grant stressed the point for future application of the principles articulated in the opinion.

Microf LLC v. Cumbess (In re Cumbess), 960 F.3d 1325, Case No. 19-12088 (11th Cir. June 3, 2020) (Martin, Newsom, and Julie Carnes, JJ.) (opinion by Newsom, J.).

Code § / Rule: § 365(p)(1)

Held: Personal property subject to a lease that is assumed by the debtor in the confirmed plan but not separately assumed by the trustee ceases to be property of the estate upon confirmation. Thus, post-petition amounts due under that lease are not automatically entitled to administrative expense priority because the estate did not retain the leased asset and the trustee never bound the estate to the assumption of the lease, at least in a case where the leased property is not alleged to have otherwise conferred a benefit upon the estate.

History: Eleventh Circuit affirmed the Bankruptcy Court for the Middle District of Georgia, which was also affirmed by the District Court for the Middle District of Georgia

Facts: "Stripped to its bare essence, this bankruptcy appeal presents the question whether the word 'trustee' means 'trustee.' We hold that it does." So began the opinion, authored by Judge Newsom, which addressed a common chapter 13 scenario. The debtor had a prepetition lease for an HVAC unit and assumed that lease in his confirmed plan as a direct-pay obligation with prepetition arrears to be cured through the trustee. The debtor defaulted on the direct payments following confirmation and the lessor moved the bankruptcy court to allow the postconfirmation delinquent amount as second-priority administrative expense under § 503(b)(1)(A) (arguing the lease payments were "necessary costs and expenses of preserving the estate") and under § 507(a)(2) (which gives second-level priority to such administrative expenses). The trustee opposed the request for administrative expense status and argued that the postconfirmation lease payments were not "necessary costs and expenses of preserving the estate." The bankruptcy court agreed with the trustee and found that the debtor's assumption of the lease in the plan did not prevent the HVAC unit from exiting the estate upon confirmation under § 365(p)(1): "If a lease of personal property is rejected or not timely assumed *by the trustee* . . . the leased property is no longer property of the estate." (emphasis added.) The bankruptcy court thus found no presumed benefit to the estate from the use of the non-estate property HVAC unit, and further found no evidence of an actual concrete benefit to the *estate*, although the debtor admitted he had benefitted *personally*. The district court agreed with the bankruptcy court's ruling: "[T]he only reasonable interpretation [of § 365(p)(1)] vests the trustee—not the debtor—with the sole power to obligate the bankruptcy estate on an unexpired lease in chapter 13 cases." Therefore, because the trustee did not assume the HVAC unit lease, the HVAC unit was no longer estate property following confirmation despite the debtor's having assumed the lease in the confirmed plan.

The Eleventh Circuit agreed. After first exploring the background of chapter 13 and of executory contracts in general, Judge Newsom focused on the discrete issue under the facts of this case—whether the debtor's assumption of a lease of personal property in a confirmed plan obligates the bankruptcy estate even though the trustee did not assume the lease. The answer, provided in the plain language of § 365(p)(1), is that the estate is not bound by the debtor's assumption in the confirmed plan but is only bound, and the leased personalty only remains in the estate, if the *trustee*

assumes the lease independently prior to confirmation. The lessor's argument in support of administrative expense status for the missed payments as "actual, necessary costs and expenses of preserving the estate" rested entirely upon the premise that the HVAC unit remained estate property as a result of the debtor's assumption of the lease in the plan, which premise was rejected by the bankruptcy, district, and circuit courts.

While § 1322(b)(7) indeed provides that a debtor via the plan may assume a lease, it refers directly to this ability being "subject to § 365" as the authority that controls what effect the debtor's assumption then has on the estate. And it is § 365(p)(1) that says, unambiguously, that only the trustee may assume the lease in such a way as to bind the estate and retain the leased personal property in the estate postconfirmation. "Where (as here) the trustee does not assume an unexpired lease, it drops out of the estate. Done and done." Opinion at p.10. The circuit court rejected the lessor's arguments that the word "trustee" in § 365(p)(1) includes the debtor because those words are used simultaneously in other places throughout that section and in no other part of the code are the words used interchangeably. In addition, § 1303 gives the debtor the powers of the trustee under certain subsections of the code, but not under § 365, thus establishing that Congress knew the powers of each were distinct and further establishing that Congress knew how to give the debtor the trustee's powers and chose not to do so under § 365 and did not intend otherwise (*expresio unius est exclusio alterius*). Finally, § 365(p)(3) was no help to the lessor, as it simply provided that the lease would be rejected if not assumed in the plan, but did not support the idea that plan assumption by the debtor alone was therefore sufficient to prevent rejection by the trustee on behalf of the estate. In other words, plan assumption by the debtor is necessary but not sufficient to keep the leased asset in the estate; the lease of personal property must also be assumed by the trustee.

It is important to note that the lessor's argument depended entirely upon the premise that the HVAC unit remained property of the estate based on the debtor's assumption of the lease in the plan, regardless of the trustee's failure to separately assume it, and that the lessor did not apparently attempt to prove any benefit to the estate notwithstanding the unit's exit from the estate as a separate ground for administrative expense status. *See* Opinion n.7.

As a practical matter, in the absence of the trustee's assumption, this ruling means that any lessor who relies on the debtor's assumption alone will have only a prepetition, general unsecured claim in the event of default during the life of the plan. While the personal property will remain property of the *debtor*, it will not be property of the *estate* if the trustee does not assume the lease. And under the logic of this ruling, such personal property that is no longer estate property is not presumed to benefit the estate (although evidence to the contrary could be put forth). But the flip side of that coin is that the trustee's failure to assume the lease (and thereby retain the personal property in the estate) may be good evidence that the property is not necessary to the estate, which may work to the debtor's detriment in opposing a motion for relief from stay where the debtor has the burden to show the property is necessary to an effective reorganization. If the debtor can show that the personal property (such as a car or HVAC system) is necessary to reorganize in defeat of a stay relief motion, how can the costs and expenses of the same property not also be necessary to preserving the estate for administrative expense purposes, even if the property is only property of the debtor and no longer estate property? Locally, we have not seen any real litigation of this issue despite initial concerns about the ramifications of this opinion. *Cf. In re Steenes*, 942 F.3d 834 (7th

Cir. 2019) (when the operation of a vehicle was necessary to earn the wages that funded the plan, parking fines incurred during the case were entitled to administrative expense status as a cost of operating the necessary asset).

Feshbach v. Dept. of Treasury I.R.S. (In re Feshbach), 974 F.3d 1320 (11th Cir. Sept. 9, 2020) (Jordan, Tjoflat, and Beaverstock, JJ.) (opinion by Jordan, J.).

Code § / Rule: willful evasion, § 523(a)(1)(C)

Held: Willful evasion can be established by a showing of "excessive discretionary spending" together with intentional, voluntary acts such as unrealistic offers-in-compromise used as delay tactics to evade payment of the tax.

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

Facts: After years of making millions "selling short against the box" and avoiding income tax liability for boxed-in capital gains, the former hedge fund manager-debtor was forced to close out his positions and incurred tax liability exceeding $1.9 million in 1999. He and his wife submitted several offers in compromise, started a new hedge fund, and lived extravagantly over the course of the next decade, with an installment plan having been accepted by the IRS but payments stopping after four months, in May 2011. The debtors filed chapter 7 and sought to have their 2001 federal income tax liability declared dischargeable. In defense, the IRS alleged the debt should be nondischargeable as a result of the debtors' willful evasion of their 2001 tax liability. The primary evidence for the IRS position was the lavish discretionary spending at very high levels while low-balling the income and expense information they provided the IRS to support their relatively paltry offers in compromise. Trial evidence showed that the debtors earned $13,000,000 from 2002 to 2010, and spent more than $8.5 million of that on personal expenses and charitable contributions, when they could have paid their tax liability in full. The bankruptcy court did not buy the debtors' argument that the lavish lifestyle was necessary to appear attractive to potential investors. The court found that the spending levels were intentional acts seeking to evade or defeat the tax debt. The offers in compromise were unrealistic and in context, served as calculated delay mechanisms supporting the finding that the evasion was also willful. The bankruptcy court therefore found the entire tax debt to be nondischargeable, and further observed that partial discharge under § 523(a)(1)(C) was not an option (and was not supported by the facts in this case in any event). The District Court agreed in all respects, finding no error and concluding partial discharge was not allowed under the Code. The Eleventh Circuit affirmed but did not reach the issue of the partial discharge.

The Eleventh Circuit has a two-prong test for dischargeability under § 523(a)(1)(C): "The government must prove by a preponderance of the evidence (1) that the debtor 'attempted in any manner to evade or defeat [a] tax,' and (2) that the attempt was done 'willfully.'"*In re Jacobs*, 490 F.3d 913, 921 (11th Cir. 2007). The first prong is satisfied by a showing that the debtor engaged in an affirmative act to avoid paying the tax, by commission or omission. The second prong of

willfulness is itself a three-part inquiry: "The government must demonstrate that (1) the debtor had a duty under the law, (2) the debtor knew he had that duty, and (3) the debtor voluntarily and intentionally violated that duty." *In re Griffith*, 206 F.3d 1389, 1396 (11th Cir. 2000) (internal citation omitted). The low-ball offers in compromise, in light of the debtors' expensive lifestyle, were not good-faith efforts or even reasonable. Rather, the offers were stalling tactics by sophisticated individuals, also intentionally spending lavishly on their lifestyle, all aimed at evading the payment of their tax obligation. Excessive discretionary spending was appropriately considered as circumstantial evidence of the willfulness of the debtors' evasion. Because partial discharge was not possible under the facts even it were possible under the Code, the Eleventh Circuit did not reach that issue.

J.J. Rissell, Allentown, PA Trust v. Marchelos, 976 F.3d 1233 (11th Cir. Sept. 25, 2020) (William Pryor, C.J.; Tjoflat and Hull, JJ.) (opinion by William Pryor, C.J.).

Code § / Rule: artificial entity (such as a trust) must be represented by qualified attorney in federal court, including when filing a notice of appeal.

Held: A notice of appeal, filed by an attorney who was disqualified by the bankruptcy court from representing the purported-appellant (which was a trust and therefore had to be represented by an attorney in federal court) was not effective to show the purported-appellant's intent to appeal.

History: Eleventh Circuit dismissed appeals.

Facts: The bankruptcy court disqualified an attorney and his firm from representing a trust that owned 50% of the debtor in bankruptcy, which trust was created for the purpose of making sure that the attorneys were paid. The bankruptcy court found an actual conflict of interest and disqualified the attorneys, who already represented the debtor, from also simultaneously representing the trust. The disqualification was no mere technical defect nor was it objectively clear that the trust intended to appeal. The only indication that the trust intended to appeal was filed by an attorney who had been affirmatively disqualified from representing the trust and therefore had no authority to speak for the trust in federal court. The fact that one of the disqualified firm's lawyers was also the trustee for the trust did not save the appeal—he, too, was disqualified as an attorney for the trust and no trustee can act pro se (to represent a trust) in federal court. "When an appeal is taken on behalf of an artificial entity by someone without legal authority to do so, the appeal should be dismissed. *See United States v. El-Mezain*, 664 F.3d 467, 578 (5th Cir. 2011)."

SE Property Holdings, LLC v. Gaddy (In re Gaddy), 977 F.3d 1051 (11th Cir. Sept. 29, 2020) (William Pryor, C.J.; Grant and Antoon, JJ.) (opinion by Antoon, U.S. Dist. J. for the M.D. Fla. sitting by designation); *cert. denied*, --- S. Ct. ---, 2021 WL 1520807 (April 19, 2021).

Code § / Rule: § 523(a)(2)(A) and (a)(6)

Held: A fraudulent transfer of property, done with intent to thwart collection of a judgment for breach of contract with no finding of fraud, does not convert the underlying judgment into one for fraud, nor does it support entry of a new judgment for the same debt when the only harm from the fraudulent transfer is the inability to collect on the contract judgment debt.

History: Eleventh Circuit affirmed the District Court for the Southern District of Alabama, which had affirmed the Bankruptcy Court for the Southern District of Alabama (Callaway, Bankr. J.).

Facts: Gaddy guaranteed over $12 million in loans to an LLC to fund a real estate development project in Baldwin County. When several of the guarantors on the deal missed required capital contributions, the bank sent warning letters and Gaddy started transferring assets out of his name (including real property, cash, and business interests) and into entities he controlled or to family members. The LLC then officially defaulted, and the bank demanded Gaddy perform under the guarantee. Rather than pay, Gaddy continued divesting himself. The bank sued the LLC, Gaddy, and other guarantors in state court, and the state court entered judgment against Gaddy in excess of $9 million. More transfers followed the entry of the judgment. Unsurprisingly, the bank's successor in interest (SE Properties Holdings, LLC) sued Gaddy and his wife in state court to set aside the transfers under the Alabama Uniform Fraudulent Transfer Act ("AUFTA") and amended the suit to include Gaddy's daughter and business entities as defendants. Gaddy then filed chapter 7. SE Properties filed an AP seeking to have Gaddy's debt declared nondischargeable under § 523(a)(2)(A) and (a)(6) based on Gaddy's allegedly fraudulent transfers of assets that could have been used to satisfy the judgment, which the plaintiff said hindered collection under (a)(2)(A) and were willful and malicious injuries under (a)(6). Gaddy moved for judgment on the pleadings and SE Properties sought to amend the complaint to include claims that the transfers created a new debt that was also not dischargeable. The bankruptcy court (Judge Callaway) granted Gaddy's motion and dismissed the AP because nothing in the complaint averred that the original judgment debt was obtained by fraud or resulted from any willful or malicious injury. The bankruptcy court also ruled that there was no basis in Alabama law for making a transferor liable to a creditor for the value of property fraudulently transferred. The District Court affirmed, as did the Eleventh Circuit.

"The bankruptcy court and the district court both concluded that SEPH's § 523(a)(2)(A) claim failed because the loans that Gaddy guarantied were not 'obtained by ... false pretenses, a false representation, or actual fraud.' They were correct, and we reject SEPH's efforts to expand case law to encompass the circumstances presented by this case." The judgment debt was a debt for an ordinary breach of contract, and subsequent fraudulent transfers did not alter the nature of the original debt. This was the case even though constructive fraud, such as fraudulent transfers, could satisfy the "obtained by" requirement in some circumstances given that a false representation is not strictly required for nondischargeability under the guidance of *Husky International Electronics, Inc. v. Ritz*, 136 S. Ct. 1581 (2016). Here, the judgment debt was not obtained by fraud

regardless of the fraud alleged at its enforcement stage. Similarly, under § 523(a)(6), a debt "for" willful and malicious injury means a debt "as a result of" willful and malicious injury. Ordinary breach of contract does not a willful and malicious injury make, and the debt here was a result of a contract years before any transfers took place. Finally, while the bankruptcy court found Alabama law would not allow SE Properties a judgment against Gaddy for the value of the fraudulent transfer under the AUFTA, the Eleventh Circuit did not reach that issue but upheld the ruling on a different basis—that Alabama law in general does not permit a double recovery for the same harm and thus would not allow entry of another judgment for what would be the same harm as the original judgment debt, to wit: the amount owing under the guaranties.

Tufts v. Hay, 977 F.3d 1204 (11th Cir. Oct. 20, 2020) (Martin, Rosenbaum, and Tallman, JJ.) (opinion by Martin, J.).

Code § / Rule: *Barton* doctrine

Held: The *Barton* doctrine does not prevent another court from exercising jurisdiction over a suit against bankruptcy-court-appointed counsel without bankruptcy court permission when the underlying bankruptcy case has ended, because the outcome of the suit at issue can have no conceivable effect on the bankruptcy estate.

History: Eleventh Circuit reversed in part and remanded to the District Court for the Middle District of Florida.

Facts: What do you get when you add one client, two sets of lawyers, and three circuit court judges? The answer is, "Nightmares, if you are a bankruptcy trustee." And in this case, you get a ruling that says the *Barton* doctrine may not protect court-appointed counsel after the underlying bankruptcy case is dismissed (because the bankruptcy court no longer has exclusive subject matter jurisdiction over the estate res). The dispute began in a chapter 11 case in North Carolina. Hay, the attorney for the debtor in that case, informed Tufts, a Florida lawyer whose firm had worked for the debtor on a Florida merger prepetition, that he had been approved as special counsel in the chapter 11 case via "bench order." Based on that assurance, Tufts performed significant work for the debtor while the bankruptcy was pending, including the appeal of a stay relief order. Tufts was paid for this work, but it eventually came to light that the firm's employment had never been approved by the bankruptcy court, contrary to Hay's representation. The bankruptcy court ordered Tufts to disgorge all fees and costs the firm had been paid for the work on the stay relief appeal, but Tufts refused to do so and was held in contempt. Litigation and settlement negotiations followed. Over a year later, the underlying bankruptcy case was dismissed by consent order. A few months after that, Tufts sued Hay in U.S. District Court for the misrepresentation and indemnification. Hay moved to dismiss alleging no personal jurisdiction, but the District Court denied that motion. In his second motion to dismiss, Hay argued that the District Court did not have subject matter jurisdiction over the claim against him because the *Barton* doctrine required Tuft to first seek permission from the bankruptcy court before suing Hay related to his actions while he was a bankruptcy-court-appointed counsel.

The Eleventh Circuit explained that in *Barton v. Barbour*, 104 U.S. 126, 128 (1881), the Supreme Court stated the general rule that the appointing court must give permission before a receiver appointed by that court may be sued in another forum. The Eleventh Circuit said the Supreme Court's rationale was based on jurisdictional concerns: "If the court below had entertained jurisdiction of this suit," the result would have "been an usurpation of the powers and duties which belonged exclusively to another court." *Id.* at 136. The second court does not have subject matter jurisdiction to entertain the suit unless the appointing court has first granted leave. *Carter v. Rodgers*, 220 F.3d 1249, 1252 (11th Cir. 2000). The Eleventh Circuit has held that the rule also covers court-appointed counsel. *Lawrence v. Goldberg*, 573 F.3d 1265 (11th Cir. 2009). But the facts in the case at bar provided a twist: the underlying bankruptcy case, which formed the basis for the bankruptcy court's subject matter jurisdiction over matters affecting the estate, had been dismissed so that there was no longer any conceivable effect on the estate, both sides agreed. Thus, it followed that the bankruptcy court had no subject matter jurisdiction and accordingly, there was no concern that the District Court's exercise of jurisdiction could work a usurpation of the bankruptcy court's jurisdiction (there being none).

The Eleventh Circuit stated that its holding was not intended as a "categorical rule that the *Barton* doctrine can never apply once a bankruptcy case ends." 977 F.3d at 1210 . In a footnote, the circuit court acknowledged that some of its sister circuits have applied the *Barton* doctrine even after the bankruptcy case has ended (citing cases involving trustees) and said its ruling did not conflict with those results. Finally, the court analyzed personal jurisdiction over Hay and found that Florida's long-arm statute and due process were satisfied. Trustees, take your blood pressure medicine and see *Chua v. Ekonomou*, 1 F.4th 948 (11th Cir. June 15, 2021).

USF Fed. Credit Union v. Gateway Radiology Consultants, P.A. (In re Gateway Radiology Consultants, P.A.), 983 F.3d 1239 (11th Cir. Dec. 22, 2020) (Ed Carnes, C.J.; Rosenbaum and Anderson, JJ.) (opinion by Ed Carnes, C.J.).

Code § / Rule: SBA rulemaking authority to implement Paycheck Protection Program ("PPP") under the CARES Act

Held: The Eleventh Circuit had jurisdiction over the bankruptcy court's preliminary injunction regarding a non-core matter. In exercising that jurisdiction to review, the appeals court held that the SBA acted within its authority in excluding active debtors from the PPP via rule and the rule was not arbitrary and capricious.

History: Eleventh Circuit dismissed in part, vacated in part, and remanded on direct appeal from the Bankruptcy Court for the Middle District of Florida.

Facts: The opinion begins with the circuit court's examination of the procedural history of SBA rule making authority and the long-standing history of considering bankruptcy filings as part of the application process and as part of the credit memorandum required of SBA lenders under the "sound value" requirement of 15 U.S.C. § 636(a)(6), onto which the PPP was grafted via the

CARES Act, with some lessened eligibility requirements. In accordance with the CARES Act requirements, the existing loan criteria were not enforced for PPP loans, lenders were able to rely on a borrower's certification while being held harmless for borrower mistakes or misrepresentations, and the underwriting process was streamlined. SBA regulations implementing the PPP loan program provided that if the applicant or the owner of the applicant entity was in an active bankruptcy at the time the application was submitted or any time before disbursement, then the applicant was ineligible for the PPP loan, as an unacceptably high risk of "unauthorized use of funds or non-repayment of unforgiven loans." The first question on the PPP loan form (SBA Form 2483) asked if the applicant was in an active bankruptcy case and stated that if the answer was yes, the applicant was not eligible for the PPP loan.

Gateway was in chapter 11 when it applied for a PPP loan of approximately $530,000.00 online with USF Federal Credit Union, and filed a motion for approval under § 364 of the Code. Contrary to fact, the application had "no" as the answer to the first question on the application—whether the applicant was in an active bankruptcy case (with the parties disputing who bore responsibility for that answer and the bankruptcy court not deciding that issue). The credit union approved the loan but would not have done so had the question been answered correctly. The credit union funded the loan with its own funds, but froze the proceeds and did not disburse them to Gateway, while litigating the debtor's eligibility for the PPP loan forgiveness and the SBA guarantee in bankruptcy court. In an adversary proceeding, the bankruptcy court ruled that the SBA rule barring active debtors from PPP loans was unenforceable. The bankruptcy court found that the rule exceeded the SBA's authority because it was contrary to the overall text and purpose of the CARES Act, was arbitrary, and was capricious. The bankruptcy court further found that the SBA's concern of nonpayment and impermissible use by debtors in bankruptcy was counter to the evidence (with the Eleventh Circuit pointing out that no evidence was actually submitted on that issue by any party and that this seemed to reflect the bankruptcy judge's views and knowledge of the bankruptcy system rather than actual evidence in the case). The bankruptcy court issued a preliminary injunction requiring the SBA to guarantee the loan if all other requirements were met and also ordered that neither the loan's forgiveness under the PPP nor the guaranty of the loan by the SBA could be conditioned on the debtor not being in an active bankruptcy. The Eleventh Circuit granted direct appeal and reversed.

The circuit court found it had jurisdiction over both the core issue of the loan approval motion (under § 364) and the non-core issue of the enforceability of the SBA's rule barring debtors from eligibility for PPP loans:

> Unlike *Stern,* in this case the decision of the core and non-core issues both turn on the same question: whether the SBA's non-bankruptcy eligibility rule is invalid. The injunction issue was, as a practical matter, subsumed in the approval order. *See Waldman v. Stone*, 698 F.3d 910, 920–21 (6th Cir. 2012) (holding that the bankruptcy court's order on a disallowance claim was final under *Stern* because it was "practically subsumed" within the core matter). The non-core matter was inseparably related to the core matter. *In re Frazin*, 732 F.3d 313, 321–22 (5th Cir. 2013) (holding that the bankruptcy court's order on a malpractice claim was final under *Stern* because it was "inseparably related" to the core matter) (quotation marks omitted).

. . .

> In these circumstances, the approval order and the preliminary injunction were not separate; they were joined at the hip. They depended on each other. One would have done Gateway no good without the other. They were, in the words of the *In re Frazin* decision, "inseparably related." 732 F.3d at 321 (quotation marks omitted). As a result, the bankruptcy court's preliminary injunction is no less a final order in the *Stern* sense than the approval order, and we have appellate jurisdiction over it.

983 F.3d at 1254-55. Having found it had jurisdiction, the circuit court next found that the SBA did not exceed its authority under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)), which the bankruptcy court had not applied, and without reaching the sovereign immunity argument. Under *Chevron*, the CARES Act had obviously although implicitly delegated rule-making authority to the SBA to determine eligibility for PPP loans, and the SBA exercised that authority consistent with other specific eligibility requirements set forth in the CARES Act. Because the SBA's rule keeping debtors in active cases from being "eligible recipients" was reasonable (which is to say rational) and was not arbitrary and capricious (having been arrived at after consultation with the Secretary of the Treasury, with a plausible rationale, in the absence of a notice and comment period given the 15-day timeline imposed by Congress). In sum, the Eleventh Circuit concluded that "[t]he SBA did not exceed its authority in adopting the non-bankruptcy rule for PPP eligibility. That rule does not violate the CARES Act, is based on a reasonable interpretation of the Act, and the SBA did not act arbitrarily and capriciously in adopting the rule." 983 F.3d at 1264.

Recently, another court explained the changes to the PPP since April 2020 and provides as follows:

> Since April 2020, Congress has passed several pieces of legislation relevant to PPP loans, none of which abrogates the Fourth Rule's bankruptcy bar. In the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, Congress also amended Section 364 of the Bankruptcy Code to allow a bankruptcy court to authorize certain bankruptcy debtors to obtain a PPP loan. § 320, 134 Stat. at 2015. However, it deferred the effectiveness of this amendment until
>
> > the date on which the [SBA] Administrator submits to the Director of the Executive Office for United States Trustees a written determination that, subject to satisfying any other eligibility requirements, any debtor in possession or trustee that is authorized to operate the business of the debtor under section 1183, 1184, 1203, 1204, or 1304 of title 11, United States Code, would be eligible for a [PPP] loan.
>
> *Id.* at 2016.

U.S. Small Bus. Admin. v. Roman Catholic Church of the Archdiocese of Santa Fe, Case No. CV 20-473 MV/GBW, 2021 WL 2981062, at *4-5 (D.N.M. July 15, 2021) (internal legislation citations omitted).

LaForce v. Owens (In re Raymond & Associates., LLC), 841 Fed. Appx. 138, Case No. 20-12537 (11th Cir. Dec. 29, 2020) (per curiam).

Code § / Rule: proof of claim, property of the estate

Held: Ex-wife's entitlement to husband's distribution, if any, from the debtor-LLC's BP claim did not give the ex-wife a claim against the LLC itself where the divorce decree did not carve out any LLC assets for her benefit. The LLC's creditors would be paid before any distribution to the ex-husband, and her claim was against the ex-husband and not the LLC itself (in the absence of veil-piercing).

History: Eleventh Circuit affirmed the Bankruptcy Court for the Southern District of Alabama (Oldshue, Bankr. J.), which had also been affirmed by the District Court for the Southern District of Alabama (DuBose, C. Dist. J.).

Facts: A husband and wife divorced, and the husband and his LLC (the LLC being the debtor in this opinion) were in bankruptcy when the final divorce decree issued. In that decree, the state court awarded the wife a percentage of the LLC's recovery for a BP Claim, but made her right to recover expressly subject to the claims of the LLC's creditors against the recovery (giving her 40% of the net claim after the LLC's creditors). The ex-wife filed a claim in the LLC's case for 40% of the BP recovery (which was $4.6 million in total). The trustee objected to the claim, on grounds that the recovery was not sufficient to pay all claims in full, so that the ex-wife's right to the husband's distribution after claims were paid was nil because there would be no distribution to the husband. The ex-wife countered that the LLC's estate did not own her portion of the recovery but instead held it in constructive trust for her pursuant to the divorce decree. The bankruptcy court sustained the trustee's objection to the claim, and found that the language of the divorce decree compelled a different result, as her rights were expressly conditioned on there being net funds remaining after the payment of the LLC's creditors. The BP claim was the LLC's property and she had no claim against the LLC but only a right to 40% of what was left after claims were paid. The district court affirmed, as did the Eleventh Circuit. The BP claim always belonged to the LLC, not to the husband. Therefore, it never became marital property and was not subject to the divorce decree as the LLC was not a party to the divorce. "For Alabama limited liability companies, '[t]he only interest of a member that is transferable is the member's transferable interest, and a 'transferable interest' is 'a member's right to receive distributions from a limited liability company or a series thereof.' *Whaley v. Whaley*, 261 So. 3d 386, 394 (Ala. Civ. App. 2017) (quoting Ala. Code §§ 10A-5A-1.02(t), -5.01)." Opinion at *3. The result might have been different if the LLC had been the ex-husband's alter ego, but there was no evidence of such. Finally, nothing in the bankruptcy court's order in the ex-husband's case changed this result, as the same judge presided over both cases and knew that he had not ruled that the BP claim was a marital asset in the individual case.

Baker v. Bank of America, 837 Fed. Appx. 754, Case No. 20-10780 (11th Cir. Dec. 29, 2020) (per curiam).

Code § / Rule: § 362; retroactive and prospective stay relief

Held: Servicer for the secured creditor had "party in interest" standing, and the bankruptcy court made sufficient findings to satisfy § 362(d)(4) because the facts it found showed a scheme to delay foreclosure, although it did not use the term "scheme" in its ruling. Nunc pro tunc and prospective stay relief were therefore appropriate.

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

Facts: The debtor executed a $392,000 purchase-money security deed to acquire a home in Fulton County, Georgia in 2005. She stopped making payments on that debt in 2008. From 2006 through 2017, the property was transferred five times by quitclaim deed, with the debtor retaining an interest until it finally was vested in her again as sole owner in the last transfer. Five bankruptcy cases were also filed that involved the property from 2012 forward, with each case being filed on the eve of foreclosure of the Fulton County property. The first four cases were dismissed early in the life of the cases for failure to either file documents or attend creditor's meeting. The fifth case gave rise to the instant appeal. It was filed on the eve of foreclosure, but the foreclosure took place anyway and the property sold to a successful bidder. The fifth bankruptcy case wound up being dismissed a few weeks later for failure to cure deficiencies. The bankruptcy court included a 180-day bar in the dismissal order. The debtor sued the foreclosing servicer (BANA, whom the district court expressly found was a servicer for the secured creditor) and the purchaser at foreclosure (Najarian Capital, LLC) in District Court, seeking damages for an automatic stay violation and also seeking to hold them in contempt. BANA then asked the bankruptcy court to reopen the case and sought nunc pro tunc stay relief, as well as prospective stay relief. The bankruptcy court held a hearing on BANA's motions and the debtor filed a response at 11:30 p.m. on the eve of the hearing. Both parties presented argument at the hearing. The bankruptcy court ruled from the bench, granting BANA's requested relief, and later memorialized the ruling in writing. The debtor failed to appear at the hearing on her motion to reconsider, so that motion was denied, and she appealed. The District Court affirmed, as did the Eleventh Circuit.

The Eleventh Circuit disagreed with the debtor, and found that BANA had both constitutional standing (case or controversy) as well as statutory "party in interest" standing. BANA suffered an injury due to default and due to the debtor's lawsuit, and the bankruptcy court's ruling redressed the injuries that were directly traceable to the debtor, thus establishing a case or controversy sufficient for Article III standing. Importantly, for "party in interest" standing under the Code, a servicer acting for a secured creditor has party in interest standing: "Baker misses the critical point that BANA had a legal interest in the property as the representative of the secured creditor and the servicer of the loan. . . . BANA's status as a representative of the secured creditor and as the loan servicer is all that is required to establish its standing to seek relief in the bankruptcy court." Opinion *4. The bankruptcy court had broad discretion to reopen the case under § 350(b) (which would be true even in the absence of a case-closing order, because the case would be considered "closed" under Rule 5009(a) when the trustee's final report and account were filed and the trustee

discharged). Regarding the hearing on the stay relief motion, the requirement that the bankruptcy court provide notice and opportunity for hearing does not require an evidentiary hearing under all circumstances. Under the facts of this case, the debtor did not request an evidentiary hearing until after fully participating in the non-evidentiary hearing under the local rules and losing, and then failed to attend the hearing on the motion to alter or amend that did make a request for an evidentiary hearing. The "lack of diligence" exhibited by the debtor did not entitle the debtor to an evidentiary hearing under these facts.

On the issues of nunc pro tunc and prospective stay relief, the bankruptcy court made findings that fulfilled § 362(d)(4) and found the facts showed a scheme to delay foreclosure, although it did not use the term "scheme" in its ruling. The bankruptcy court spoke to the egregious nature of the debtor's actions, the multiplicity of bankruptcies, as well as the lack of good faith in any of those filings. The bankruptcy court found cause for nunc pro tunc relief based on the amazing fact that it had been over ten years since the debtor made a payment. The successive failed cases by various individuals all aimed at stopping foreclosure of the mortgage against the property also justified prospective relief and a two-year bar.

Rohe v. Wells Fargo Bank, N.A., 988 F.3d 1256, Case No. 19-13947 (11th Cir. Feb. 18, 2021) (Wilson, Grant, and Tjoflat, JJ.) (opinion by Tjoflat).

Code § / Rule: non-appellate use of the All Writs Act, 28 U.S.C. § 1651(a), by District Court when case falls under bankruptcy court's purview

Held: Because the bankruptcy court was fully capable of guarding the integrity of the removed mortgage foreclosure case, and because the normal appeals process was available to the debtor, the proceeding was not one in which the district court could use the All Writs Act to provide the desired relief to the debtor.

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

Facts: The debtor filed bankruptcy a couple of months after a judgment of foreclosure against her property in Florida, which judgment she had appealed immediately before filing her bankruptcy petition. As a result, the trial court held the foreclosure case in inactive status and canceled the foreclosure sale, but her appeal moved forward. A few months later, the bankruptcy court granted Wells Fargo stay relief to proceed with foreclosure because the property was not included in the plan. She appealed that order to the United States District Court and a few days later, also filed a notice of removal of the state court foreclosure action to bankruptcy court. Despite the removal, the state appeals court nevertheless affirmed the foreclosure judgment, awarded Wells Fargo attorney fees, and the state trial court rescheduled the foreclosure sale and put the case back on active status. Wells Fargo moved to dismiss the removal AP on grounds that a state-court appeal was not removable, and the bankruptcy court granted the motion to dismiss. However, apparently because it believed the removal was not properly done in the first place, the bankruptcy court did not remand the case to the state court.

The debtor then filed a petition with the United States District Court, seeking a writ under the All Writs Act, which would void the state court's actions and also seeking damages against the bank and its attorneys. The debtor claimed that the bank and the state court violated the removal statute by continuing to proceed with the state court foreclosure case despite removal divesting the case entirely from the state court's jurisdiction. The District Court dismissed the petition for the writ with prejudice on grounds that it had no jurisdiction over the requested writ under the *Rooker-Feldman* doctrine, saying the petition essentially asked the federal court to serve as an appellate court for the state court judgment. The debtor then appealed the dismissal of her petition for the writ to the Eleventh Circuit.

The circuit court did not agree with the *Rooker-Feldman* rationale, but affirmed nonetheless because the case simply was not one in which the All Writs Act could operate. The court discussed the history and purpose of the Act:

> The purpose of the All Writs Act is to allow courts to protect their jurisdiction, that is, to safeguard the integrity of their proceedings and judgments. As we have stated, "The Act does not create any substantive federal jurisdiction. Instead, it is a codification of the federal courts' traditional, inherent power to protect the jurisdiction they already have, derived from some other source."

Opinion at *4 (quoting *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1099 (11th Cir. 2004) (citation omitted). The court discussed the use of the Act in appellate matters, and the use in a non-appellate situation, and stated that "[i]t is a basic precondition to a court's issuing such an order that there be some other matter over which the court has jurisdiction—some other proceeding in that court or some order or judgment previously made by that court—and that the All Writs Act order serve to protect that proceeding, order, or judgment from some threat to its integrity." Opinion at *6. Because the debtor could—and did—first ask the bankruptcy court to enforce the automatic stay, she had an adequate remedy to seek the relief she requested by virtue of the normal appeals process (which she in fact utilized). Allowing a review of the same issues by the District Court under the All Writs Act would almost be the functional equivalent of substituting that process for a normal appeal. The bankruptcy court was well-equipped to enforce the automatic stay, which was within its purview entirely, and to guard the integrity of the removed state-court foreclosure proceeding if it perceived a threat to its capacity to control the removed case (including the ability to enjoin the state court proceedings in the removed case if need be). Accordingly, there was no underlying proceeding that wasn't already sufficiently protected by the normal appellate and removal process (in other words, neither the automatic stay issue nor the issue with the state court acting in the removed foreclosure case were beyond the bankruptcy court's ability to safeguard and the debtor's ability to appeal).

Reynolds v. Behrman Capital IV, L.P., 988 F.3d 1314, Case No. 19-13537 (11th Cir. Feb. 23, 2021) (Jordan, Lagoa, and Brasher, JJ.) (opinion by Jordan, J.).

Code § / Rule: derivative jurisdiction; Bankruptcy Rule 7004(d) nationwide service of process

Held: Doctrine of derivative jurisdiction did not apply to personal jurisdiction, so that it was permissible for the district court, post-removal, in a case that either arose under the Code or was at least related to a bankruptcy proceeding, to apply Rule 7004(d) allowing nationwide service of process (rather than the state's long-arm statute) even if there would have been no personal jurisdiction under Alabama's long-arm statute had the case not been removed.

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

Facts: The chapter 7 trustee for companies in bankruptcy filed suit in state court against three companies that were equity holders (along with the defendant-companies' limited partners and members), seeking to recover distributions made on the eve of the bankruptcy filings. The defendants removed the suit to federal court arguing a significant federal issue was implicated under 28 U.S.C. § 1441, and alternatively removing the case under 28 U.S.C. § 1452(a) on the basis that the District Court had original jurisdiction as the issues arose under or were related to the Bankruptcy Code. The District Court ruled that removal was proper under § 1452 but not under § 1441. The District Court then granted a motion by some of the defendants to dismiss them for lack of personal jurisdiction under the doctrine of "derivative jurisdiction" because the state court lacked personal jurisdiction over those defendants under its long-arm statute. Alabama's long-arm statute did not establish personal jurisdiction over several of the defendants due to a lack of minimum contacts with the state. The District Court ruled that the trustee could not rely on Rule 7004(d), which allows nationwide service of process and considers national contacts for personal jurisdiction, because the limits of derivative jurisdiction did not allow the personal jurisdiction of the federal court after removal to be expanded beyond the scope of personal jurisdiction over the defendants that could be exercised in the state court prior to removal. The trustee then filed an amended complaint, omitting the dismissed parties, and requesting alternatively that the suit be transferred to the Southern District of New York. The District Court granted the remaining defendants' motion to dismiss the amended complaint for lack of personal jurisdiction based on its application of the doctrine of derivative jurisdiction and denied the motion to transfer on grounds that the District Court in New York would face the same derivative jurisdiction obstacle. The trustee appealed the dismissal of both complaints.

Even though the amended complaint superseded the original complaint, the trustee still had the right to appeal the dismissal of the original complaint. A plaintiff does not have to re-plead dismissed claims in its amended complaint to preserve the dismissal of those claims for appeal, particularly where the amendment would have been futile, as here, where there were no additional facts in the amended complaint. On the merits of the personal jurisdiction issue, the Eleventh Circuit ruled that the doctrine of derivative jurisdiction is limited in its application to subject matter jurisdiction and does not apply to limit the federal court's personal jurisdiction. The doctrine of derivative jurisdiction does not allow a federal court after removal (when the removal is accomplished other than under 28 U.S.C. § 1441, which was the case here) to exercise subject

matter jurisdiction if the state court in which the suit was originally brought could not do so, even if the federal court would have had jurisdiction if the suit had been filed in federal court originally. But the same limit does not apply to personal jurisdiction. Unlike subject matter jurisdiction, which is a structural, uncurable defect when it is missing, personal jurisdiction is just that—personal, rather than structural—and may be cured or waived. The federal rules of procedure for establishing personal jurisdiction apply following removal. Accordingly, the case was reversed and remanded for the District Court to determine whether it could exercise personal jurisdiction under Rule 7004(d) and its consideration of nationwide contacts rather than contacts with the forum state.

Suvicmon Dev., Inc. v. Morrison, 991 F.3d 1213, Case No. 20-11681 (11th Cir. March 25, 2021) (Grant, Tjoflat, and Ed Carnes, JJ.) (opinion by Tjoflat, J.).

Code § / Rule: § 524(a)(2) and § 523(a)(19)

Held: The discharge injunction of § 524(a)(2) prevents a creditor from pursuing a fraudulent transfer action even though the creditor's predicate debt is nondischargeable under § 523(a)(19).

History: Eleventh Circuit affirmed the Bankruptcy Court for the Northern District of Alabama (Jessup, Bankr. J.), which had also been affirmed by the District Court for the Northern District of Alabama (Coogler, Dist. J.).

Facts: The creditors were granted stay relief to proceed with a prepetition state-court suit against the debtor and others, alleging securities law violations and asserting claims under the Alabama Uniform Fraudulent Transfer Act ("AUFTA"). The stay relief order did not, however, allow execution on any judgment. The state court then entered judgment against the debtor on the securities law violations, which judgment debt the bankruptcy court (Judge Jessup) found to be nondischargeable. The state court ruled in favor of the defendants on the AUFTA claims. The creditors then asked the bankruptcy court to allow them to proceed with the appeal of the AUFTA ruling against them and asked to be allowed to include the debtor as a defendant on retrial if the creditors were successful on appeal. The bankruptcy court refused and ruled that the discharge injunction barred the continued pursuit of the fraudulent transfer claims against the debtor, although the appeal and possible retrial of the claims could continue against the other defendants (who were the debtor's sons). Distinguishing *Owaski v. Jet Florida Systems, Inc. (In re Jet Florida Systems, Inc.)*, 883 F.2d 970 (11th Cir. 1989) (per curiam), the bankruptcy court found that the debtor would be burdened with the expense of defense if the AUFTA claims against him proceeded. It did not matter that the AUFTA claims alleged that the debtor had transferred away assets that could have been used to satisfy the judgment on the nondischargeable securities fraud claims. The district court agreed, adding as further support that the presence of the debtor as a defendant in the AUFTA claims was not a prerequisite for recovery against the sons on those claims (further distinguishing the facts from a *Jet Florida* scenario where the debtor is an indispensable party who must be named but with an insurance company bearing the cost of defense). The Eleventh Circuit agreed, while explaining that the bankruptcy court's decision on allowing or disallowing suit against a debtor after discharge was reviewed under the "abuse of discretion" standard and not de novo.

The circuit court pointed out that the fraudulent transfer action is no mere collection action, even though the plaintiffs wanted to use it to collect on their nondischargeable judgment. It was instead a claim that required a separate determination of liability under the elements of the AUFTA. Importantly, under the AUFTA, in some cases (although it was not expressed that it was the case in the instant matter) damages under the AUFTA can sometimes include compensatory damages beyond the value of the asset transferred, and sometimes also punitive damages if actual fraud is shown. A finding that the underlying debt that predicates the ability to file the AUFTA claim in the first place is nondichargeable is not the same as finding that the debt arising from the fraudulent transfer itself would be nondischargeable. In this way, the circuit court distinguished its decision in *SE Prop. Holdings, LLC v. Gaddy (In re Gaddy)*, 977 F.3d 1051 (11th Cir. 2020) (deciding that fraudulent transfer claims did not amount to new debt, so that if the damages for the predicate debt were dischargeable, then so too was the fraudulent transfer claim, and finding that no "double recovery" should be allowed for both the predicate debt and the fraudulent transfer claim under Alabama law). The instant panel said that the *Gaddy* decision was not inconsistent because here there would be no double recovery permitted and in *Gaddy*, the court did not address the import of additional compensatory or punitive damages as a result of the fraudulent transfer because it found they were not available in that particular case. In other words, the predicate debt in *Gaddy* was determinative and the AUFTA claims were subsumed within and treated as a collection device for that debt rather than as stand-alone, separate claims; here, the predicate debt was not determinative and the AUFTA claims were treated as stand-alone, separate claims. Read both cases and decide for yourself how you would advise a creditor in a similar situation, if you like a good challenge. The possibility of an award of compensatory or punitive damages in addition to the value of the asset transferred may be significant.

Hunstein v. Preferred Collection and Management Services, Inc., 994 F.3d 1341, Case No. 19-14434 (11th Cir. April 21, 2021) (Jordan, Newsom, and Tjoflat, JJ.) (opinion by Newsom, J.).

Code § / Rule: standing for statutory violation in absence of tangible harm; Fair Debt Collection Practices Act at 15 U.S.C. § 1692c(b).

Held: A claim for inappropriate communication of personal information under § 1692c(b) was a concrete injury in fact because it was sufficiently akin to a tort to provide standing for the statutory violation even in the absence of tangible harm or a risk of real harm. The phrase "in connection with the collection of any debt" in 15 U.S.C. § 1692c(b) does not require that the communication itself include a demand for payment.

History: Eleventh Circuit reversed and remanded to the District Court for the Middle District of Florida. As of July 16, 2021, the mandate had not issued and a petition for rehearing and for rehearing en banc was pending.

Facts: A debt collector sent electronic information, including the consumer's name, balance owing, son's name, and fact that the debt being collected resulted from the son's medical treatment, to a vendor who then prepared a collection letter and mailed it to the consumer. The consumer

sued the debt collector for communicating his "personal information" to a third party (the vendor) "in connection with the collection" of the debt in violation of 15 U.S.C. § 1692c(b). Relevant to the appeal, the District Court found that the information transmission was not done in connection with the collection of any debt and dismissed the complaint for failure to state a claim. On appeal of that discrete issue under § 1692c(b), the Eleventh Circuit asked for additional briefing on the issue of Article III "case or controversy" standing.

The Eleventh Circuit first found that it had subject matter jurisdiction because the claim for inappropriate communication of personal information under § 1692c(b) is a concrete injury in fact, even though it was not a tangible harm or a risk of real harm. It is instead a violation of a procedural statutory right that in the circumstances of the case, rose to the level of an injury in fact. This was the case because the statutory violation alleged in the complaint led to the type of harm that "has historically been recognized as actionable." Opinion at *8 (citing *Muransky v. Godiva Chocolatier, Inc.,* 979 F.3d 917, 926 (11th Cir. 2020) (en banc). Personal privacy invasions have long been the basis for tort claims, and so the harm here was sufficiently akin to a tort to provide standing for the statutory violation even in the absence of tangible harm or a risk of real harm.

The panel attempted to distinguish this decision from another panel's decision in *Trichell v. Midland Credit Mgmt., Inc*., 964 F.3d 990 (11th Cir. 2020), also involving the FDCPA, and in which the panel found the plaintiffs had no Article III standing, as follows:

> [*Trichell*] addressed a claim under a different FDCPA provision, § 1692e, which states that a "debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. The plaintiffs in *Trichell* alleged that debt collectors had sent them misleading letters, and in assessing their claims' pedigree, we determined that the "closest historical comparison is to causes of action for fraudulent or negligent misrepresentation." 964 F.3d at 998. Canvassing the common-law history of those torts, we held that the plaintiffs' claims lacked the necessary "close relationship" to them. *Id*. at 997–98. That conclusion is entirely consistent with our holding here that Hunstein has standing to sue under a different FDCPA provision. Hunstein's claim, unlike the *Trichell* plaintiffs', arises under § 1692c(b) and bears a close relationship to a common-law tort.

Opinion at *11-12. The current panel distinguished the *Trichell* panel's reliance on the language allowing recovery for "actual damages" in § 1692k(a) (which the *Trichell* panel relied upon as evidence that Congress did not intend that violations of other provisions of the statute would necessarily amount to a concrete injury in the absence of actual damages, which supported the ruling that in the absence of being actually misled, the plaintiff there had no Article III standing) by pointing out that the *Trichell* panel's rationale did not mean that no violation of other provisions of the statute, such as § 1692c(b), could ever amount to a concrete injury.

After finding the plaintiff had standing, the Eleventh Circuit went on to reverse the District Court's ruling on the merits. The phrase "in connection with the collection of any debt" does not require that the communication itself include a demand for payment, as the District Court had ruled based on cases interpreting that phrase under § 1692e. To read that same "gloss" into the identical

language in § 1692c(b) would create a grammatical redundancy and risk superfluity. Instead, the communication need only be connected to the collection of the debt in the ordinary sense of those words, without a specific attempt to actually collect the debt (i.e., the communication need not demand payment). The Eleventh Circuit declined to adopt any multi-part test for making that determination. The Circuit Court recognized that its ruling would upset the normal practice of using third party vendors to print and mail "dunning" letters, while likely adding no true benefit in terms of improving consumer privacy, but that was a problem for Congress to solve, if it was a problem at all. The volume of amicus briefs filed in support of rehearing indicates nationwide concern over the implications of this ruling for the day-to-day operations of debt collectors and third-party vendors.

Tomberlin v. Multibank 2009-1CML-ADM Venture, LLC, 848 Fed. Appx. 875, Case No. 20-10776 (11th Cir. May 5, 2021) (per curiam) (Wilson, Rosenbaum, and Grant, JJ.).

Code § / Rule: § 727(a)(2)(A) transfer of property within one year of petition with intent to hinder, delay

Held: Intent to hinder a creditor's collection efforts, regardless of whether the debtor had an acceptable or a nefarious reason for doing so, was all the statute required.

History: Eleventh Circuit affirmed the Bankruptcy Court for the Middle District of Alabama (Williams, Bankr. J.), which had also been affirmed by the District Court for the Middle District of Alabama (Marks, C. Dist. J.).

Facts: The chapter 7 debtor owed over $300,000 to the IRS in unpaid taxes, interest, and penalties. In 2014, Multibank obtained a judgment against the debtor for $20,000,000. Soon thereafter, the IRS levied against his bank accounts. On the advice of counsel, and worried that the IRS garnishment could leave him unable to pay his bills, he began using his corporation's checking account as his personal checking account into which his salary was deposited and from which his monthly bills were paid. He then filed bankruptcy within the year. Multibank objected to the debtor's discharge in part on grounds that he intended to hinder or delay a creditor (the IRS) by routing his personal income through his corporate checking account within a year of the petition. The bankruptcy court (Judge Williams) agreed and denied the discharge. The District Court and Eleventh Circuit agreed. The debtor's argument centered on the intent prong. He argued that he channeled his income into the corporate account to be able to avoid garnishment so he could get by personally and professionally with no misrepresentation, with no intent to deceive and no actual concealment or misdirection. However, his intent to hinder the IRS in its collection efforts, even if he had never lied or concealed anything, was all the statute required. No intent to defraud or ill-will need be shown.

Chua v. Ekonomou, 1 F.4th 948, Case No. 20-12576 (11th Cir. June 15, 2021) (William Pryor, C.J.; and Luck and Marks, JJ.) (opinion by William Pryor, C.J.).

Code § / Rule: trustee liability; the *Barton* doctrine; judicial immunity

Held: Claims made after the receivership ended against a state-court-appointed receiver (for actions taken within the scope of the receivership) did not fall under *Barton v. Barbour*, 104 U.S. 126, 128 (1881) but instead should be dismissed because the receiver was entitled to judicial immunity.

History: Eleventh Circuit affirmed in part, vacated in part, and remanded to the District Court for the Northern District of Georgia.

Facts: This non-bankruptcy case involved claims-- made after the receivership had ended -- against a state-court-appointed receiver (for actions taken within the scope of the receivership). The district court dismissed the claims for lack of subject matter jurisdiction, because the appointing court had not given permission for the suit, under *Barton v. Barbour*, 104 U.S. 126, 128 (1881). The Eleventh Circuit agreed that the claims against the receiver should fail but the reason was because the receiver was entitled to judicial immunity as to the claims, and the district court erred when it found no subject matter jurisdiction. As it had recently discussed in the bankruptcy context in *Tufts v. Hay*, 977 F.3d 1204 (11th Cir. 2020), the *Barton* doctrine does not apply after the bankruptcy case has concluded. The bankruptcy estate no longer exists and thus there is no res over which the bankruptcy court would have exclusive jurisdiction. Because *Barton's* requirement that the appointing court first approve a suit against a receiver was based on the exclusive subject matter jurisdiction of the appointing court, that requirement was held not to apply once the subject matter jurisdiction concern ended, which for bankruptcy purposes, was when the bankruptcy estate no longer existed because at that point, there could be no conceivable effect on the defunct estate.

The same result attained when the Eleventh Circuit extrapolated and expanded on that logic as it applied in the receivership context. It attempted to alleviate concerns for bankruptcy trustees and other court-appointed trustees, who may fear being subject to suit for actions taken in the course of their duties, by assuring them that the doctrine of judicial immunity would bar any such actions, even after the appointing court lost exclusive subject matter jurisdiction over the res:

> We disagree with our sister circuits that the need to protect court-appointed receivers and bankruptcy trustees is relevant to the *Barton* doctrine. Their opinions fail to grapple with the fact that the *Barton* doctrine is grounded in the exclusive nature of *in rem* jurisdiction. The need to attract qualified individuals to serve as receivers and bankruptcy trustees might be a legitimate policy concern, but it has nothing to do with subject-matter jurisdiction. Although our previous decisions discussing the *Barton* doctrine have credited this policy concern, they have done so only in dicta. *See Tufts*, 977 F.3d at 1210 n.4; *Lawrence*, 573 F.3d at 1269; *Carter*, 220 F.3d at 1252–53. This policy concern is unfounded because court-appointed receivers enjoy judicial immunity for acts taken within the scope of their authority. *Prop. Mgmt. & Invs., Inc. v. Lewis*, 752 F.2d 599, 602 (11th Cir. 1985). Receivers

> do not need the *Barton* doctrine to provide an additional layer of protection for the performance of their duties.
>
> … As a court-appointed receiver, Lambros receives "judicial immunity for acts within the scope of [his] authority." *Prop. Mgmt.*, 752 F.2d at 602. That immunity applies even if his acts were "in error, malicious, or . . . in excess of [the appointing court's] jurisdiction." *Bolin v. Story*, 225 F.3d 1234, 1239 (11th Cir. 2000). And it extends to his counsel as well. *Cf. In re DeLorean Motor Co.*, 991 F.2d 1236, 1241 (6th Cir. 1993) ("The protection . . . afford[ed] the Trustee . . . would be meaningless if it could be avoided by simply suing the Trustee's attorneys.").

Opinion at pp.14-15.

Harris v. Jayo (In re Harris), --- F.4th ---, Case No. 19-11286 (11th Cir. July 14, 2021) (Jordan, Marcus, and Ginsburg, JJ.) (opinion by Jordan, J.).

Code § / Rule: claim preclusive effect of state-court judgment

Held: The collateral estoppel law of Florida, not the federal courts, would control whether a Florida state-court judgment was entitled to preclusive effect in an adversary proceeding, and the elements could not be satisfied by a general default judgment when the underlying factual allegations could have also supported the judgment without a finding of fraud.

History: Eleventh Circuit reversed and remanded, following the Bankruptcy Court for the Southern District of Florida having been affirmed by the District Court for the Southern District of Florida.

Facts: Jayco invested in and loaned money to certain businesses operated by Harris, which never yielded much return. Eventually Jayco sued Harris in state court in Florida for allegedly converting the businesses' assets to Harris's own benefit. The claims in the complaint included fraudulent misrepresentation, negligent misrepresentation, breach of fiduciary duty, conversion, unjust enrichment, investment fraud, unfair and deceptive trade practices, and conspiracy to defraud. As a sanction for bad conduct during the case, such as lying about a heart attack to secure a continuance, the state court sanctioned Harris by striking his answer and entering a $1.8 million default judgment against him. Unfortunately for Jayco, the state court did not specify in either the order granting a default or the default judgment which claims supported the money judgment awarded. When Harris filed chapter 7, Jayco sued to have the judgment debt declared nondischargeable under § 523(a)(2)(A). The bankruptcy court applied the federal court default judgment collateral estoppel doctrine of *In re Bush*, 62 F.3d 1319 (11th Cir. 1995), and found the debt to be nondischargeable. On appeal, the district court affirmed, also employing the *Bush* doctrine of collateral estoppel. The Eleventh Circuit reversed under plenary review of the legal issue of dischargeability.

In its opinion, the Eleventh Circuit pointed out that the collateral estoppel law of Florida, not the federal courts, would control whether the Florida judgment was entitled to preclusive effect in the adversary proceeding. *In re St. Laurent*, 991 F.2d 672, 676 (11th Cir. 1993). The lower courts' reliance on *Bush* was therefore misplaced. The court went on to analyze the elements of § 523(a)(2)(A) and ultimately determined that under Florida law, "the issue previously presented and determined must be identical to the one currently before the court being asked to apply collateral estoppel." Opinion at p.12. "[W]hen a complaint alleges several alternative (and inconsistent) factual grounds for a legal claim, and each of those grounds would be independently sufficient to establish the claim, it is impossible to tell which of the grounds a general default judgment was based on. And if one of those alternative factual grounds is insufficient to meet the elements of fraud under the Bankruptcy Code, the issues cannot be deemed identical." Opinion at p.16. The claims in the complaint each contained alternative factual allegations that would not satisfy § 523(a)(2)(A), so it was impossible to tell on which factual basis the state court entered default judgment. Therefore, the general default judgment was not entitled to preclusive effect under Florida law.

SUPREME COURT CASES OF NOTE:

Mission Product Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652 (May 20, 2019) (opinion by Kagan, J. and joined by Roberts, C.J.; and Thomas, Ginsburg, Breyer, Alito, Sotomayor, and Kavanaugh, JJ.) (concurrence by Sotomayor, J.) (dissent by Gorsuch, J.).

Held: A distributor-licensee retained the right to use the debtor's trademark under a prepetition trademark licensing agreement despite the debtor-licensor's rejection of the executory trademark licensing agreement in bankruptcy under § 365(a) which then amounted to a breach –but not a rescission of rights already granted under the contract--under § 365(g). The licensee had an arguable claim for money damages.

Summary: This case arose in the First Circuit, and the Court's decision resolved a split between the First and Seventh Circuits. The Court affirmed the reasoning of the Seventh Circuit and reversed the First Circuit. Tempnology manufactured exercise apparel designed to stay cool and marketed those products under trademarks associated with its "Coolcore" branding. Tempnology entered a licensing agreement with Mission Product Holdings that gave Mission the exclusive license for distributing Coolcore products domestically and a non-exclusive license to use the Coolcore trademarks both domestically and internationally. The non-exclusive license to use the Coolcore trademarks was the key aspect of the appeal. Approximately three years into the four-year term of the licensing agreement, Tempnology filed chapter 11 and rejected the licensing agreement with Mission. As a result of the rejection, the parties agreed that Tempnology had no further obligation to perform under the agreement and that Mission had a prepetition claim for damages caused by the nonperformance. The dispute was whether Mission retained the right to use the Coolcore trademarks despite rejection. Section 365 does not specifically address trademark licenses although it does provide a close analog in § 365(n). Under that subsection, the licensee of certain intellectual property licenses (typically patents) continues to be able to use the property under the patent following rejection under § 365(a) so long as it makes the contractual payments

to the debtor-licensor. The bankruptcy court agreed that the failure to specifically provide for retention of rights under a trademark licensing agreement meant those rights were essentially "revoked" when the debtor-licensor rejected the agreement. The First Circuit BAP disagreed, finding that the negative inference argument was not well-taken and that rejection amounts to breach rather than to a wholesale "vaporization" of the underlying contract. The First Circuit then disagreed with the BAP, accepted the negative inference argument of the debtor and the bankruptcy court, and added a policy ground that reading the code as only breaching the agreement rather than vaporizing it entirely would mean the debtor-licensor continued to have a "burdensome obligation" of monitoring the licensee's use of the trademark in order to protect its value going forward.

The Court held that the case was not moot because Mission still asserted a plausible claim for money damages (lost profits) from the rejection through the expiration of the contract term (even though recovery seemed remote given the debtor's insolvency). The Court first rejected the debtor's argument that the case was moot and recovery not possible because Mission could have simply flouted the bankruptcy court's ruling given that no injunction had issued and used the trademark despite the bankruptcy court's order that it could not do so, thereby avoiding any lost profits from non-use of the trademark. The Court found that "Mission need not have flouted a crystal-clear ruling and courted yet more legal trouble to preserve its claim." Opinion p. 1660-61. On the merits, the Court held that the statute clearly provides that rejection is a breach, not a rescission. The debtor-licensor can stop performing but cannot deprive the licensee of rights granted to it in the licensing agreement now rejected. The estate had no greater rights than the debtor possessed. The debtor in bankruptcy therefore could not use bankruptcy rejection to claw back interests it had already given to the licensee in the executory agreement. This result also comported with avoidance action powers (§§ 544-553), which are limited in their application to particular narrow circumstances as opposed to the broad power to reject under § 365. If rejection were treated as rescission, it would become an easy way to undo transfers without having to meet any of the requirements of the avoidance-specific Code provisions, contrary to the "core tenets" of the Code. The specific provisions that gave rise to the debtor's negative-inference argument in fact were added to the Code to clarify the general rule that rejection equals breach (not rescission) to combat some specific rulings to the contrary that were of the same type the First Circuit engaged in below. The policy argument based on the burden of monitoring use of the trademark going forward was not sufficient to overcome the broad language of § 365 and its "rejection equals breach" mandate which applies to nearly every executory contract. To rule otherwise because of issues specific to trademark agreements would "allow the tail to wag the Doberman." Opinion at p. 1665.

Taggart v. Lorenzen, 139 S. Ct. 1795 (June 3, 2019) (opinion for unanimous court by Breyer, J.).

Held: Actions taken in violation of the discharge injunction warrant contempt sanctions if there is "no fair ground of doubt" as to whether the discharge order prohibited the actions taken. The standard for imposing civil contempt sanctions in general applies, and that standard requires the court to assess whether the actor had an objectively reasonable basis for believing its conduct was appropriate, and is neither a strict-liability nor a subjective-good-faith-belief standard.

Summary: Taggart had been a business owner, along with others, and the business he formerly owned along with the other owners sued him in state court prepetition for a breach of the business's operating agreement. Taggart then filed bankruptcy and received a discharge under chapter 7. Post-discharge, the state court entered judgment against the debtor, and one of the other owners sought an award of his attorney fees incurred after the discharge on the basis that Taggart had "returned to the fray" in the state court case post-discharge. The state court agreed and awarded the owner the attorney's fees against Taggart. Taggart returned to bankruptcy court to seek contempt sanctions against the state-court plaintiffs and the bankruptcy court found that Taggart had indeed returned to the fray under the relevant Ninth Circuit authority, and thus found no violation of the discharge in the award of the post-discharge attorney fees. The district court reversed, however, and found the other owner to be in civil contempt for violating the discharge injunction by trying to collect the attorney fees and remanded the case. On remand, the bankruptcy court used a strict liability standard as the Eleventh Circuit established in *In re Hardy*, 97 F.3d 1394 (11th Cir. 1996), in which the Eleventh Circuit ruled that the standard for finding contempt for a discharge violation was one of strict liability-- so long as the actor intended the action that in fact violated the discharge, then sanctions were appropriate. The Ninth Circuit BAP then reversed, and the Ninth Circuit agreed with the BAP, based on its ruling that even an unreasonable belief that the conduct did not violate the discharge was sufficient to avoid contempt sanctions, so long as that belief was subjectively held in good faith.

The Supreme Court resolved the circuit split by disagreeing with both the Ninth and Eleventh Circuits to some extent, and reversed and remanded the case. The standard for contempt sanctions for violations of the discharge injunction is instead an objectively reasonable one, as with civil contempt in general. The injunction language of § 524(a)(2) and the bankruptcy court's ability to issue orders necessary to carry out the Code's purposes under § 105(a) "bring with them the 'old soil' that has long governed how courts enforce injunctions." Opinion at p. 1801. This "old soil" includes the long-held traditional notion that civil contempt is an extreme remedy and that it "should not be resorted to where there is [a] *fair ground of doubt* as to the wrongfulness of the defendant's conduct." Opinion at p. 1801-02 (quoting *Cal. Artificial Stone Paving Co. v. Molitor*, 113 U.S. 609, 618 (1885)) (emphasis added in Opinion). That traditional standard is an objective one, although subjective intent may still be relevant in determining the distinct issue of bad faith in the context of a contempt motion. "Under the fair ground of doubt standard, civil contempt therefore may be appropriate when the creditor violates a discharge order based on an objectively unreasonable understanding of the discharge order or the statutes that govern its scope." Opinion at p. 1802. The Court said a more strict-liability type standard (as the Eleventh Circuit had employed in *Hardy*) would lead creditors who were on solid ground to nonetheless expend time and money to seek advance rulings before taking action, whereas the purely subjective standard would lead to debtors too often having to spend time and money to come back into litigation to

preserve the rights under the discharge. The standard for stay violation damages, which Taggart urged the Court to consider here, is a "willful" standard, which is close to strict liability with the added requirement of willfulness, but Congress employed specific language in § 362(k)(1) to establish such standard for stay violations, which is aimed at the short-run maintenance of the status quo while the case progresses. By contrast, the discharge comes into place toward the end of the typical case and binds creditors for much longer, and there is no similar specific language in the Code setting forth a "willful" or strict liability standard for discharge violations. Notably, the Court said "willful" is usually not associated with true strict liability but requires some reference to context, and declined to say whether the use of that word in § 362(k)(1) "supports a standard akin to strict liability." Opinion at p. 1804.

Rotkiske v. Klemm, 140 S. Ct. 355 (Dec. 10, 2019) (opinion by Thomas, J., joined by Roberts, C.J., and Breyer, Alito, Sotomayor, Kagan, Gorsuch, and Kavanaugh, JJ.; Sotomayor, J., also filed a concurring opinion; Ginsburg, J., filed an opinion dissenting in part and dissented from the judgment).

Held: The Fair Debt Collection Practices Act ("FDCPA") unequivocally states that the statute of limitations under 15 U.S.C. § 1692k(d) runs for one year from the date of the violation, and does not allow for the a-textual imposition of a general discovery rule to change that result.

Summary: A debt collector obtained a judgment against an individual defendant, after allegedly serving the individual at a bad address and by leaving the summons and complaint with someone unauthorized to accept service. The defendant did not find out about the suit and resulting default judgment against him until some years later, at which point he sued the debt collector alleging it had violated the FDCPA by filing suit after the state statute of limitation on the underlying debt had expired. In response, the debt collector raised the one-year statute of limitation of the FDCPA as grounds for dismissal. The individual responded to the motion to dismiss by arguing for a "discovery rule" to push the statute of limitation start date to when the violation was (or reasonably should have been) discovered rather than when it occurred. The district court refused to apply a general discovery rule because the statute expressly states that the action must be filed "within one year from the date on which the violation occurs." 15 U.S.C. § 1692k(d). The Third Circuit agreed, and rejected the Ninth Circuit's contrary view.

The Supreme Court affirmed. The statute's plain language foreclosed the application of a general discovery rule, especially since Congress had provided in other contexts (and prior to the enactment of the FDCPA) that some statutes of limitation would begin upon discovery rather than upon the occurrence of the violation. The court would not second-guess that legislative decision. It was possible that an equitable, fraud discovery rule might have made a difference in the outcome, but that issue was not argued below nor included in the cert petition. The Court expressly did not decide whether the statutory language foreclosed the possibility of an equitable doctrine or fraud discovery rule changing the result. Justice Sotomayor concurred to emphasize that the fraud discovery rule very well might have changed the result had it been preserved as an issue. In dissent, Justice Ginsburg believed the plaintiff had preserved the fraud discovery rule issue and would have allowed that rule to extend the start of the limitations period to when the violation was discovered,

regardless of the fact that the violation itself did not involve fraud but because of the alleged fraud of the debt collector in concealing the collection suit from the individual by purposely serving the original collection summons and complaint to the wrong address where someone without authority accepted service.

Ritzen Group, Inc. v. Jackson Masonry, LLC, 140 S. Ct. 582 (Jan. 14, 2020) (opinion for unanimous court by Ginsburg, J.).

Held: An order granting or denying a motion for relief from stay without reservation is a final, immediately appealable order under 28 U.S.C. § 158(a). The time for appeal thus runs from entry of the order.

Summary: Ritzen Group, Inc. ("Ritzen") entered a contract to purchase real property from Jackson Masonry, LLC ("Jackson"). The deal never closed and Ritzen sued Jackson in state court for breach of contract. Around a year later, and on the eve of trial, Jackson filed chapter 11. Ritzen moved in the bankruptcy court for relief from the stay, with the goal of allowing the state court trial to proceed. The bankruptcy court entered an order denying the motion for relief. Ritzen did not appeal. Instead, Ritzen filed a proof of claim for its alleged damages, and in an adversary proceeding, the bankruptcy court ultimately determined that the party in breach of the contract was Ritzen rather than Jackson and disallowed Ritzen's claim. The bankruptcy court then confirmed Jackson's plan without objection, and the plan contained typical language enjoining the commencement or continuation of any proceedings against the debtor on account of prepetition claims against the debtor. Following confirmation, Ritzen filed two appeals. First, it appealed the order denying its stay relief motion. Second, it appealed the order resolving the breach of contract claim in the AP. The district court found the appeal of the stay relief order was untimely under Rule 8002(a) and 28 U.S.C. § 158(c)(2), which required the appeal be filed within 14 days of entry of the order. The court denied the breach of contract appeal on the merits. The Sixth Circuit then affirmed the district court. On the stay relief appeal, the Sixth Circuit found that the stay relief motion was a discrete proceeding within the larger bankruptcy case, rather than just a step in the claims-adjustment process, and thus the order that finally resolved that motion was a final, appealable order and the appeal time ran from entry. The Supreme Court granted certiorari on the issue of whether orders denying relief from stay are final and immediately appealable when entered, and affirmed the Sixth Circuit.

Bankruptcy cases are unique in the world of civil litigation because each case encompasses multiple individual controversies. As set out in *Bullard v. Blue Hills Bank*, 575 U.S. 496, 501 (2015), a bankruptcy court order is final for purposes of appeal when the order determines definitively a particular discrete proceeding within the global bankruptcy case. Against this backdrop, the unanimous Court had little trouble agreeing with the Sixth Circuit that the time for appeal of the order denying stay relief was calculated from entry of the order, not from confirmation of the plan. The issues in a stay relief motion are distinct from and usually occur prior to the adjudication of the creditor's claim on the merits. In its final footnote, the Court cautions, "We do not decide whether finality would attach to an order denying stay relief if the bankruptcy court enters it 'without prejudice' because further developments might change the stay calculus. Nothing in the record before us suggests that this is such an order."

Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano, 140 S. Ct. 696 (Feb. 24, 2020) (per curiam) (Alito, J. concurring with Thomas, J. joining).

Held: A state court loses jurisdiction upon the filing of a notice of removal and that jurisdiction is not restored retroactively by the federal court's issuance of a nunc pro tunc order; such "now for then" orders are only appropriate to document in writing rulings that were actually made in the past but which were never entered on the docket due to inadvertence.

Summary: Catholic school employees sued the Archdiocese and others, alleging that the trust for the employees' pension plan had terminated the trust and had by that act eliminated the employees' pension benefits. The trial court denied the employees' request for a temporary injunction and was affirmed by the appeals court. The Puerto Rico supreme court then reversed and remanded, at which point the Archdiocese removed the case to federal court on the basis that the trust was in an active chapter 11 case. While the case was removed and before it had been remanded, the trial court in Puerto Rico nonetheless ordered the church to make payments and ordered its assets seized. The Puerto Rico appeals court reversed, and on further appeal, the Puerto Rico supreme court reversed yet again and reinstated the preliminary injunction. Each of those orders was issued while the case was removed to federal court, and the Archdiocese had actively defended itself in the Puerto Rico proceedings following removal. The federal district court remanded the case to the Puerto Rico trial court in an order that was nunc pro tunc to the date of the trust's dismissal from chapter 11. After the Puerto Rico supreme court's ruling, the Archdiocese petitioned for certiorari, which was granted.

The Archdiocese took the position that the rulings of the Puerto Rico courts were absolutely void, having been made after removal. The employees countered that that the Archdiocese was bound by the Puerto Rico court rulings notwithstanding the effect of removal in divesting those state courts of jurisdiction, because the Archdiocese had participated in the case in the Puerto Rico courts following removal. Additionally, the employees believed the federal district court's nunc pro tunc remand order validated the Puerto Rico courts' orders as a matter of law because the nunc pro tunc effect retroactively restored jurisdiction to the Puerto Rico courts as of the nunc pro tunc date. The Supreme Court disagreed on both points. The Court held that nunc pro tunc orders in federal court are only appropriate to document in writing rulings that were actually made in the past but orders for which were never entered on the docket due to inadvertence. They should not be used to issue new rulings with prior effective dates. The Court also held that the removing party had the right to continue to file motions and defend itself in the local action where the local court was proceeding as though it still had jurisdiction, and could do so without waiving or forfeiting its rights in federal court, including the right to insist that removal had in fact divested the local forum of jurisdiction.

Justice Alito, joined by Justice Thomas, joined the opinion of the Court and also concurred to emphasize issues that might be raised on remand, particularly that the trial court in Puerto Rico was wrong to interpret prior Supreme Court precedent as holding that the Catholic Church is a single entity for purposes of civil liability; the case relied upon did not say what the Puerto Rico

court extracted from it. Finally, they pointed out that the Free Exercise Clause of the First Amendment requires, at a minimum, that neutral rules be applied in determining whether any entity is associated with a religious body in such a way as to be accountable for each other's debts, while also bringing to the fore the difficult questions of whether a civil authority may question a religious body's interpretation of its own structure and whether the First Amendment limits the rules so employed against religious bodies so that no Americans' right to freely exercise religion as a member of a religious body is infringed.

The Ninth Circuit BAP in *Merriman v. Fattorini (In re Merriman)*, 616 B.R. 381 (9th Cir. B.A.P. 2020) ruled that the Supreme Court's decision did not take away a bankruptcy court's ability to annul the stay retroactively under § 362(d). The BAP upheld the bankruptcy court's order that annulled the stay to validate the filing of a state court suit, which would result in the liquidation but not collection of a wrongful death claim against the debtor. The state court suit would also include findings that could be preclusive in a dischargeability action. The state court suit was filed by the creditor postpetition but without notice of the bankruptcy and the creditor filed its motion to annul the stay expeditiously when the creditor discovered the bankruptcy. The holding of *Acevedo* did not sweep so broadly, the BAP found, as to overcome the statutory language of § 362(d) that expressly allowed the stay to be annulled with the grant of retroactive relief.

City of Chicago v. Fulton, 141 S. Ct. 585 (Jan. 14, 2021) (opinion by Alito, J. joined by all Justices except for Barrett, J., who took no part; Sotomayor, J., joined the main opinion and also filed concurrence).

Held: Code § 362(a)(3) prohibits affirmative acts to exercise control over estate property, which concept requires something more than merely retaining possession.

Summary: The City of Chicago impounded chapter 13 debtors' cars prepetition for failure to pay fines. The car owners each demanded the return of their impounded vehicles once their petitions were filed but the City refused. The bankruptcy court held that the refusal to return the impounded vehicles was a violation of § 362(a)(3) as an act to exercise control over estate property. The Seventh Circuit affirmed, and joined the majority of circuits to consider the issue. The Supreme Court granted cert to resolve the split and reversed the Seventh Circuit in a unanimous opinion, but-for Justice Barrett, who took no part in the decision. The decision required more analysis than just reading the text of § 362(a)(3) in isolation and applying dictionary definitions to the words used, which could result in ambiguity given that "omissions can qualify as "acts" in certain contexts, and the term "control" can mean "to have power over." *Id.* at 590. Instead, the Court read the statute in conjunction with § 542(a), which requires turnover of estate property, with some exceptions. If § 362(a)(3) meant that a creditor's retention of estate property (maintaining the status quo once a case was filed) was a stay violation and that creditors had an affirmative duty to return estate property to debtors once a petition was filed, then § 542 would be surplusage, serving only to define whether the turnover had to be made to the debtor or the trustee. The Court pointed out that the debtors' proposed reading would also put the exceptions to the turnover provisions of § 542 into direct conflict with § 362(a)(3), which would be textually inconsistent. The Court supported its decision with reference to the legislative history of the 1984 amendment to §

362(a)(3), which added the words “or to exercise control over property of the estate” but which did not mention making a change to require an affirmative turn over duty immediately upon the filing of the case. The better reading, consistent with the legislative history, is that the language was added in 1984 to clarify that actions aimed at changing the status quo regarding intangible property were stayed once a debtor filed bankruptcy, as were actions aimed at changing the status quo regarding tangible property. The Court pointedly did not decide anything about the mechanics of § 542, nor did it reach the issue of whether maintaining the status quo would violate § 362(a)(4) or (a)(6). In her concurrence, Justice Sotomayor “emphasize[d]” that “[t]he City’s conduct may very well violate one or both of these other provisions.” She wrote to make the point that the Court’s opinion did not mean the bankruptcy court should not consider “alternative solutions,” including allowing turnover by motion rather than by adversary proceeding, or even requiring turnover under § 542(a) automatically without any order or proceeding, or expediting the proceedings or ordering preliminary relief where an adversary proceeding is required. “Ultimately, however, any gap left by the Court’s ruling today is best addressed by rule drafters and policymakers, not bankruptcy judges.” *Id.* at 595 (Sotomayor, J., concurring).