11TH CIRCUIT CASES UPDATE
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Hon. James J. Robinson
Chief United States Bankruptcy Judge
Northern District of Alabama[1]

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

Calderon v. U.S. Bank Nat'l Ass'n, 860 Fed. Appx. 686, Case No. 20-14663 (11th Cir. July 9, 2021) (per curiam) (Wilson, Rosenbaum, and Branch, JJ.).

Code § / Rule: debtor standing to pursue rescission in chapter 7

Held: As of the petition date, the debtor had not yet filed a formal lawsuit following the bank's refusal to accede to the debtor's prepetition rescission demand, and therefore the rescission claim was a potential cause of action that became estate property. The unscheduled rescission cause of action remained estate property, having not been scheduled and administered or otherwise abandoned by the trustee. Therefore, only the trustee had standing to pursue the cause of action.

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

Facts: Three years after signing a mortgage loan for a Florida residence, Calderon sent a rescission demand to U.S. Bank and other companies based on alleged Truth in Lending Act violations. The bank denied the rescission demand in writing. A few months later, without having sued to enforce the rescission demand, Calderon filed chapter 7. He scheduled the mortgage as a secured debt but did not schedule or otherwise mention his unresolved rescission claim. The case discharged and closed. Almost a decade later, Calderon and his spouse filed in district court to enforce the rescission demand made and denied prior to the bankruptcy petition. They also sought to have the security interest voided, the return of all payments made, statutory damages, actual damages, attorney fees, and costs. The bank moved for summary judgment and won, arguing that the debtor did not have standing to pursue the rescission claim, as it remained estate property and could only be pursued by the chapter 7 trustee. The Eleventh Circuit agreed on appeal.

The debtor's main argument on appeal was that the rescission demand was complete when made and received by the bank and other defendants, which occurred prepetition, so that the claim for rescission was fully exercised prior to the case being filed and did not become an estate asset. The circuit court disagreed. The property of the estate includes, and the debtor must disclose, all assets--including potential assets. When the chapter 7 case was filed, the debtor had not yet filed a formal lawsuit involving the rescission demand following the bank's refusal to accede to the demand, so the rescission claim was still a potential cause of action, and accordingly was an estate asset. As an unscheduled asset, having never been abandoned by the trustee under § 554, the claim remained an estate asset a decade later and could only be pursued by the chapter 7 trustee. Summary judgment dismissing the complaint was therefore appropriate.

Powers v. Chadwell Homes of Ala., LLC (In re Powers), 860 Fed. Appx. 159 (11th Cir. July 13, 2021) (per curiam) (Martin, Branch, and Anderson, JJ.).

Code § Rule: § 1301(c)(2)

Held: Co-debtor stay relief was appropriate where the debtor's property secured a claim owed by the non-filing co-debtor, which claim was not provided for in the debtor's plan, and with the correct procedures under § 1301 having been followed.

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

Facts: Chadwell Homes moved for co-debtor stay relief under § 1301(c)(2). Stay relief as to the pro se debtor under § 362 had previously been granted and affirmed on appeal. The bankruptcy court granted the motion under § 1302 because the chapter 13 plan did not provide for payment on Chadwell's claim. The district court affirmed, as did the Eleventh Circuit. The debtor and her non-filing spouse argued that Chadwell was not a creditor because the debtor had discharged her personal liability on the mortgage obligation in an earlier chapter 7 case. The district court explained that because Chadwell held an unpaid mortgage against the debtor's property, Chadwell remained a creditor in the debtor's case regardless of the discharge of the debtor's personal liability for the debt. The bankruptcy court was correct in granting co-debtor stay relief: Chadwell was a creditor and was even scheduled as such, the plan did not propose to pay the debt owed by the husband and secured by the debtor's property, and proper procedures were followed. Chadwell was a creditor regardless of any non-bankruptcy dispute over the validity of the mortgage and debt owed by the husband. The bankruptcy court's order simply lifted the co-debtor stay so that Chadwell could begin foreclosure if it were entitled to do so; it did not determine the appropriateness of any such foreclosure.

Storick v. CFG, LLC (In re Storick), 2021 WL 3615358, Case No. 21-10563 (11th Cir. Aug. 16, 2021) (per curiam) (William Pryor, C.J.; Newsom and Anderson, JJ.).

Code § / Rule: laches, equitable estoppel in context of dischargeability

Held: Summary judgment was appropriate in favor of the creditor in an AP filed by the debtor seeking a dischargeability determination when the debtor had consented to entry of an order in his prior case, although not within an adversary proceeding, which order provided the debt was not dischargeable in the current or future cases and the elements of equitable estoppel were satisfied, including that the debtor never, despite ample opportunity, contested that order in the year of litigation leading up to his second bankruptcy petition coupled with the creditor's reasonable reliance on the debtor's agreement in the first case.

History: Eleventh Circuit affirmed the District Court for the Southern District of Florida on *de novo* review of summary judgment; the District Court had also affirmed the Bankruptcy Court for the Southern District of Florida.

Facts: In his second bankruptcy case, Storick filed an AP seeking a ruling that his debt to CFG was dischargeable. In his prior bankruptcy case, the debtor and CFG entered a consent agreement, which provided that the debt (based on default on a loan owed by both the debtor and his company) was nondischargeable "in [the prior case] or any future bankruptcy case in which Storick is a debtor." The agreement also allowed CFG to have the judgment finalized in state court in

Delaware where suit had been pending but final judgment not yet entered when the debtor filed bankruptcy. The bankruptcy court's order incorporated and approved the consent agreement and lifted the stay for CFG to proceed thereunder. The debtor received his discharge soon thereafter.

In state court in Delaware following discharge, judgment was entered with no appearance by the debtor despite having ample opportunity to do so, and the debtor's employer began garnishing the debtor's million-dollar salary. The debtor then asked the state court to vacate the judgment and the writ of attachment supporting the garnishment. At the same time, the debtor filed a parallel action in Florida district court, arguing his wages should be exempt from garnishment and that the confessed judgment should not be allowed under Florida law. The district court dismissed that action as being duplicative of the Delaware proceeding, and in 2013, the Eleventh Circuit affirmed that dismissal while pointing out that the debtor had agreed to allow the confessed judgment for a debt he admitted he owed. The debtor continued to fight the garnishment in Delaware state court for years and having lost on all fronts in his attempts to vacate the writ of attachment, the debtor filed his second bankruptcy petition, as well as the AP at issue in this 2021 opinion.

In his AP, the debtor argued that the debt was dischargeable because the consent agreement and order approving it were not done within an adversary proceeding. CFG moved to dismiss on grounds of laches, equitable estoppel, and res judicata. The bankruptcy court treated the motion to dismiss as a motion for summary judgment and granted it in favor of CFG on all issues raised by the debtor. The district court then affirmed on laches and equitable estoppel grounds, the debtor having had numerous opportunities during the ten-year course of dealings to challenge the order approving the consent agreement but having never done so, and finding CFG reasonably relied on the debtor's assent to judgment. The Eleventh Circuit also affirmed on de novo review on the ground of equitable estoppel. The debtor did not give more than passing reference to that alternate ground in his appeal and did not dispute that: (1) he consented to the nondischargeability, (2) he consented to the confession of judgment, (3) he did not raise these issues at all during litigation in Delaware and Florida, and (4) CFG had reasonably relied on his agreement to its detriment. Therefore, the Eleventh Circuit affirmed the District Court's ruling on equitable estoppel grounds.

TitleMax of Ala., Inc. v. Womack (In re Womack), 2021 WL 3856036, Case No. 21-11476 (11th Cir. Aug. 30, 2021) (per curiam) (William Pryor, C.J.; Jill Pryor and Branch, JJ.).

Code § / Rule: title pawn; § 1322(b)(2); § 541(a)(1)

Held: The estate owned the vehicle, not just the right to redeem the vehicle, because the pawn contract had not matured and the debtor still held the full legal title and possessory rights to the vehicle when the case was filed. This meant the title pawn could be treated as a secured debt and modified under § 1322(b)(2) despite the contract maturing during the case. It would not "drop out" of the estate.

History: Eleventh Circuit affirmed the District Court for the Middle District of Alabama (Judge Watkins), which had affirmed the Bankruptcy Court for the Middle District of Alabama (Judge Sawyer).

Facts: The issue was whether a chapter 13 case filed before the contract maturity date (and thus before a default) on a title loan under the Alabama Pawnshop Act, Ala. Code § 5-19A-1, et seq., could modify the rights of the pawn shop in the chapter 13 plan as a secured claim and essentially prevent the vehicle from dropping out of the estate under *In re Northington*, 876 F.3d 1302 (11th Cir. 2017). The bankruptcy court ruled that the estate owned the vehicle, not just the right to redeem the vehicle, because the pawn contract had not matured, and the debtor still held the full legal title and possessory rights to the vehicle when the case was filed. This meant the title pawn could be treated as a secured debt and modified under § 1322(b)(2) despite the contract maturing during the case (in other words, the vehicle would not drop out of the estate once the maturity date and redemption period ran postpetition).

The district court affirmed, determining that because the case was filed before the pawn matured, the full legal ownership became estate property, describing the estate in *Northington* as owning only the conditional possessory right and the statutory right to redeem. The Eleventh Circuit panel agreed in this unpublished decision and said, "[The debtor's] fixed interest in her vehicle is distinguishable from the contingent interest that the debtor had in *Northington*." The debtor in *Northington* did not file bankruptcy until after the contract had matured and thus the panel in the instant case found that "the property of the debtor's estate consisted only of a right to redeem his pawned vehicle." This rationale then formed the basis for the panel's reasoning that *Northington's* dynamic-estate logic would not apply to this vehicle because the case was filed before the contract matured. Instead, the full ownership of the vehicle, subject only to Titlemax's rights as a secured lienholder, was estate property and the automatic stay prevented that ownership situation from changing when the contract maturity date expired postpetition (dynamism under state law not applying because the petition was filed before the pawn contract matured).

As bankruptcy courts continuing to wrestle with the issues have noted, the panel here perhaps began its analysis with an interesting reading of *Northington*. *See, e.g., TitleMax of Ga., Inc. v. Hamilton (In re Hamilton)*, 635 B.R. 877 (Bankr. S.D. Ga. Jan. 13, 2022); *TitleMax of Ga.,Inc. v. Snyder (In re Snyder)*, 635 B.R. 901 (Bankr. S.D. Ga. Jan. 13, 2022). Those cases make the point that contrary to the rationale of the instant panel, the *Northington* panel in its published opinion stated unequivocally that *both* the vehicle itself and the redemptive right entered the estate. *See Northington*, 876 F.3d at 1309-10. Further complicating matters, the *Northington* panel rejected the argument that the bankruptcy petition resulted in a "freezing" of the asset's status under state law, which argument was embraced by the instant panel in *Womack.* In essence, the instant panel concluded that the estate's ownership interest was fixed because the contract had not yet matured, with no analysis or explanation as to why that would be different solely because of the maturity date relative to the petition date, when the *Northington* panel rejected the freezing argument and held that the clock under state law continued to tick and the dynamism of state law acting on the pawned asset followed that asset into bankruptcy. *Northington*, 867 F.3d at 1313-14. This area is far from settled, particularly insofar as statutory differences in Alabama and Georgia law may affect the applicability of *Northington* in Alabama in the first place. *See TitleMax of Ala., Inc. v. Hambright (In re Hambright)*, 635 B.R. 614 (Bankr. N.D. Ala. Feb. 4, 2022) (Judge Henderson's thorough discussion of the issue under Alabama law; opinion by Judge Maze in Case 7:21-cv-1602-CLM issued on Apr. 15, 2022 in consolidated appeal of *Hambright* and nine other cases granting the motion to certify direct appeal to the Eleventh Circuit and encouraging the circuit to

certify to the state supreme court the following: "When an owner pawns his car's title but keeps the car, then fails to make his loan payments, does the pawnbroker own (a) the title and the vehicle or (b) the title but not the vehicle?")

NLG, LLC v. Horizon Hospitality Grp., LLC (In re Hazan), 10 F.4th 1244, Case No. 19-14049 (11th Cir. Sept. 1, 2021) (William Pryor, C.J.; Jordan and Marcus, JJ.) (opinion by Marcus, J.).

Code § / Rule: *Rooker-Feldman*; equitable mootness

Held: The *Rooker-Feldman* doctrine does not apply to deprive the federal court (the bankruptcy court here) of jurisdiction when the parties are not the same in both the state and federal cases, even when the different parties could be considered in privity with the original parties.

History: Eleventh Circuit affirmed the District Court for the Southern District of Florida, which had dismissed the appeal on equitable mootness grounds. Equitable mootness was a proper remedy under the facts of the case with no stay of the confirmation order, a transfer of property having taken place, and third parties having relied on the plan's proposed treatment in casting their votes in the plan's favor.

Facts: Litigation between the debtor and NLG, LLC regarding a purchase-money mortgage that NLG held from the sale of a residential home to Hazan had been ongoing for years across two states and no fewer than six judges. To summarize the litigation, different judges had entered orders that: (1) awarded NLG judgment on the note against Hazan for approximately $1.6 million; (2) refused to allow foreclosure on the ground that NLG had made an election of remedies in pursuing only a judgment on the note in the first order; (3) assigned NLG's judgment on the note against Hazan to a company owned by Hazan's husband in partial satisfaction of a judgment in excess of $5 million against NLG, originally held by a Quebec entity and then sold to Hazan's husband's company; and (4) reversed the order that had disallowed NLG's right to foreclosure, instead allowing foreclosure and establishing the foreclosure judgment amount at $4.8 million. Hazan filed bankruptcy on the eve of the foreclosure sale.

Hazan and the company owned by her husband then filed multiple adversary proceedings against NLG objecting to its proof of claim and seeking a determination that NLG no longer held any interest in the property. The bankruptcy court agreed with the debtor, finding the husband's company had applied the judgment it acquired, in the amount of $4.8 million to match the foreclosure judgment, to essentially redeem the property from the mortgage on Hazan's behalf, extinguishing all rights of NLG to the property and satisfying the note and mortgage. NLG appealed (with that appeal being dismissed eventually for no standing, because the receiver appointed for NLG had not authorized the appeal). While the appeal of the first order was pending, Hazan confirmed a plan that did not treat NLG as a secured creditor while dealing with several other creditors with secured claims against the property. The disclosure statement provided that the equity in the property potentially could support a future refinance that could be used to fund the plan. NLG did not object to confirmation, nor did it seek a stay pending appeal as part of the confirmation process, despite the bankruptcy court's warning that it risked its anticipated appeal

of the confirmation order being mooted if it did nothing and the confirmed plan were consummated.

A couple of months post confirmation, NLG moved the bankruptcy court to stay the case until the appeal of the confirmation order was filed, but the bankruptcy court denied the motion to stay. On appeal of the confirmation order to the district court, NLG argued that the *Rooker-Feldman* doctrine barred the bankruptcy court from considering the issues. The district court disagreed and found that the *Rooker-Feldman* doctrine did not apply because the husband's company was not a party to the foreclosure action in state court, and then dismissed NLG's claims as equitably moot based on: (1) the failure to obtain a stay and the delay in seeking a stay pending appeal despite warnings to that effect; (2) the substantial consummation of the plan had already occurred; and (3) altering the confirmed plan at that point would adversely affect the other secured creditors who voted for and accepted the plan based on NLG's not having a secured claim. NLG again appealed.

The Eleventh Circuit affirmed on both grounds. The *Rooker-Feldman* doctrine does not apply to deprive the federal court (the bankruptcy court here) of jurisdiction when the parties are not the same in both the state and federal cases, even when the different parties could be considered in privity with the original parties. The husband's company did not take any action that would allow it to be considered a de facto party under Florida law. Additionally, the APs were not seeking to overturn the state court foreclosure judgment but were asking for a determination of rights and interests resulting from the foreclosure judgment. Issue preclusion was also not applicable to the relief sought in the APs, although unlike the *Rooker-Feldman* doctrine, issue preclusion can apply when the current parties are in privity with the original parties, because the husband's company here was not actually in privity with the debtor.

On the equitable mootness argument, the panel reiterated that "the equitable mootness doctrine provides that reviewing courts will, under certain circumstances, reject bankruptcy appeals if rulings have gone into effect and would be extremely burdensome, especially to non-parties, to undo." 10 F.4th at 1252 (quoting *Bennett v. Jefferson Cty*., 899 F.3d 1240, 1247 (11th Cir. 2018)). Equitable mootness is an equitable and prudential doctrine and does not really involve "mootness" at all. The doctrine has been applied in the chapter 13 context as well as chapter 11.

"The facts will weigh in favor of finding equitable mootness when allowing an appeal to go forward will impinge upon actions taken to one's detriment in good faith reliance on a final and unstayed judgment." *Id.* (quoting *Bennett,* 899 F.3d at 1248). The factors to consider for invocation of the equitable mootness remedy include: (1) whether the appellant obtained a stay pending appeal; (2) whether substantial consummation of the plan has occurred; and (3) whether third-party rights or the debtor's ability to reorganize would be harmed in granting the appellant relief. The court found that not only did NLG not obtain a stay, NLG was unreasonable in its delay in seeking a stay, especially in light of the warning it received from the bankruptcy court that mootness could follow confirmation. Substantial consummation, as defined in § 1101(2), had taken place even though no property had been transferred by deed or sale, due to the revesting of estate property in the debtor at confirmation – a transfer of property per se, and a warning that substantial consummation may be closer to confirmation than perhaps imagined in some cases. Distributions had also commenced under the plan, regardless of the dispute as to what amount had actually been distributed. Third parties had relied on the equity cushion (which would be destroyed if NLG's

claim were allowed) and should not be deprived of the benefit that formed part of the bargain that was confirmation.

Eldridge v. TitleMax of Ala., Inc., 2021 WL 4129368, Case No. 21-11457 (11th Cir. Sept. 10, 2021) (per curiam) (Jill Pryor, Branch, and Brasher, JJ.).

Code § / Rule: title pawn (case filed after redemption period expired)

Held: A title pawn transaction entered into after the expiration of the time to redeem the preceding title pawn transaction is still a title pawn transaction; the pawn company may voluntarily waive or release its ownership rights in favor of the debtor under Alabama law even after the 60-day period.

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

Facts: The debtor pawned his car title and renewed it several times over a series of approximately 4 years. The transactions were typical title pawns: 30 days to maturity, and then 30 more days to either (1) redeem by paying the principal and interest owing along with an additional pawnshop charge, or (2) enter into a new pawn ticket. "The upshot [of the title pawn transactions was] that, if [the debtor] did nothing for 60 days, the car's title and, with it, the car would become TitleMax's property." Opinion at *1. Some of the renewals took place after the 60-day window had already expired. A little over a month after the last 60-day period expired, the debtor filed chapter 13. In his plan, the debtor treated the car as estate property and the pawn as a secured claim. The debtor argued that when the redemption period ran for the first time without his either redeeming or renewing it within the 60 days, the car became TitleMax's property as a matter of law, and it was then sold to the debtor as part of a secured transaction when the first post-redemption-period pawn ticket was created. TitleMax objected to confirmation and filed a motion for an order that the car was exempt from the automatic stay because it belonged to TitleMax rather than the debtor following the most recent pawn transaction, when it was neither redeemed nor renewed within 60 days of the most recent pawn transaction, which 60-day period expired before the petition date. The bankruptcy court, as well as the district court and Eleventh Circuit panel, agreed with TitleMax. The transactions entered into after the preceding redemption periods expired remained pawn transactions by their express terms (standard pawn agreements, no personal obligation to pay, for fixed 30-day period followed by 30-day redemption period, and TitleMax retaining possession of the certificate of title throughout—all "key attributes of a pawn transaction"). Opinion at *3. TitleMax had the right to waive its ownership interest as part of the pawn transactions after the redemption period expired, and nothing in Alabama law forbade that. Judge Callaway's opinion below was published at 615 B.R. 657 (Bankr. S.D. Ala. 2020).

Ford v. Waage (In re Ford), 2021 WL 4129376, Case No. 20-13977 (11th Cir. Sept. 10, 2021) (per curiam) (Newsom, Brasher, and Anderson, JJ.).

Code § / Rule: § 1307 dismissal for cause

Held: The bankruptcy court was within its discretion in dismissing a case that had been lingering without confirmation resulting in undue delay and prejudice to creditors.

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

Facts: The pro se chapter 13 debtor was a veteran bankruptcy attorney, well-versed in bankruptcy law and procedure. He objected to a claim filed by the Florida Department of Revenue for unpaid domestic support obligations. The bankruptcy court deferred a final ruling on the amount of credit the debtor was due and told the debtor to return to the state court to determine the final amount of the credit, giving the debtor time to return to state court for a ruling on the issue. The debtor did not return to state court for a ruling, and in the meantime, filed an amended plan that was unconfirmable on its face because it called for the bankruptcy court to make the determination of the credit due, which the bankruptcy court already said it would not do. The bankruptcy court entered an order that gave the debtor a deadline to file an amended plan that was confirmable, or the trustee could submit an order dismissing the case. Instead, the debtor filed a late plan with the same defects. After the case had been pending for almost three years without the debtor having liquidated his DSO credit in state court, the bankruptcy court dismissed the case without prejudice, as it had warned it would do in its prior order, based on the debtor's delay and resulting prejudice to creditors. It appears that no motion to dismiss had been filed by any party. The debtor moved for reconsideration of the dismissal, which the Department of Revenue opposed. The Department of Revenue also then filed a motion to dismiss, as insurance in the event the bankruptcy court were to grant reconsideration or vacate its dismissal order. Ultimately, the bankruptcy court denied the debtor's motion to reconsider and refused to vacate its dismissal order. The debtor then appealed and tried unsuccessfully to secure the recusal of the district court judge. The district court affirmed, as did the Eleventh Circuit.

On appeal, the circuit court did not afford the pro se debtor the usual leeway, such as liberal construction for his pleadings, because of the debtor's expertise in bankruptcy. In his brief on appeal, the debtor only addressed the issue of the district court's affirming the bankruptcy court's dismissal order and all other claims of error were abandoned and waived. On the merits of the dismissal order and the bankruptcy court's refusal to reconsider its ruling, the debtor could not prevail. "We have made clear that a bankruptcy court cannot 'fix a debtor's personal liability for child-support [or alimony] through rulings on a claim objection or confirmation of a chapter 13 plan.'" Opinion at *2 (quoting *Fla. Dep't of Rev. v. Diaz (In re Diaz)*, 647 F.3d 1073, 1092 n.16 (11th Cir. 2011)). Accordingly, the bankruptcy court's requirement that the debtor return to the state court to liquidate the amount of the credit due was appropriate. Further, it was not error to dismiss the case for the debtor's failure to timely propose a plan that met the bankruptcy court's requirements under § 1307 as "cause." "Cause" under these facts could have been found independently in: (1) the failure to meet the bankruptcy court's deadline to get the liquidated figure included in an amended plan; (2) the inclusion of a provision in the late-filed amended plan that still required the bankruptcy court, rather than the state court, to liquidate the credit owed on the DSO; and (3) the motion to dismiss filed by the Department of Revenue, which would have been due to be granted under § 1307(c)(1) even if the case had been reinstated and reconsideration of the court's sua sponte dismissal granted. "The plain language of Section 1307(c) empowers

bankruptcy judges to dismiss when, as the bankruptcy court put it, debtors 'languish in chapter 13 by filing unconfirmable plans and thus hold [their] creditors at bay for years.'" Opinion at *3.

Cutuli v. Elie (In re Cutuli), 13 F.4th 1342, Case No. 20-14515 (11th Cir. Sept. 23, 2021) (Jill Pryor, Luck, and Marcus, JJ.) (opinion by Marcus, J.).

Code § / Rule: Fed. R. Bankr. P. 7004(f) and (g); Fed. R. Civ. P. 4(m), applicable per Fed. R. Bankr. P. 7004(a)(1)

Held: The bankruptcy court did not abuse its discretion in granting an extension of the deadline to effect proper service on the debtor and his attorney where the debtor and attorney had actual knowledge of the complaint and the delay in perfecting service was in part due to court rulings later reversed on appeal, with much importance placed on the fact that the statute of limitations would have barred the claim completely otherwise.

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

Facts: A chapter 7 debtor appealed the district court's order affirming the bankruptcy court's entry of a default judgment against him and in favor of his former business partner. The default judgment in the AP declared that a California judgment in excess of $14,800,000.00 resulting from a fraudulent transfer was nondischargeable in the chapter 7 case. The issue on appeal to the Eleventh Circuit was the district court's ruling that allowed an extension of the deadline to effect proper service on the debtor and his attorney under Fed. R. Bankr. P. 7004(f) and (g). The debtor's agreement with his chapter 7 attorney included a provision that excepted defense of adversary proceedings from the scope of services. The debtor was incarcerated at the time service of the AP summons and complaint to him was first attempted by mail, but personal service on the debtor in prison was then accomplished within the 90-day time allowed by Fed. R. Civ. P. 4(m), applicable per Fed. R. Bankr. P. 7004(a)(1), as well as within the shorter 28-day period allowed by local rule. The plaintiff moved for default and the bankruptcy attorney appeared and argued he had not been served as required by Fed. R. Bankr. P. 7004(g), so the plaintiff served the attorney, but with a stale summons.

The debtor's bankruptcy attorney then moved to dismiss based on insufficient service of process, arguing the stale summons served on the debtor's attorney resulted in insufficient service, and further arguing that insufficient service as to the attorney was a jurisdictional defect. In his motion to dismiss and at the hearing on that motion, the debtor's attorney stressed that he was making a limited appearance for the sole purpose of asserting insufficient service and insufficient process. The plaintiff countered that he had properly served the defendant-debtor so that jurisdiction was established regardless of the service issues with the debtor's attorney. The bankruptcy court denied the motion to dismiss, noting that the fee disclosure of record excepted representation in adversary proceedings from the scope of services provided by the debtor's attorney and noting that the attorney had received a copy of the complaint in any event. The court ordered the debtor to file an answer, but the debtor failed to do so, and the plaintiff again moved for default. The debtor

appeared pro se at the hearing on the default application and indicated he didn't have the money to fight the case when the court asked if he had an attorney. The debtor said he did not object to the entry of default. The default was entered, and the court then granted the plaintiff a default judgment.

On appeal, the district court reversed the default judgment, finding that the service of a stale summons on the debtor's bankruptcy attorney was insufficient service of process, and resulted in the court's not having personal jurisdiction over the debtor in the AP, which meant it also lacked jurisdiction to enter the default judgment. The district court remanded for the bankruptcy court to determine whether it should extend the time under Rule 4(m) to effect service. The plaintiff appealed but the appeal was dismissed due to the order not being final, because of the discretion yet to be exercised by the bankruptcy court on remand.

With the matter now firmly in the bankruptcy court's purview, the plaintiff filed a motion to extend the time to perfect service of process. The bankruptcy court exercised its discretion and granted the motion on two different bases: (1) Rule 4(m) contains mandatory language saying the court "must extend the time" for service if the movant shows good cause; and (2) it would exercise its discretion to order a specified time to perfect under the rule even in the absence of good cause. The bankruptcy court found good cause in the first instance because it had entered the default judgment based on the debtor's statement that he would not be defending the lawsuit. Had it not done so, the plaintiff may have tried again to perfect service on the attorney. The court would not punish the plaintiff for his reliance on the court's ruling. On the second prong, the exercise of discretion to extend the time was warranted by the fact that the debtor had been served properly, that the debtor's statements at the default hearing were confusing at best and led the court to believe no defense would be made, and by the fee disclosures that supported the court's belief that the attorney was not appearing in the AP. Additionally, denying the extra time would result in a final adjudication because the complaints bar date under Fed. R. Bankr. P. 4007(c) had already run in the meantime. The bankruptcy court thus allowed twenty-one days for an alias summons to be served on both the debtor and his attorney, which the plaintiff accomplished. Again, the debtor did not file an answer, and again the bankruptcy court entered a default judgment.

The debtor then appealed the bankruptcy court's ruling that extended the time for service, and the district court affirmed. The district court found the extension was a proper exercise of the bankruptcy court's discretion, primarily because the bar date for complaints having run would have given the debtor a "windfall" in discharging a multi-million-dollar judgment that the debtor never intended or sought to defend despite having been properly served himself from the beginning, all because of a stale summons.

On appeal to the Eleventh Circuit, the abuse of discretion standard applied. While the bankruptcy court ultimately allowed a total of 845 days from the filing of the complaint to perfect service, that was not an abuse under the facts of this case. No authority sets an outer time limit under Rule 4(m), and the bankruptcy court's reasoning was sound. The plaintiff waited as long as he did in large part because he was relying on the bankruptcy court's ruling, which was later reversed. He moved quickly to secure an alias summons and serve it properly on both the debtor-defendant and the debtor's attorney after the district court reversed and the circuit court declined the interlocutory appeal. The debtor was aware of the claim the entire time, having been properly served initially,

and the debtor's attorney was also aware of the claim despite the summons having been stale. There was no prejudice because the debtor failed to defend both times he was faced with default judgment. Most importantly, the statute of limitations would have operated to bar the action entirely had the time not been extended. The Eleventh Circuit held that the imminent expiration of a statute of limitation is a sound reason to extend the time for service in *Horenkamp v. Van Winkle and Co., Inc.,* 402 F.3d 1129 (11th Cir. 2005). There was no clear error in the bankruptcy court's exercise of its discretion to extend the time to perfect service under these circumstances. The issue of whether good cause mandated the extension was thus moot.

Reynolds v. Servisfirst Bank (In re Stanford), 17 F.4th 116, Case No. 20-11652 (11th Cir. Nov. 1, 2021) (Jordan, Brasher, and Julie Carnes, JJ.) (opinion by Brasher, J.; concurrence by Jordan, J.).

Code § / Rule: statutory mootness under § 363(m)

Held: Appeal of an order authorizing sale of estate property is statutorily mooted when the sale to a good faith purchaser is completed prior to the appeal being decided, even if the sale should not have been authorized.

History: Eleventh Circuit affirmed the District Court for the Northern District of Alabama (Judge Axon), which had dismissed as moot an appeal from the Bankruptcy Court for the Northern District of Alabama (Judge Mitchell).

Facts: A married couple filed chapter 11, as did the printing company they owned. Before filing bankruptcy, the couple and the company each had loans with Servisfirst. The couple's debt was approximately $5 million and the company's debt approximately $7.2 million. The couple's debt was guaranteed by the company, and vice versa. The couple's obligations to the bank were also secured by a lien against their real property. After the couple and the company each filed bankruptcy, the company sought and gained bankruptcy approval for DIP financing of up to $13.2 million, which included a roll up of the existing obligations that the company either owed or guaranteed, as well as an additional $1 million in working capital. The bank was given a super-priority claim in the company's case, a secured position on all unencumbered property of the company (both pre-and post-petition property), took junior liens on all property under § 364(c)(3), and provided that the couple would guarantee the roll-up loan to the company and would give a lien on their real property as collateral. While negotiating the roll up, none of the parties believed the DIP loan would have any effect on the bank's then-existing lien against the couple's real estate. Soon after the roll-up DIP loan to the company, the couple asked the bankruptcy court in their case to approve the sale of the real estate collateral to the bank in exchange for $3.5 million, outside the normal course of business under § 363(b). Following a hearing, the bankruptcy court approved the motion and entered an order approving the sale via credit bid to the bank, finding the bank was a good faith purchaser with the highest and best offer exceeding the property's liquidation value.

After the sale order was entered, the couple filed a motion to amend the sale order seeking to require cash instead of a credit bid, and for the first time raised the possibility that the roll-up DIP

loan in the company's case had effectively "paid off" the couple's then-existing debt (their personal loans and their guaranty) to the bank, so that the lien against their real property had been satisfied. In effect, the couple's position was that the DIP loan to the company created an administrative claim in the company's case but fully satisfied the prepetition debts owing by both the couple and the company. No personal debt to secure meant no lien against their real property. No lien against their real property meant that the bank could not credit bid to purchase their real property but instead had to pay in cash. The bankruptcy court denied the motion to amend. First, it found that the company still owed its $7.2 million debt, and further that the company was now a co-obligor with the couple (rather than a guarantor) of the couple's $5 million debt, because the roll up had the effect of making the company a co-obligor, rather than a mere guarantor, on all the couple's debt to the bank. The bankruptcy court concluded the roll-up DIP financing had no effect on the bank's lien against the couple's real property. Additionally, the bankruptcy court concluded that the couple were equitably and judicially estopped from arguing against the law of the case, which law of the case established that the credit bid was valid. The couple and their attorneys had attended every hearing on their own motion to sell and had repeatedly indicated that the lien survived the roll up and that a credit bid at the sale would be appropriate.

The couple appealed the sale order and the order denying their motion to amend. The bankruptcy court conditioned a stay pending appeal on the posting of a $1.5 million bond, which the couple failed to post. At some point during the appeal process, the couple delivered a deed to the bank, which deed was recorded. The bank then moved to dismiss the appeal as moot under § 363(m), and the district court agreed. Section 363(m) provides, "[t]he reversal or modification on appeal of an authorization …of a sale … of property does not affect the validity of a sale … under such authorization to an entity that purchased … such property in good faith … unless such authorization and such sale … were stayed pending appeal." The completion of the sale in the absence of a stay meant the district court had no authority to "grant effective relief" and the appeal was moot.

Taking the issue to the Eleventh Circuit, the couple argued that only sales properly authorized under the code—not just every sale authorized by the bankruptcy court—fit the § 363(m) requirement of "an authorization under subsection (b) or (c) of this section." They further argued that the credit bid was invalid and provided no value, and thus the sale was not proper under the code. The Eleventh Circuit panel rejected that argument but split in its reasoning. Judge Brasher and Judge Julie Carnes disagreed with the argument that only sales properly authorized were protected under the § 363(m) standard. The language instead protected any sale authorized under that section by the bankruptcy court, even if the bankruptcy court did not act properly in allowing the sale. To the contrary, § 363(m) "states a flat rule governing all appeals of section 363 authorizations." 17 F.4th at 123 (quoting *In re The Charter Co.,* 829 F.2d 1054, 1056 (11th Cir. 1987)). And because the couple did not challenge the mechanism of credit bids in general—only the propriety of a credit bid under these circumstances—the panel majority found *In re Saybrook Manufacturing Co., Inc.,* 963 F.2d 1490 (11th Cir. 1992) inapplicable. *Saybrook* is traditionally characterized as prohibiting the cross-collateralization of under-secured prepetition debt with additional collateral as part of a new postpetition loan. The creditor in *Saybrook* challenged the concept of allowing such cross-collateralization at all under § 364, not just the propriety of allowing it in that particular case. Here, by contrast, the couple did not challenge the propriety of credit bids generally, but only as applied in this case. The panel majority also found no error in the

bankruptcy court's finding that the bank acted in good faith. The dilemma for the couple was that they took the position that the bank was a good faith purchaser when they filed the sale motion. The bank's bid was sufficient to support the bankruptcy court's finding of good faith in any event (although an unusually low credit bid may be relevant to the good faith inquiry if it indicates fraud or collusion). Having decided the appeal was the type covered by § 363(m), the panel majority then found that the effect of § 363(m) on the facts of this case mooted the appeal. The credit bid was approved as the consideration for the sale, which was consummated. Changing the sale mechanism from a credit bid to a cash requirement would amount to changing the validity of the sale itself, which cannot be done under § 363(m).

Judge Jordan joined the opinion in large part, but-for the analysis that distinguished the precedents of *Saybrook* (§ 363(m) does not bar an appeal if the issue is whether the Code allows the *type* of financing that was utilized) and *The Charter Company* (§ 363(m) does bar an appeal if the issue is whether the *particular* sale transaction—not the type in general-- was appropriate). Although this was not the case for doing so, those precedents seemed to Judge Jordan to be more difficult to distinguish than the panel majority indicated. As to that aspect of the opinion (which found the appeal was aimed at the particular credit bid and not at the overall mechanism of credit bids in general), Judge Jordan only concurred in the judgment, but agreed that the couple invited the error they then sought to appeal (by filing a motion for sale allowing the bank to credit bid, which credit bid they were attacking on appeal). Judge Jordan also wrote separately to express concern that roll ups may be problematic as DIP financing arrangements that functionally violate the rule of *Saybrook*, which prohibits the shoring up of under-secured pre-petition debt by securing it with both pre- and post-petition collateral as part of a post-petition DIP financing, as being "directly contrary to the fundamental priority scheme of the Bankruptcy Code." *Saybrook*, 963 F.2d at 1495. Roll ups have become an increasingly common mechanism to circumvent *Saybrook*'s crosscollateralization prohibition while functionally accomplishing the prohibited end. He ended by pointing out that the Supreme Court, albeit in dicta, recently noted that roll ups may be acceptable even if they violate the Code's priority scheme for distributions where the roll up nonetheless serves a "Code-related objective[]." *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 977 (2017). "All of this is to say that the type of debtor-in-possession financing loan approved in this case is due for serious substantive review." 17 F.4th at 128 (Jordan, J., concurring in the judgment).

Practitioners who encounter § 363 sales in chapter 11 plans may be interested in a recent Seventh Circuit decision that places the burden on the purchaser to ensure that known holders of interests in the property received written notice of the proposed free and clear sale before the buyer can satisfy the "good faith" standard, at least under the facts of that case. In *Archer-Daniels Midland Co. v. Country Visions Coop.,* ---F.4th---, 2022 WL 998984 (7th Cir. Apr. 4, 2022), the holder of a right of first refusal was not scheduled or given actual notice of the free-and-clear sale of the property. The purchaser had title work showing the right of first refusal and knew the holder of the right had not received actual written notice of the sale motion. In determining whether § 363(m) protected the sale from being challenged years later, the first issue was not whether the debtor acted in good faith (it clearly did not) nor whether the interest holder received constructive notice sufficient to satisfy due process (it very well may have); the first issue was whether the *buyer* satisfied the statutory requirement of "good faith." The purchaser had title work prior to the sale showing the right of first refusal, which was of record, and thus had both actual and constructive

knowledge of the interest. The purchaser also knew the interest holder had not received actual notice of the sale free and clear. The purchaser was not acting in "good faith" because it could have brought the issue to the bankruptcy court's attention and received assurances that the sale would be free and clear of the known-but-not-notified-in-writing interest holder but chose not to do so, even if the holder of the interest arguably had constructive notice of the sale provision. A state court suit by the holder of the right of first refusal seeking damages from the purchaser (who had since sold the property to a third party) for disregarding the right of first refusal was allowed to proceed.

Markland v. Davis (In re Centro Group, LLC), 2021 WL 5158001, Case No. 21-11364 (11th Cir. Nov. 5, 2021) (per curiam) (Wilson, Jordan, and Branch, JJ.).

Code § / Rule: non-debtor release, bar order under *Munford* or under *Seaside*

Held: *Munford* factors applied because the issue was whether the bar order was integral to the settlement agreement; *Seaside* factors would apply if the issue were whether the bar order was "necessary for the reorganized entity to succeed."

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

Facts: Two payroll companies (Centro and ProHCM) merged, with Centro then becoming the operating entity as a wholly owned subsidiary of ProHCM. Soon after the merger, a whistleblower alleged that one of the companies (Centro) had misappropriated its clients' funds, particularly by taking money from client escrow accounts for payroll taxes, leading to over $1.7 million in tax liability for those clients, not including penalties and interest. Centro's CEO at the time of the alleged scheme, as well as several of Centro's former directors, were implicated. The CEO of Centro was replaced by the CEO of ProHCM immediately prior to the companies each filing chapter 11, about six months after the merger.

The companies in bankruptcy reached an agreement with the unsecured creditors' committee to allocate assets and liabilities between them, which agreement the bankruptcy court approved. The companies then investigated certain claims against third parties (including the Centro officers and directors implicated in the misappropriation). Those third-party claims were then settled among the third parties, the creditors' committee, and the companies. The settlement included a bar order that released the third parties from any claims directly or indirectly related to the companies' bankruptcies. The former CEO of ProHCM, who also was the largest holder of preferred shares of ProHCM, objected to the bar order on grounds that it would prevent him from pursuing his claims against the third parties.

The bankruptcy court overruled that objection and approved the settlement, including the bar order. The bankruptcy court analyzed the settlement and bar order under the principles set forth in *In re Munford*, 97 F.3d 449 (11th Cir. 1996). The shareholder appealed to the district court, on grounds that the bankruptcy court should have instead applied the analysis from *In re Seaside Eng'g &*

Surveying, Inc., 780 F.3d 1070 (11th Cir. 2015). The district court affirmed, and the shareholder appealed to the circuit court, which also affirmed.

Notably, the issue on appeal did not include whether the bankruptcy court correctly applied the factors under *Munford*; the issue was whether the *Munford* or the *Seaside* factors should have been utilized in assessing the bar order. *Munford* held that bankruptcy courts can "enter bar orders where such orders are integral to settlement in an adversary proceeding." 97 F.3d at 455. Factors to examine pursuant to *Munford* in determining whether a bar order is fair and equitable include: "(1) the interrelatedness of the claims that the bar order precludes; (2) the likelihood of the non-settling defendants to prevail on the barred claim; (3) the complexity of the litigation; and (4) [ ] the likelihood of depletion of the resources of the settling defendants." Opinion at *2 (quoting *Munford*, 97 F.3d at 455). The bar order in *Munford* was "integral" because without it, at least one of the settling parties would not have agreed to the settlement.

Seaside was decided two decades later and involved a bar order as part of a chapter 11 plan of reorganization, where the company was continuing operations post-confirmation albeit under a new name. The bar order in the chapter 11 plan in *Seaside* barred suits against the company and its officers for claims "related to or arising out of the bankruptcy." Opinion at *3 (citing *Seaside*, 780 F.3d at 1075). A creditor in *Seaside* had appealed the bankruptcy court's approval of the bar order. The district court affirmed and the Eleventh Circuit affirmed. The Eleventh Circuit distinguished the bar order in *Seaside* from that in *Munford*. In *Munford*, the bar order was integral to the settlement agreement; in *Seaside*, the bar order was "necessary for the reorganized entity to succeed." Opinion at *3. As opposed to the settlement context in *Munford*, the Eleventh Circuit in *Seaside* instead adopted the seven-point test from *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002) to assess bar orders in plans of reorganization:

> We hold that when the following seven factors are present, the bankruptcy court may enjoin a non-consenting creditor's claims against a non-debtor: (1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full and; (7) The bankruptcy court made a record of specific factual findings that support its conclusions.

280 F.3d at 658.

"The *Munford* factors apply to bar orders assessed in the settlement context. Such a bar order is appropriate where the parties would not have entered into a settlement agreement without it, and thus it is "integral" to the settlement. The *Seaside* factors apply to bar orders that are specifically

within the reorganization context . . . to assess unusual cases in which such an order is necessary for the success of the reorganization." Opinion at *3 (internal quotation omitted). The instant case was more like *Munford* than *Seaside*. The bar order was integral to a settlement and was not proposed as part of the reorganization effort of either company (neither company was attempting to reorganize or continue its business). The purpose of the bar order was to facilitate settlement, not to ensure the success of a reorganized entity. Therefore, the application of *Munford* was not an abuse of discretion. The court did not consider whether the bankruptcy court properly applied *Munford* to the facts, because that issue was not preserved on appeal.

Jackson v. Le Centre on Fourth, LLC (In re Le Centre on Fourth, LLC), 17 F.4th 1326, Case No. 20-12785 (11th Cir. Nov. 15, 2021) (Jordan, Jill Pryor, and Tjoflat, JJ.) (opinion by Jill Pryor, J.).

Code § / Rule: third-party releases; due process; Rule 2002; § 523

Held: Actual receipt of the plan and disclosure statement satisfied due process. The confirmation order release provision barred creditors from proceeding nominally against the non-debtor third party in order to reach its insurer.

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

Facts: Mr. Jackson was a paraplegic hotel guest, who dropped off his car (with hand controls) for valet parking and had to enter the street in his wheelchair to access the hotel because the wheelchair ramp was blocked by another vehicle. While Mr. Jackson was making his way down the street in his wheelchair to reach the hotel entrance, the Embassy Suites valet driver lost control of Jackson's car and hit Jackson from behind, seriously injuring him. Jackson and his wife sued the driver and valet company in state court in Kentucky. Le Centre on Fourth was the company that owned the hotel property and had filed a chapter 11 case prior to the state court suit. The transactions among Le Centre and the related defendants involved a master lease, a management agreement, and a sub-management agreement, each of which contained indemnification clauses. Mr. Jackson (not Mrs. Jackson) asked the bankruptcy court to lift the stay to allow him to add Le Centre as a defendant in the state court suit, and limited relief was granted to Mr. Jackson for the purpose of pursuing any liability insurance. Mr. Jackson also waived any claim against the estate as part of that relief. The Jacksons then amended the complaint in state court to include Le Centre, the master tenant entity (which was owned by a U.S. Bank subsidiary), and the sub-management entity (which they later found out did not actually have insurance covering the incident) as defendants.

Le Centre amended its schedules to add the Jacksons' attorney as a notice recipient and filed and served a chapter 11 disclosure statement and plan. The disclosure statement recited in all capital letters that it contained important information for soliciting acceptances and that the disclosure statement and plan should be read in their entirety before voting. The disclosure statement included a discussion of releases and provided that failure to vote would result in the creditor being bound by the release language from asserting claims against the "Released Parties," which term

was not defined in the disclosure statement. The plan was amended several times, and the third amended plan filed on the day of the confirmation hearing added U.S. Bank and its subsidiaries to the definitions of "Released Parties." The Jacksons' attorney was served with the plan and disclosure statement, but not with the specific notice of the release as required by Rule 2002(c)(3) and certainly not within the 28 days required by that rule for objections to the plan, at least as to the third amended plan, which was filed on the same day as the confirmation hearing. The third amended plan contained an expanded definition of "Released Parties" to specifically include US Bank and its subsidiaries, but without naming the specific subsidiary that was the master tenant, and was not received by the Jacksons or their attorney prior to confirmation.

The bankruptcy court confirmed the third amended plan and approved the third-party releases as integral to the reorganization of Le Centre, finding that a failure to approve the releases would mean the plan couldn't be confirmed by consent. The confirmation order included a permanent injunction barring the continuation or filing of any claim by anyone in any manner in respect of a released claim. Following confirmation, without objection by the Jacksons, the debtor and related entities moved in the Kentucky case for dismissal based on the confirmed plan's release language. The Jacksons sought an order from the bankruptcy court that would allow them to continue their case against the debtor and the related entities nominally, with any recovery to come from the entities' insurers, which insurers were not "Released Parties" and the bankruptcy court refused.

The Jacksons also argued that they did not receive notice of the plan sufficient to satisfy due process because they never received notice as required by Rule 2002, although their attorney indisputably received copies of the plan and disclosure statement as well as notices of the hearing on the disclosure statement (although not in time to object to confirmation of the third amended version). The attorneys admitted they had not read the plan and disclosure statement, relying on the premise that a Rule 2002 notice was necessary under the facts of the case. The district court agreed that it was sufficient due process that the Jacksons' attorney received copies of the disclosure statement, plan, and hearing notices. Rule 2002 did not require a separate notice. Further, the district court agreed that the bankruptcy court was within its discretion in reading the plan releases and confirmation order as prohibiting even the nominal claims against the non-debtor released parties, because such nominal claims against the master tenant or the sub-management entity could trigger direct indemnification claims against the debtor entity.

The Eleventh Circuit agreed. The Jacksons admitted they received actual notice of the releases in the disclosure statement and plan. The circuit court described the requirements of Rule 2002(c)(3) as "procedural" requirements, the violation of which could not support a violation of due process under the guidance of *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010) (failure to initiate adversary proceeding as required by Bankruptcy Rules for discharge of student loans was not a deprivation of due process rights and plan calling for discharge of those loans was binding where the rule requirements were merely procedural, the creditor had actual notice of the plan, and the creditor failed to object to the violation of the procedural requirements before the bankruptcy court confirmed the plan despite having opportunity to do so). Here, the Jacksons had actual notice of the plan and failed to object to the releases under Rule 2002. The fact that the Jacksons had released their claims against the estate did not justify the failure to read the disclosure statement and plan because it is well-settled law that a plan can contain release provisions that may protect third parties from future claims. The circuit court notes that the expanded definition of "Released

Parties" in the third amended plan was not received by the Jacksons prior to confirmation, so they did not have actual knowledge of that amendment prior to confirmation, but that issue was not briefed on appeal and was therefore waived, as was the issue of whether the description of U.S. Bank and its subsidiaries provided sufficient notice that the master tenant was included, even if notice of that expanded definition of "Released Parties" had been received. Those two issues could have either made the difference in the outcome or given the circuit a platform to expand the application of *Espinosa*, had they been at issue in the appeal.

On the merits of the injunction and bar of nominal claims against the Released Parties, the circuit court reiterated that in the Eleventh Circuit, § 105(a) has been interpreted as endowing the bankruptcy court with the ability to release non-debtor third parties. *SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying, Inc. (In re Seaside Eng'g & Surveying, Inc.)*, 780 F.3d 1070, 1076-79 (11th Cir. 2015). Although § 524(e) provides that the discharge does not affect the liability of another entity on the discharged debt, the circuit court applied its recent analysis in *SuVicMon Dev., Inc. v. Morrison*, 992 F.3d 1213, 1219 (11th Cir. 2021). Under the *SuVicMon* analysis, two conditions must be met to allow a party to nominally pursue a discharged debtor (as here extended to reaching a released *non-debtor* third party): (1) the presence of the debtor (released party) as a party to the suit must be a legal prerequisite to recovery against the third party; and (2) there must be a sufficient certainty that the suit will not financially burden the debtor so as to interfere with the fresh start. Kentucky law did require the presence of the master tenant to pursue recovery against the insurer, there being no direct-action provision in the state, so the first prong was met. As to the second prong, the circuit found the bankruptcy court did not abuse its discretion in determining that the nominal claims against the master tenant could burden the debtor, because of the possibility that the master tenant would seek indemnification from the debtor for any recovery against it as well as for attorney fees and costs incurred in defense. Although the policy covered those costs, the policy did have a limit.

Zalloum v. River Oaks Comm. Servs. Ass'n, Inc. (In re Zalloum), 2021 WL 5112272, Case No. 20-11483 (11th Cir. Nov. 3, 2021) (per curiam) (Jordan, Rosenbaum, and Grant, JJ.).

Code § / Rule: notice of appeal and filing fee; Rule 8003

Held: Bankruptcy court erred as a matter of law in treating the partial summary judgment order "as final and independently appealable" because it did not resolve all claims and was not certified under Rule 54(b); dismissal of appeal as untimely by the bankruptcy court was also vacated and the issues remanded as no rationale for the ruling was discernable on the record or in the ruling itself.

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

Facts: Zalloum filed chapter 13 and soon thereafter filed an adversary proceeding against a homeowner's association and related entities. The bankruptcy court disposed of most but not all issues by granting partial summary judgment in favor of all but one remaining defendant. Zalloum

appealed the grant of partial summary judgment and paid the filing fee for the notice of appeal. A few months later, the bankruptcy court resolved the remaining claims in the adversary proceeding by issuing an opinion and judgment in the adversary proceeding and entering a series of three orders in the main case aimed at the last remaining defendant in conformity with the opinion and final judgment in the AP (granting stay relief, allowing the defendant's claim, and dismissing the case with a bar on refiling). Zalloum then filed an amended notice of appeal, without paying an additional filing fee, designating the partial summary judgment ruling from the first notice of appeal, and also adding the adversary proceeding opinion and judgment as well as the three related orders in the main case as matters being appealed to the district court. The bankruptcy court issued an order that required Zalloum to file separate notices of appeal and pay separate filing fees for each order. The bankruptcy court struck the amended notice of appeal as to the partial summary judgment, which it found was already covered by the first notice of appeal filed. The court then treated the amended notice of appeal as covering the opinion and judgment in the AP, but not the three other orders, and required that a fee be paid for its filing. When the fee was not paid and the new notices were not filed, the bankruptcy court dismissed those appeals. The district court affirmed. The Eleventh Circuit vacated and remanded.

In discussing the standard of review (factual findings for clear error and legal conclusions as well as jurisdictional issues de novo), the circuit court pointed out that lower courts should explain the basis for their rulings sufficiently to allow meaningful review and that the appeals court will vacate and remand when it cannot determine the basis for the ruling below from the record or from the ruling itself. That introductory reminder was a clear indication of where the opinion was headed. The circuit court found that the bankruptcy court erred as a matter of law in treating the partial summary judgment order "as final and independently appealable" because it did not resolve all claims and was not certified under Rule 54(b). Consequently, an appeal of the final judgment in the adversary proceeding would have included the partial summary judgment ruling as a prior non-final order. The fact that Zalloum did not wait to file one single appeal after the final order was entered may make a difference, but it was wrong of the bankruptcy court to rule that Zalloum was *required* to file two different notices of appeal and pay two different filing fees to appeal both the non-final partial summary judgment order and the final judgment. The bankruptcy court's ruling dismissing the adversary proceeding opinion and judgment appeal for failure to pay what would have been a second filing fee was vacated, as was the district court's order affirming, and that issue was remanded.

As to the three orders in the main bankruptcy case, the circuit court could not determine on what basis the bankruptcy court deemed the notice of appeal as untimely, especially given that Rule 8003(a)(2) vests the district court—not the bankruptcy court--with the authority to dismiss an appeal as untimely. It also defied logic and efficiency for the bankruptcy court, without citing any authority, to require a pro se party to file, pay for, and prosecute separate appeals for each order when the issues were "legally and factually intertwined." It may well be that separate fees are required at least for an appeal of the orders entered in the main case as opposed to in the adversary proceeding, but the matter should be considered and explained on remand considering the circuit court's concerns.

State Farm Fla. Ins. Co. v. Carapella (In re Gaime), 17 F.4th 1349, Case No. 20-12240 (11th Cir. Nov. 16, 2021) (Newsom, Branch, and Lagoa, JJ.) (opinion by Newsom, J.).

Code § / Rule: § 362(a) as applied to the debtor's insurance company seeking to intervene

Held: It was no abuse of discretion to refuse to lift the automatic stay to allow an insurance company to intervene on behalf of the debtor where the intervention would result in the continuation of the state court action.

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

Facts: The automatic stay issue in this case arose after a series of insurance defense litigation decisions that culminated in a bad faith suit. The facts underlying the claim against the debtor that gave rise to the insurance defense decisions are profoundly tragic. In 1999, a mother (Gaime) placed herself and her two young sons, whom she had drugged, inside a car with the engine running in an enclosed garage. One of the boys died; Gaime and the other child survived. Gaime was convicted of second-degree murder and incarcerated until sometime in 2016. At the time of the murder, she had insurance on her home and car with State Farm. In 2001, the deceased child's estate, the surviving child, and the boys' father sued Gaime for wrongful death and bodily injury in Florida state court. Gaime tendered her defense to State Farm and State Farm appointed an attorney (Reynolds) to defend her while seeking a declaration, via separate action against Gaime and the wrongful death plaintiffs, that the policies did not cover the events at issue and that it had no duty to defend or indemnify Gaime.

While that coverage dec action was pending, the state court reserved ruling on Gaime's motion to dismiss the wrongful death suit. The plaintiffs discussed a possible settlement with attorney Reynolds. The plaintiffs maintained that Gaime wanted to accept the offer and avoid subsequent liability but that State Farm through Reynolds dissuaded settlement and the offer was refused. Thereafter, State Farm won a declaration that the policies did not cover the incident and that it had no duty to defend Gaime, and Reynolds withdrew from defending Gaime in the wrongful death action. The wrongful death plaintiffs then filed their fifth amended complaint, which was untimely but went unanswered (Gaime still being in prison at the time, and unrepresented). The state court entered default judgment against Gaime on liability and damages were tried to the jury, which ultimately returned a verdict against Gaime in the approximate amount of $505 million.

The plaintiffs subsequently filed in involuntary chapter 7 case against Gaime, which Gaime did not answer, and the bankruptcy court entered the order for relief and appointed Carapella as trustee. The bankruptcy estate's only asset was a claim against State Farm for bad faith rejection of the settlement offer and malpractice, which Carapella pursued by filing suit on behalf of the bankruptcy estate against State Farm in state court in Florida. State Farm responded by seeking to intervene in the wrongful death action post-judgment, in hopes of vacating the default judgment on grounds that the last amended complaint was untimely, and ultimately in hopes that vacating the default judgment against Gaime would obviate the bad-faith claim against State Farm. But the bankruptcy filing prevented State Farm's intervention in state court—the bankruptcy court would

first have to lift the stay to allow the motion to intervene to be filed and pursued. And the bankruptcy court refused to lift the stay on State Farm's motion, which decision the district court affirmed.

On appeal to the circuit court, State Farm argued that the automatic stay did not apply to its motion to intervene and that if it did apply, its application was a violation of due process, along with procedural errors it claimed the bankruptcy court committed. The Eleventh Circuit affirmed the lower courts. First, the statutory issue was whether the motion to intervene was a "continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under [title 11]." 11 U.S.C. § 362(a)(1). The wrongful death action was an action against the debtor, commenced prepetition, that would be "continued" (even though State Farm argued it would be continued for the debtor's benefit) because the motion to intervene would be a docket matter that required an order. It did not matter that the continuation of the prepetition action against the debtor was being sought in aid of the debtor rather than in opposition to the debtor's interests; what mattered was that the underlying action being continued was an action against the debtor. In the absence of stay relief, State Farm could do nothing, including filing the motion to intervene, that would amount to continuing the wrongful death action no matter whose side State Farm was taking.

Due process was satisfied here because State Farm had opportunity to be heard and made litigation decisions on at least two such opportunities: first when it filed the dec action seeking a determination of no coverage for the plaintiffs' claims; and second when it advised Gaime to reject the settlement offer while the dec action was pending but undecided. State Farm then ended its defense of Gaime after refusing the settlement offer, based on its victory in the coverage dec action, which decision to end its defense amounted to an assumption of the risk of having to later defend a bad-faith suit. It was no deprivation of due process to refuse to allow State Farm to unwind its decisions when the risk it chose proved to be unwise. State Farm also had opportunity to present its argument about the untimely amended complaint as part of its defense in the bad faith suit.

Finally, while it was error for the bankruptcy court to place the burden on State Farm as movant to prove cause rather than requiring the party opposing the motion (the trustee) to prove the absence of cause under § 362(g)(1), the error was harmless because the trustee showed there was indeed no cause to lift the stay. The totality of the circumstances, considering the benefits and burdens of lifting the stay, supported the bankruptcy court's decision. Insurance defense counsel beware, even if you want to "help" the debtor, any action that "continues" a prepetition suit is prohibited in the absence of stay relief, and stay relief is not assured, especially if the totality of the circumstances shows the movant made strategic decisions that resulted in missed opportunities before the bankruptcy was filed.

U.S. Trustee v. Bast Amron, LLP (In re Mosaic Mgmt. Grp., Inc.), 22 F.4th 1291, Case No. 20-12547 (11th Cir. Jan. 14, 2022) (Jordan, Brasher, and Anderson, JJ.) (opinion by Anderson, J.).

Code § / Rule: Constitution's Bankruptcy Clause; fee schedule application in UST jurisdictions compared to BA jurisdictions

Held: "To summarize, we hold that the 2017 Amendment properly applied in this case because Congress clearly expressed its intent to this effect. We also hold that the 2017 Amendment does not violate substantive due process and is not a tax . . .. Finally, we hold that the 2017 Amendment presents no violation of the Bankruptcy Uniformity Clause."

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

Facts: Mosaic and two related entities were in the business of selling interests in life insurance policies (purchased from insured individuals) to investors. The three companies filed chapter 11 in 2008 in Florida, which is a United States Trustee ("UST") jurisdiction (as opposed to Alabama and North Carolina, which operate under the Bankruptcy Administrator ("BA") system). The UST is part of the administrative branch while the BA system is part of the judicial branch. The three companies confirmed a joint chapter 11 plan in 2017, which transferred the debtors' assets to an investment trust, and which required the payment of quarterly fees post-confirmation as calculated based on disbursements from the investment trust. A few months after confirmation, the fee schedule for large chapter 11 cases was increased by Congress to shore up the UST System Fund that was suffering due to declining filings and to fund a temporary bankruptcy judgeship in a BA district. The increase in quarterly fees was to be triggered if the balance of the UST System Fund was below certain levels and became effective in October 2017, leading to the fee increase applying in UST jurisdictions beginning with the quarter starting January 1, 2018 and continuing through 2022. Contrary to what had historically been the immediate implementation of fee increases in BA jurisdictions to match UST jurisdictions, this particular increase was not immediately applied by the Judicial Conference in the BA jurisdictions (eventually it was implemented for cases filed on or after October 1, 2018). So, for about 9 months, quarterly fees for the largest chapter 11 cases were significantly higher in UST jurisdictions than in BA jurisdictions.

The investment trust paid the increased fee amount for all of 2018 and 2019, which meant it paid $125,816.69 more than it would have under the fee schedule prior to the 2017 amendment (a 350% increase). The trustee appointed for the investment trust under the plan filed a motion for determination of quarterly fee liability in Sept. 2019. The trustee argued that the increase should only apply to cases filed or confirmed after the effective date of the amendment and that the amendment violated the constitutional tax and bankruptcy uniform law requirements as it was applied differently in BA and UST jurisdictions.

The bankruptcy court held that the amendment was uniform as required by the Bankruptcy Clause except as to 2% of the fee. The purpose of eliminating a shortfall and building a reserve in the UST Fund was appropriately tied to an increase in the fee schedule in UST districts. But 2% of the fees went into the general treasury to fund a temporary judgeship in a BA district. The bankruptcy court ordered the UST to credit the trustee with 2% of the fees paid since January 2018. Otherwise, the application of the fee schedule increase was approved as uniform and as not violating due process in its prospective application to disbursements made during quarters beginning after its effective date no matter when the case was filed or confirmed. The parties sought and were granted direct appeal to the Eleventh Circuit. The parties were substituted after the appeal was filed, as the

investment trust transferred its interest in the litigation to Bast Amron and a new UST was appointed for Region 21.

The circuit court panel described the issues on appeal as: (1) whether the fee increase legislation was properly applied to the case that was pending and confirmed prior to its enactment; (2) whether the fee increase violated substantive Due Process under the Fifth Amendment; (3) whether the fee increase was a valid exercise of the power to collect taxes and the requirement that such taxes be uniform under the U.S. Constitution Art. I, § 8, Cl. 1; and whether the fee increase was a valid exercise of the power to establish uniform bankruptcy laws under the U.S. Constitution, Art. I, § 8, Cl. 4. The review of these purely legal issues was de novo.

First, the circuit court panel found that the fee increase was properly applied to cases that were pending and confirmed prior to its enactment. While the statute did not expressly state that it would apply retroactively to pending cases, it did expressly state that its "temporal reach" would begin with quarterly fees payable for disbursements made during quarters that began after the law's enactment, which enactment was October 26, 2017. This meant that the fee schedule amendment would apply to disbursements made starting with the quarter beginning January 1, 2018. Congress did not limit the application based on when the case was filed or confirmed but instead showed clear intent that the amendment would apply based on when disbursements were made. The court rejected negative inference arguments based on chapter 12 and found no plausible reason to distinguish this from the 2007 fee increase that was immediately applied to disbursements under pending and confirmed cases without controversy, using similar language. Similarly, the panel considered that the 2020 fee amendment's language expressly applying the 2020 amendment to pending cases did not support a negative inference that the 2017 amendment therefore must not have been intended to apply to pending cases when the 2017 amendment's language set a clear trigger. The express inclusion of "pending cases" language in the 2020 amendment instead was an attempt to avoid disputes as several lower courts had misinterpreted the 2017 amendment as not applying to pending cases. Because Congress made its temporal intent clear, the analysis ended there.

Second, the circuit panel found no substantive due process violation. No vested rights were impaired by any irrational legislative act without notice. Bankruptcy legislation such as the fee increase was properly analyzed under rational basis review, which asks whether "any set of facts may be reasonably conceived to justify legislation." 22 F.4th at 1304 (quoting *United States v. Ibarguen-Mosquera*, 634 F.3d 1370, 1382 (11th Cir. 2011). Increasing fees for four years in large chapter 11 cases to shore up the UST System Fund and pay for a temporary judgeship in a BA district was a rational means of achieving a legitimate goal.

Third, the quarterly fees are not subject to the uniform taxation requirement of the Constitution because they are merely user fees, not taxes. The fees are paid by users of the bankruptcy trustee systems to help fund the operational costs of those systems as a "fair approximation of each beneficiary's share of the cost." 22 F.4th at 1305 (internal quotation omitted). The fee calculation for the largest cases at 1% with a $250,000 cap met the "fair approximation" standard. On this point, that the quarterly fees are user fees and not taxes, the panel agreed with *In re Buffets, L.L.C.*, 979 F.3d 366 (5th Cir. 2020); and *In re Circuit City Stores, Inc.*, 996 F.3d 156 (4th Cir. 2021), *cert. granted sub nom., Siegel. v. Fitzgerald,* No. 21-441, 142 S. Ct. 752 (U.S. Jan. 10, 2022).

Finally, the fee increase legislation was a law concerning bankruptcy because it touched on the subject of a debtor's relief relative to its creditors by limiting the funds available to pay creditors and obtain bankruptcy relief. The fee increase was therefore subject to the Constitution's uniformity requirement, and it met the uniformity requirement. In this analysis, the panel was quick to recognize that its ruling did not address whether the dual operation of the BA jurisdictions distinct from the UST jurisdictions creates a constitutional uniformity problem. The circuit panel rejected the UST's argument that the quarterly fee law was analogous to statutes authorizing bankruptcy appellate panels and local rules, which are then utilized differently among the circuits. The fee provision has a direct effect on the debtor-creditor relationship by limiting the funds available and therefore must be uniform. Uniformity within bankruptcy laws is not a rigid concept, but one of inherent flexibility, and has historically been read as prohibiting laws that amount to private bankruptcy bills. *See Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457 (1982). The law must "apply uniformly to a defined class of debtors." 22 F.4th at 1309 (quoting *Gibbons*, 455 U.S. at 473). The fee increase legislation made no distinction between UST and BA jurisdictions and applied to debtors in all jurisdictions whose disbursements fit its parameters (not just to debtors in UST jurisdictions), while the vehicle of the implementation of the uniform law did differ between the two. "[T]he decisions to use two different statutory provisions to establish quarterly fees for every district in the country comes well within the flexible range of permissible bankruptcy legislation." 22 F.4th at 1310.

The panel supported its decision with the history of the 2000 amendment of 28 U.S.C. § 1930(a) to add paragraph (7) which (as it existed in 2017) allowed, but did not require, the Judicial Conference to impose quarterly fees in BA jurisdictions equal to those charged in UST jurisdictions. The 2000 amendment was done in response to the Ninth Circuit's decision in *St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525 (9th Cir. 1994), amended, 46 F.3d 969 (9th Cir. 1995) (finding the extension of the provision allowing the BA districts to exist without the BA districts collecting quarterly fees to be unconstitutionally non-uniform). The 2000 amendment also made the BA system permanent in Alabama and North Carolina. Quarterly fee increases have been applied across both systems immediately and without a uniformity issue in the case law until 2017, and nothing in the legislative history indicated that Congress could have intended a different result (i.e., a non-uniform application) or reasonably anticipated the Judicial Conference's unprecedented nine-month delay in implementing the 2017 fee increase in BA districts (the difference being that the increase in 2017 was huge compared to prior increases which encouraged litigation). By way of contrast with state exemption laws, where the disparity in treatment depending upon location is both permanent and anticipated by Congress, the disparity in the timing of the application of the fee increase by the Judicial Conference was unexpected and was addressed by Congress in the 2020 amendment to 28 U.S.C. § 1930(a)(7) to make the language mandatory rather than permissive—the Judicial Conference now *shall* require BA debtors to pay equal fees. If the uniformity requirement of the Bankruptcy Clause is flexible enough to tolerate a permanent disparity in exemptions, it is flexible enough to tolerate an unanticipated nine-month disparity in quarterly fees that has since been addressed. The analysis had nothing to do with the geographic location of the debtors, and the panel rejected its sister circuits' analyses, which seem to assume that addressing a geographically isolated problem was the only rationale that would support a finding of uniformity as a matter of law. "We reject that conclusion as inconsistent with the inherent flexibility of the uniformity requirement, and with the well-established Supreme Court

case law holding that the disparity resulting from the varying state law exemptions does not violate the flexible Bankruptcy Uniformity Clause." 22 F.4th 1324 n.32.

"To summarize, we hold that the 2017 Amendment properly applied in this case because Congress clearly expressed its intent to this effect. We also hold that the 2017 Amendment does not violate substantive due process and is not a tax . . .. Finally, we hold that the 2017 Amendment presents no violation of the Bankruptcy Uniformity Clause." The bankruptcy court was affirmed in all respects except as to its ruling that the 2% fee allocation for the BA district judgeship was a partial nonuniformity violation—that ruling was reversed, and the cases remanded.

Judge Jordan joined the full opinion and wrote a separate concurrence to add that if the dual UST-BA systems are constitutionally uniform, then there would be no reason why the fees to cure the UST shortfall couldn't be increased in UST jurisdictions only without offending the uniformity requirement as well. Judge Brasher concurred with the analysis and result in all parts of the opinion except for the analysis of whether the 2017 Amendment violated the Bankruptcy Uniformity Clause. He agreed with the result but not the analysis. Instead, Judge Brasher believed the disparity in fees for nine months amounted to unconstitutional lack of uniformity as did the Tenth and Second Circuits. *See In re John Q. Hammons Fall 2006, LLC*, 15 F.4th 1011, 1022-25 (10th Cir. 2021); and *In re Clinton Nurseries, Inc.*, 998 F.3d 56, 64-70 (2d Cir. 2021). Judge Brasher, however, believed the requested remedy of refunding the overpayment was wrong and therefore concurred in the result only as to that portion. The correct remedy was to force the Judicial Conference to collect the proper fee from debtors in Alabama and North Carolina, had the Judicial Conference been made a party to the case, which it had not been in the instant case. "Ultimately, the Supreme Court will resolve this issue." 22 F.4th at 1330 (Brasher, J., concurring in the result). In point of fact, the Supreme Court heard oral argument on April 18, 2022, related to the appeal of the Fourth Circuit's *Circuit City* decision (*cert. granted sub nom., Siegel v. Fitzgerald,* No. 21-441, 1425 S. Ct. 752 (U.S. Jan. 10, 2022)).

5200 Enterprises Ltd. v. City of New York, 22 F.4th 970, Case No. 20-13753 (11th Cir. Jan. 5, 2022) (Jordan, Newsom, and Ed Carnes, JJ.) (opinion by Newsom, J.).

Code § / Rule: continuing trespass claim under NY law; property tax challenge § 505(a)(2)(C)

Held: Section 505(a)(2)(C) barred the bankruptcy court from revisiting the ad valorem tax assessments where the debtor had the right to contest the taxes under New York law but failed to do so within the time allowed prepetition; applying the amended code provision to a case filed after its enactment, when taxes for years prior to its enactment were at issue, did not give retroactive effect.

History: Eleventh Circuit affirmed the Bankruptcy Court for the Middle District of Florida on direct appeal; denied motion to certify.

Facts: The single asset real estate debtor (5200 Enterprises) owned real property in Brooklyn, NY, which had formerly been owned by the City of New York and occupied by a power plant that

was dismantled in the 1940s. During the dismantlement, the City placed the dismantled smokestack in the building's basement, on top of a mechanical system that was insulated with asbestos, and then covered the works with a concrete slab. The city sold the property to a third party who then sold the property to 5200 Enterprises in 1986. Within a year of 5200 Enterprises' purchase, the City negotiated to lease the property and discovered PCB contamination. That discovery led to the property being listed by the State of New York as a threat to public health or the environment, thus erasing the property's value. Years later, in 2015, the State was undertaking remediation and discovered the asbestos material under the smokestack where it had been buried for decades. The presence of asbestos required changes to the remediation plan and postponed the remediation indefinitely. Since taking ownership in 1986, 5200 Enterprises had received tax bills for the property based on its best intended use (commercial and industrial warehouse) rather than as a worthless piece of contaminated dirt. The taxes were not challenged and were not paid, resulting in tax liens against the property.

In 2018, 5200 Enterprises filed chapter 11 and sued the City in an AP claiming damages for continuous trespass and seeking a declaratory judgment that the City was responsible for the hazardous waste and resulting damages, as well as having improperly taxed the property at a best-use value when it was instead essentially worthless. The City filed a motion to dismiss saying the continuous trespass claim was not available under New York law, and that the claim would be barred by the statute of limitations even if it were available. The City also argued that the challenge to the tax assessments failed under § 505(a)(2)(C) because the time for challenge under New York law had already expired. The bankruptcy court agreed that the continuous trespass was not a valid claim under New York law and agreed that the tax challenge was also barred, and dismissed the AP. On direct appeal, the circuit court affirmed and refused to certify the trespass question to the New York state court. Instead, the circuit court affirmed the dismissal of the continuous trespass claim on the basis that it was barred by the statute of limitations applicable to all actions against a municipality, without having to reach the issue of whether New York law would support the debtor's legal theory, which was an open question.

The circuit court panel also agreed that § 505(a)(2)(C) barred the bankruptcy court from revisiting the ad valorem tax assessments. The debtor conceded that if § 505(a)(2)(C) applied it would be fatal to its tax challenge in the AP. The issue was whether § 505(a)(2)(C), which was added to the Code via BAPCPA in 2005, would have inappropriate retroactive effect if applied to taxes for periods prior to 2005. "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law." 22 F.4th at 976 (quoting *Landgraf v. USI Film Prods.,* 511 U.S. 244, 269 (1994)). A statute has retroactive effect only if "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id*. (quoting *Landgraf*, 511 U.S. at 280). Retroactive effect is determined based on the activity being regulated by the statute. Section 505(a)(2)(C) regulates bankruptcy cases, not state tax liabilities, and there was no dispute that the regulated activity—the debtor's bankruptcy case—took place after BAPCPA's effective date. The debtor had the right to contest the taxes under state law but failed to do so within the time allowed under New York law, and § 505(a)(2)(C) merely served to prevent the re-assertion in bankruptcy of that expired right. Judge Newsom concurred in the analysis and result, but wrote separately to address the continuous trespass issue, which he believed was a failed theory under New York law, primarily because there was no "entry

onto the land of another"—the contamination occurred while the City owned and possessed the property.

Valley Nat'l Bank v. Warren (In re Westport Holdings Tampa, Ltd. P'ship), 2022 WL 964962, Case No. 21-11767 (11th Cir. Mar. 3, 2022) (per curiam) (Jill Pryor, Branch, and Black, JJ.).

Code § / Rule: litigation funding agreement; Article III standing, "person aggrieved" standing

Held: The bank did not have Article III standing to appeal the approval of a litigation funding agreement, having only a hypothetical injury; and did not have "person aggrieved" standing as its interest in avoiding litigation was not an interest protected by the Bankruptcy Code (and having to litigate would only be an indirect harm at best).

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

Facts: The debtor entities filed jointly administered chapter 11 cases. The debtors owned and operated retirement, long-term care, and skilled nursing care facilities, some of which were operated by a debtor entity but owned by a non-debtor third party. Valley Bank was a creditor of the non-debtor third party that owned some of the facilities operated by the debtor entities, but the bank was not a creditor of either debtor. The bankruptcy court confirmed a joint plan of liquidation following mediation. All assets became the property of a liquidating trust, and the liquidating trustee was authorized to settle, sell, or otherwise dispose of all causes of action. The liquidating trustee struck a deal with Tampa Life for the purchase of all the assets in the liquidating trust, which consent agreement was also joined by the Florida Office of Insurance Regulation. In the meantime, the liquidating trustee filed an AP against Valley Bank for aiding and abetting one of the debtors in its breach of fiduciary duty and for recovery of $3 million as a fraudulent transfer from the debtor's required liquid reserves. Soon thereafter, the liquidating trustee sought bankruptcy court authority to sell the trust's claims against Valley Bank to BRP Senior Housing Management, LLC. Valley Bank objected on the basis that the principal of BRP had an ongoing feud with Valley Bank and had threatened to purchase causes of action against the bank and pursue them if the bank did not concede on certain challenges against BRP that the bank had filed with the Office of Insurance Regulation. The BRP deal never closed and the trustee then asked the bankruptcy court to approve a litigation funding agreement between the liquidating trust and A/Z Property Partners, which also happened to be managed by the same principal as BRP. A/Z was to help close the sale to Tampa Life and pursue the claims against Valley Bank. The trustee remained in control of all decisions, and the bankruptcy court approved the funding agreement.

Valley Bank appealed the approval of the litigation funding agreement, claiming in part that the bank had Article III standing because it suffered an injury in fact by virtue of a third party being able to exert control, influence settlement, and extend the litigation as part of the principal's vendetta against the bank. The bank claimed to have "person aggrieved" standing because the improper control over the AP by the funding company, controlled by its acrimonious principal,

amounted to undue influence, and impaired the integrity and fairness of the AP. The bank had to concede at oral argument that none of the potential harms (settlements made and rejected, discovery or other abuse of process) had occurred but maintained that the principal's stated intent to litigate aggressively against the bank as punishment meant the trustee could not settle even if the trustee wanted to. Nothing much had happened in the AP at that point, however. The district court ruled that the bank did not have Article III standing because it did not allege a concrete injury in fact and the risk of such was speculative. The district court ruled that the bank did not have "person aggrieved" standing because the funding agreement did not directly harm the bank and the bank's interest was not one that the Bankruptcy Code protected. The Eleventh Circuit agreed in both respects.

For Article III standing, the injury in fact to a legally protected interest must be concrete and imminent, not merely hypothetical. The party must show that the injury is in immediate danger of occurring and substantially likely to occur. Opinion at *3 (citing *Corbett v. Transp. Sec. Admin.*, 930 F.3d 1225, 1232-33 (11th Cir. 2019)). The alleged injury had not come close to being realized and was a mere hypothetical possibility. For "person aggrieved" standing, the party must fit a tighter standard than that considered for Article III standing. The party "must have a direct and substantial interest in the question being appealed." Opinion at *4. This includes more than an interest in avoiding protracted litigation; it requires the party be "directly, adversely, and pecuniarily affected" by the bankruptcy ruling. *Id*. (quoting *In re Ernie Hare Ford, Inc.*, 764 F.3d 1321, 1325-26 (11th Cir. 2014)). Having to litigate is an indirect harm, and an interest in avoiding liability is not sufficient for "person aggrieved" standing and is not an interest protected by the Bankruptcy Code. The court did not reach the merits of the litigation funding agreement, having determined that the bank lacked standing to pursue the appeal.

United States Pipe & Foundry Co. v. Holland (In re United States Pipe & Foundry Co.), ---F.4th---, Case No. 20-13832 (11th Cir. May 3, 2022) (William Pryor, C.J.; Grant and Anderson, JJ.) (opinion by William Pryor, C.J.; Anderson concurring in part and dissenting in part).

Code § / Rule: "claim" under § 101(5)(A); retiree health benefits under the Coal Act, 26 U.S.C. §§ 9704(a); 9711(a); and 9712(d)(1), (3)

Held: "Because the companies' obligations to provide health-care benefits were fixed before the bankruptcy court confirmed the plan of reorganization, the Trustees' claims for future retiree benefits were discharged in 1995" even though the amount of the obligation was contingent upon Walter Energy failing to make the required payments and was not fixed at that time. The obligation was not a tax.

History: Eleventh Circuit reversed and remanded to the District Court for the Middle District of Florida, which had agreed with the Bankruptcy Court for the Middle District of Florida that the premium obligations were a nondischargeable tax.

Facts: In 1992, the three debtor companies in this appeal were "related persons" to Jim Walter Resources, Inc. (a "coal company" under the Coal Act) because they were all owned by the same

parent company, now known as Walter Energy, Inc. As related persons under the Coal Act, the debtor companies were contingently jointly and severally liable for all required retiree health benefit payments owed by Jim Walter Resources under the Coal Act, based on their status as of the Coal Act's effective date. No changes to the companies' businesses or relationships after that date would change the liability so established. The required payments included three obligations under the Coal Act: (1) the obligation to pay into a common benefit fund under pre-existing wage agreements; (2) the obligation to continue to provide health benefits directly to retired miners; and (3) premium payments to the 1992 United Mineworkers of America Benefit Plan established under the Coal Act to provide benefits to miners who were not receiving the benefits they were otherwise owed under the Act. In 1989, the Jim Walter companies, along with their parent and subsidiaries including the three debtor companies at issue in this appeal, filed bankruptcy. Several years later, in 1995, a consensual plan of reorganization was confirmed in the administratively consolidated cases.

The confirmed plan discharged all claims arising before the effective date unless provided for in the plan. Walter Energy assumed the obligation to fund the retiree health benefits and did so for a number of years post-confirmation. However, in 2015, Walter Energy, no longer associated with the debtor companies at issue in the instant appeal, again filed bankruptcy and in that case, the bankruptcy court (Judge Mitchell) ruled that Walter Energy's obligation to provide health benefits to the retirees, as well as the obligation to pay into either fund, were terminated. Within a couple of months following that ruling, the trustees of the benefit funds and plans at issue sued the debtor companies in district court to force them to pay the past-due premiums that were no longer being paid by Walter Energy and to establish and maintain an employer plan as required by the Coal Act. The debtor companies in turn filed complaints in bankruptcy court, arguing the 1995 discharge barred enforcement of the trustees' claims under the Coal Act that were being pursued in the district court action.

The bankruptcy court ruled that the premiums were a tax, without addressing the option for providing benefits directly to the retirees under the Coal Act, and the liability for that tax arose only when the premiums were assessed to the debtors (which was after Walter Energy stopped paying in April 2016). If the premiums were instead a contingent claim at the time of the plan confirmation in 1995, they would have been discharged. The district court agreed that the premium obligations were a tax, arising only when Walter Energy stopped paying. The district court also ruled that the obligation to provide benefits (as opposed to paying premiums to the common benefit funds) was not a "debt" but was instead an obligation giving rise to a debt and could not have been discharged.

In a lengthy opinion, the Eleventh Circuit disagreed with the lower courts and reversed and remanded. The obligation to pay premiums to the common benefit fund under the pre-existing wage agreement, the obligation to provide benefits directly to the retirees, and the obligation to pay premiums to the 1992 UMA benefit plan were all "claims" that were discharged at confirmation in the debtors' 1995 bankruptcy. The trustees held a "claim" for payments to the combined fund under the preexisting wage agreement when the discharge occurred in 1995 because the Coal Act liability of the debtor entities already existed at that time. The trustees' claim was an existing, fixed right to payment. This was true even though the amount of the claim was unliquidated and the obligation was at that time unmatured. The fact of the debtors' liability was

determined based solely on prepetition conduct, which conduct was being "related persons" to a coal company under the Coal Act as of its effective date in 1992, and that liability was inescapable (even though the amount of that contingent liability was unliquidated). Nothing could happen postpetition that would change the liability so established, per the Coal Act's provisions. The concept of a "claim" in bankruptcy is purposefully broad and includes causes of action that have not yet accrued and rights to payment that exist but are not enforceable. Opinion at *6 (citing *Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407, 1412 (2017)). Whether the premiums were properly classified as taxes did not change the analysis because even if the premiums were taxes, the debtors' liability for the payment of those taxes was based entirely on prepetition conduct, and thus the claim arose prepetition even if the premium obligations were in the nature of a tax.

Similarly, the obligation to provide benefits directly to retirees and to pay into the 1992 UMA fund if those benefits were not provided were also claims that were discharged in 1995. The concept of a "claim" is not just an existing liability as of the petition date; the concept also includes a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment" under § 105(5)(B):

> Like with the claim for Combined Fund premiums, the Trustees and the companies had the requisite relationship, and the companies' liability under section 9711 is based solely on the companies' pre-confirmation conduct and was fixed in 1992. . . . As we have explained, it is immaterial that in 1995 the claim was not yet enforceable or that the *amount* of the 1992 Plan premiums was uncertain. Both those facts are irrelevant in determining whether the Trustees held a pre-confirmation "claim" under the Bankruptcy Code.

Opinion at *7 (internal citations omitted). The majority criticized the dissent as conflating the existence of a liability with its enforceability and reiterated the Supreme Court's rationale in *Midland Funding* that the existence of a claim is a separate issue from that claim's enforceability. There is no requirement for a prepetition breach of the triggering contingency before a liability is considered a claim in bankruptcy. The right to specific performance (i.e., the right to force the debtors to provide health benefits directly to the retirees), which existed prior to the petition date in 1995, was a "claim" under § 105(5)(B) and was thus discharged at confirmation. The same was true of the debtor companies' obligations to pay premiums to the common benefit fund under the prior wage agreement as well as to the 1992 UMA benefit plan:

> In the light of our earlier conclusions, we have little trouble concluding that all claims against the companies held by the Trustees for 1992 Plan premiums existed and were discharged in 1995. Liability to the 1992 Plan, including liability to provide a security payment and pay prefunding premiums, was fixed before 1995. To be sure, the total amount that would be owed to the 1992 Plan was uncertain. But that uncertainty means only that the Trustees' claims were "unliquidated" and required estimation, not that those claims did not exist. *See* 11 U.S.C. § 101(5)(A). In so holding, we join the many courts that have treated future Combined Fund and 1992 Plan premiums as similarly dischargeable in bankruptcy.

Opinion at *9 (citation of supporting cases omitted). Judge Anderson concurred in part, agreeing that liability for the preexisting wage agreement common benefit fund was discharged, but dissenting as to the obligations to provide health coverage or pay into the 1992 UMA plan. Judge Anderson believed the obligation to provide coverage was not a claim at all, and that the obligation to pay into the 1992 UMA plan was a claim but did not arise until after the debtors' discharge, when Walter Energy stopped paying and thus triggered the debtors' obligation to fill the void in 2016.

Short and sweet (or perhaps brief and bitter, depending upon one's position) opinions of interest:

Gibbs v. Gibbs (In re Gibbs), 2021 WL 5098928, Case No. 21-10286 (11th Cir. Nov. 2, 2021) (per curiam) (William Pryor, C.J.; Jill Pryor and Branch, JJ.) (no opinion given on moot questions that are no longer live controversies of practical importance, where bankruptcy court abstained from exercising jurisdiction and the decision to abstain was not reviewable by the court of appeals; appeals court also could not review interlocutory bankruptcy court orders).

Liebman v. Ocwen Loan Servicing, LLC (In re Liebman), 2021 WL 5071845, Case No. 20-14872 (11th Cir. Nov. 2, 2021) (per curiam) (William Pryor, C.J.; Wilson and Anderson, JJ.) (*pro se* debtor denied relief from bankruptcy court's judgment and nunc pro tunc order where the law of the case from her first failed appeal controlled, and reading *Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano*, 140 S. Ct. 696 (2020) as standing for the "unremarkable conclusion that a state court lost jurisdiction to issue orders in an action that had been removed to federal court and was awaiting remand"; that proposition was not implicated here as the bankruptcy court's nunc pro tunc order reflected the reality of what had occurred at an earlier date by clarifying that the reinstatement of her case had not reimposed the automatic stay because she had not filed a confirmable plan within the time conditionally imposed by the bankruptcy court).

Galvin v. U.S. Bank Nat'l Assoc'n (In re Galvin), 2021 WL 5105819, Case No. 21-10411 (11th Cir. Nov. 3, 2021) (per curiam) (Jill Pryor, Newsom, and Branch, JJ.) (no error in disallowing 7th amended complaint where debtor and husband filed seven different bankruptcy cases in five years to avoid enforcement of existing state court judgment of foreclosure, filing an indecipherable shotgun-pleading AP challenging and seeking to overturn the state court judgment, which was expressly the type of action barred by the *Rooker-Feldman* doctrine; dismissal for lack of subject matter jurisdiction is necessarily without prejudice).

KK-PB Fin., LLC v. 160 Royal Palm, LLC (In re KK-PB Fin., LLC), 2021 WL 5605085, Case Nos. 20-12361 and 20-12368 (11th Cir. Nov. 30, 2021) (per curiam) (Jordan, Rosenbaum, and Newsom, JJ.); *pet. for cert. docketed, KK-PB Fin., LLC v. 160 Royal Palm, LLC*, --- U.S. ---, March 2, 2022 (appeal of confirmation order where no stay had been obtained was equitably moot because chapter 11 plan had been substantially consummated and involved millions of dollars in transactions and undoing the transactions would create problems for several others; and because

confirmation order was not appealable, request to modify the separate valuation of the movant's claim at zero was constitutionally moot as it would be impossible to grant effective relief as to valuation and distribution where the confirmation order could not be disturbed).

Thakkar v. GlassRatner Adv. & Capital Grp., LLC (In re Sugarloaf Centre, LLC), 2022 WL 663020, Case No. 21-12872 (11th Cir. Mar. 4, 2022) (per curiam) (Newsom, Branch, and Lagoa, JJ.) (an amended order by the district court that resolved no genuine ambiguity but changed only the division shown in the heading of the order and not its substance did not restart the appeal clock; and because the time for appeal was calculated based on the entry of the original order and not from service, no additional time was added under Fed. R. App. P. 4(a)(1) and the appeal was dismissed as untimely by one day).

Daymark Properties Realty, Inc. v. GCL, LLC (In re Daymark Realty Advisors, Inc.), 2022 WL 703963, Case No. 21-12766 (11th Cir. Mar. 9, 2022) (per curiam) (William Pryor, C.J.; Luck and Lagoa, JJ.) (an attorney is bound by an injunction under Fed. R. Civ. P. 65(d)(2)(B) to the same extent as a party, and the attorney was properly sanctioned by the bankruptcy court under § 105(a) by paying attorney fees incurred by the moving party and by the trustee, even though the trustee did not join the creditor's motion or file his own motion, related to the suit filed by the attorney in violation of the injunction as well as for the attorney fees related to the motion to enforce the injunction).