11TH CIRCUIT CASES UPDATE
June 2022 – May 2023

Hon. James J. Robinson
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.

Kenny v. Critical Intervention Servs., Inc. (In re Kenny), 2022 WL 2282843 (11th Cir. June 23, 2022) (William Pryor, C.J.; Rosenbaum; and Brasher, JJ.) (opinion by Brasher, J.).

Code § / Rule: settlement under § 105(a) and Rule 9019(a); *Justice Oaks* factors

Held: The bankruptcy court did not abuse its discretion when it approved a settlement agreement resolving a dispute in state court that became an estate asset without ruling on the merits of the underlying state-court action, and without ruling on the merits of a claim objection subsumed within the settlement agreement.

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: Prior to filing bankruptcy, the debtor had worked for a security company ("CIS") for less than a month before changing jobs to begin working with a competitor. The debtor had signed a noncompete with CIS that provided he would not work for a competitor for a period of two years following the end of his employment with CIS. When CIS notified the debtor's second employer of the noncompete and its alleged violation, the second company fired the debtor. The debtor sued CIS in state court asking for a declaration that the noncompete was unenforceable, seeking money damages for tortious interference (which were capped at $10,000 due to unemployment benefits offset), and seeking non-economic damages for emotional distress as well as punitives. CIS counterclaimed for breach of contract, asking for an injunction and liquidated damages. CIS also moved to disqualify the debtor's attorney. While the motion to disqualify was pending in the state court, the debtor filed his chapter 7 case.

The state-court claim against CIS was the main estate asset. CIS filed a proof of claim for approximately $300,000, to which the debtor objected saying nothing was owed and that CIS was not a creditor of the estate. The chapter 7 trustee settled the state-court claim against CIS before the debtor's claim objection was resolved. The settlement required CIS to pay $30,000 to the estate in exchange for dismissal with prejudice of the state-court action. CIS would be allowed a claim of slightly over $300,000 but would be subordinated to all other unsecured claims. One-third of any payment CIS received on account of its allowed claim would be assigned to the debtor, up to $10,000. In sum, all other unsecured creditors would be paid in full under the agreement and the debtor would receive up to $10,000 cash. The bankruptcy court approved the settlement under the four factors set out in *Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.)*, 898 F.2d 1544 (11th Cir. 1990) (probability of success on the merits, potential collection difficulties, complexity, and interest of the other creditors). In addition to approving the settlement, the bankruptcy court ruled that the settlement resolved the issues in the debtor's objection to CIS's claim and therefore overruled the objection. The debtor appealed and the district court affirmed, as did the Eleventh Circuit.

The bankruptcy court did not abuse its discretion in applying the *Justice Oaks* factors to the settlement. The debtor complained that the noncompete was patently unenforceable and argued that the bankruptcy court should have ruled on the merits of his state-law claims as part of the analysis. The Eleventh Circuit disagreed:

> In evaluating a settlement proposal, a bankruptcy court need not find facts, draw legal conclusions, or otherwise adjudicate the merits of underlying litigation. The nature of a settlement is that no court rules on the merits of the settled claims. Because the trustee's proposed settlement was well above the "lowest point in the range of reasonableness," the bankruptcy court did not abuse its discretion in approving it.

Opinion at *5 (citing *Justice Oaks*, 898 F.2d at 1549; and quoting *Martin v. Pahiakos (In re Martin)*, 490 F.3d 1272, 1275 (11th Cir. 2007)). Similarly, "nothing requires a bankruptcy court to rule on a proof of claim or an objection to a proof of claim before the claim can be settled." *Id.* (citing *Ga. Dep't of Rev. v. Mouzon Enters., Inc. (In re Mouzon Enters., Inc.)*, 610 F.3d 1329, 1334 (11th Cir. 2010)). To rule otherwise would defeat entirely the purpose of a settlement.

Auriga Polymers Inc. v. PMCM2, LLC, 40 F.4th 1273 (11th Cir. July 17, 2022) (Wilson, Lagoa, and Martinez, JJ.) (opinion by Lagoa, J.).

Code § / Rule: § 547(b) preference recovery and new value offset

Held: For purposes of the new value defense under § 547(c)(4)(B), "otherwise unavoidable transfers" means prepetition transfers, so that transfers made postpetition under § 503(b)(9) to pay for administrative expense claims do not affect a creditor's new value defense.

History: On direct appeal, the Eleventh Circuit reversed the Bankruptcy Court for the Northern District of Georgia.

Facts: Section 547(c)(4) provides the new value defense to a preference if the creditor "gave new value to or for the benefit of the debtor (A) not secured by an otherwise unavoidable security interest; and (B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor." This case presented a matter of first impression in the Eleventh Circuit: whether the value of prepetition goods that are accorded administrative expense priority under § 503(b)(9) as being received by the debtor within 20 days of the petition date and sold to the debtor in the ordinary course of the debtor's business can nonetheless support the creditor's new value defense to a preference action. The short answer is, "Yes." The Eleventh Circuit joined the Third Circuit in so holding. *See Friedman's Liquidating Trust v. Roth Staffing Companies LP (In re Friedman's Inc.)*, 738 F.3d 547 (3d Cir. 2013).

The scenario and arguments were interesting and unique. Auriga supplied polyester resins and polymers to the debtor carpet company (Beaulieu Group, LLC) prepetition. After confirmation, the liquidating trustee sued to recover approximately $2 million that the debtor had paid Auriga during the preference period. Auriga asserted as part of its new value defense the value of the goods it delivered within the § 503(b)(9) window, which amount was also entitled to administrative priority (approximately $421,000). The trustee, of course, argued that because the § 503(b)(9) value had been accorded administrative priority for repayment, it could not also function as part of the new value defense because the priority treatment should be considered "an otherwise unavoidable transfer" made by the debtor for the benefit of the creditor. The trustee sought to reclassify any portion of the § 503(b)(9) value that was included in the new value defense as a general unsecured rather than priority claim. The bankruptcy court agreed with the trustee and did not allow the new value defense to the extent of the § 503(b)(9) funds (which were held in a reserve fund and thus had been "transferred" although not yet paid to Auriga). The District Court stayed the case to allow for an immediate appeal to the Eleventh Circuit, which disagreed with the bankruptcy court's statutory interpretation.

The circuit panel said the word "transfer" should be interpreted within the context of the section in which it is used. In § 547(c)(4), that reading would necessarily mean "prepetition transfer" to give consistent meaning to that word within the same subsection despite the word "prepetition" not being expressly included. Also, the title of § 547 is "Preferences," which are, by definition, prepetition transfers, and which is consistent with the term's use in other parts of that section as referring exclusively to prepetition transfers. Finally, the statute of limitations runs from the petition date, which indicates the parameters of the new value defense are established as of the petition date—otherwise, if a postpetition allowance of an administrative claim could destroy the new value defense, preference calculations could change significantly depending upon when the complaint was filed relative to the payment of the administrative claim. For all those reasons, a § 503(b)(9) priority expense claim being paid postpetition (or as in this case, being accorded priority status and held in reserve for the creditor but not yet paid) is not "an otherwise unavoidable transfer" for purposes of the new value defense. The court did not agree with the trustee's description of the outcome as one allowing "double payment" because the new value defense is not a payment, and the creditor is not getting paid twice. The new value defense is instead a protection against disgorgement, while the § 503(b)(9) priority payment was only as to value for goods delivered but unpaid within the twenty-day window. In other words, the code allows both the new value defense against preference disgorgement for the value of goods delivered prepetition as well as administrative priority treatment postpetition for the creditor's claim (which will only be paid once) for the value of the same goods delivered within the twenty-day window.

Norcross Hospitality, LLC v. Jones (In re Nilhan Dev., LLC), 2022 WL 3275175 (11th Cir. Aug. 11, 2022) (per curiam) (Jill Pryor, Branch, and Brasher, JJ.).

Code § / Rule: "substantial contribution" claim under § 503(b)(3)(D); actual, necessary expense under § 503(b)(1); and equitable subordination under § 510(c)(1)

Held: Unauthorized postpetition loan was subordinated even though the loan benefited the estate.

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

Facts: The chapter 11 debtor entity sold a parcel of developed real property with bankruptcy court approval and retained a repurchase option. As the deadline for exercising the repurchase option drew near, the debtor's manager—without court approval—entered into two loans to fund the repurchase. The manager obtained one loan from an unrelated entity called Rass Associates (which was repaid and its interest treated as an administrative expense when the estate eventually sold the property following repurchase), but the real issue in this opinion is the second loan obtained from Norcross Hospitality. Norcross was a company owned by the debtor's manager's children and also managed by him. With the funds in hand, the manager led the debtor to repurchase the real property. The bankruptcy court found out about the repurchase by means of a reference in a pleading filed by a creditor in an adversary proceeding. The court ordered the manager to appear and explain, and in response, the debtor (still under the manager's control) asked that the property be transferred back to Norcross to maximize its value for sale, and also asked for nunc pro tunc approval of the loan from Norcross that made the repurchase possible. The bankruptcy court held off on ruling on those motions but quickly appointed a chapter 11 trustee, who later sold the property for an amount sufficient to repay Rass in full plus its accrued interest as an administrative expense (with no discussion in this opinion of whether the Rass loan was ever approved by the court). Norcross also sought administrative expense status for its loan that enabled the repurchase and for nunc pro tunc approval of its loan to the debtor. The bankruptcy court denied both requests and instead subordinated the Norcross claim to the claims of all other creditors.

A key factor in this ruling was the "insider" relationship between the debtor and Norcross, which were under common ownership and management. Heightened scrutiny was thus applied. The manager proceeded with the insider loan without court approval and without an honest belief that court approval was not necessary. The insider lender (Norcross) was not one of the enumerated entities who could assert a "substantial contribution" claim under § 503(b)(3)(D). Although not exhaustive, the list of potential substantial contribution claimants in the statute was limited to the types of creditors enumerated therein, which includes creditors, equity security holders, and indentured trustees, but not an insider entity such as Norcross. Additionally, the Norcross debt did not qualify for administrative expense as an actual, necessary expense under § 503(b)(1) because it was not incurred in the ordinary course of the debtor's business. It was also held no abuse of discretion to deny nunc pro tunc approval of the Norcross loan where the bankruptcy court would not have approved the loan on the same terms had the request been timely made (the interest rate was too high and the term too short, as well as the venture being too risky), and where the bankruptcy court found neither the debtor nor the insider creditor held an honest belief that court approval was not necessary when they entered into the transaction. Finally, subordination under § 510(c)(1) was no abuse here despite the ultimately good result for the estate. If the Norcross claim were not subordinated, the unsecured creditors would not have been paid in full (and that included the insider claims of another creditor who was not subordinated as to these funds). The real misconduct was the manager's decision to place the estate at risk by entering into a risky deal with an insider company with no court approval while knowing court approval should have been sought. Equitable subordination was no abuse under these facts. In the end, Norcross recovered no interest and was repaid all but approximately $500,000.00 of its principal while all other unsecured claims were paid in full.

Spring Valley Produce, Inc. v. Forrest (In re Forrest)**,** 47 F.4th 1229 (11th Cir. Aug. 31, 2022) (Wilson, Branch, and Lagoa, JJ.) (opinion by Wilson, J.); *pet. for cert*. docketed Nov. 30, 2022.

Code § Rule: § 523(a)(4) nature of "fiduciary capacity"

Held: Fiduciary capacity under § 523(a)(4) requires: (1) a trustee holding (2) an identifiable res (3) for the benefit of an identifiable beneficiary and must (4) impose sufficient trust-like duties to create a technical trust. Strong indicators, but not requirements, of sufficient trust-like duties include: (1) the duty to segregate trust assets and (2) the duty to use trust assets only for a trust purpose. Finally, the fiduciary capacity must exist before creation of the debt by virtue of an action that is alleged to have been fraud or defalcation on the part of the trustee. The PACA trustee was not acting in a fiduciary capacity under these standards.

History: Eleventh Circuit affirmed the Bankruptcy Court for the Middle District of Florida on direct appeal.

Facts: The debtors owned a market that sold produce. Their market bought produce from Spring Valley and became a trustee of that produce under the Perishable Agricultural Commodities Act (PACA). Spring Valley gave the required notices on its invoices to preserve its rights as a beneficiary of a statutory PACA trust. The market never paid for the produce and the debtors filed chapter 7. Spring Valley then filed an AP against the debtors (on the theory that they were personally liable for the market's PACA debt) seeking to have the produce debt declared nondischargeable under § 523(a)(4) as a debt "for fraud or defalcation while acting in a fiduciary capacity." The debtors moved to dismiss on grounds that a PACA trustee is not acting in a "fiduciary capacity" as that term is utilized in § 523(a)(4) because PACA does not require segregation of the trust res (i.e., the produce and its proceeds) and does not prohibit using the trust assets for other purposes. The bankruptcy court agreed with the debtors, as did the Eleventh Circuit on direct appeal.

The panel discussed older caselaw on what it means to act in a "fiduciary capacity" and distilled the following three principles: (1) the fiduciary capacity exception to discharge applies to technical trusts and not to implied trusts; (2) the debtor must be in the capacity of a fiduciary at the time of the defalcation giving rise to the debt; and (3) the substance of the transaction controls rather than its form or the parties' labels in the contract. Under the first guiding principle, the court looked at the elements required of technical trusts to determine whether the statutory PACA trust was a technical trust: (1) an identifiable trustee, (2) an identifiable beneficiary, and (3) an identifiable trust res, along with (4) sufficient trust-like duties imposed upon the trustee.

Having established its test, the panel found that the PACA trustee was not acting in a fiduciary capacity because although the trustee, res, and beneficiary were identifiable, there were insufficient trust-like duties under either the PACA statute or the regulations promulgated thereunder. Commingling was permitted under the regulations, as was use of the res (which includes the produce as well as its proceeds) for non-trust purposes. The duty to segregate trust assets and to only use the assets for trust purposes are strong indicators, but not always requirements, of technical trusts. Those elements were missing here because the regulations implementing PACA allowed for commingling of the trust assets (the produce and its proceeds) and also allowed for the use of the assets for purposes other than the trust. The requirement that the trustee maintain sufficient assets to pay its debts is not "trust-like" and could be found in many contracts. The duty to maintain books and records was more "trust-like" but was not sufficient in the absence of a requirement to segregate and refrain from non-trust use of the trust assets. A PACA trust is more like a resulting or constructive trust because the duty to segregate trust assets is triggered only after a showing of dissipation. Therefore, debts for unpaid PACA trust obligations do not fit the parameters of § 523(a)(4) because there is no technical trust that could support a finding of "fiduciary capacity." The panel limited its analysis to the interpretation of that term under § 523(a)(4) and said its logic would not necessarily extend to other trust or fiduciary scenarios.

Hunstein v. Preferred Collection and Mgmt. Servs., Inc., 48 F.4th 1236 (11th Cir Sept. 8, 2022) (en banc) (opinion by Grant, J.; concurrence by William Pryor, C.J. and joined by Tjoflat, J.) (dissent by Newsom, J. and joined by Jordan, Rosenbaum, and Jill Pryor, JJ.).

Substantive law: Fair Debt Collection Practices Act (FDCPA); 15 U.S.C. §§ 1681; 1692

Held: Disclosure of protected information to a third-party mail vendor was not sufficiently similar to the type of publicity contemplated in the tort of public disclosure to confer standing on the consumer. Without a similar type of publicity of the protected information under the FDCPA, there is no "concrete injury" and thus no Article III standing.

Facts: The plaintiff sued a debt collector for disclosing protected information to a third-party mail vendor hired by the defendant to send the collection letter at issue. The Eleventh Circuit panel had twice ruled that the plaintiff had standing—once before and once after the Supreme Court's decision in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021) (finding no standing under the FCRA where the credit reporting agency defendant labeled the plaintiff a potential terrorist but did not disclose that report to a third party so that no reputational harm akin to that contemplated under the tort of defamation could be shown, and thus no Article III standing). But the en banc court ruled that the plaintiff did not allege a concrete injury. There was no allegation of the type of "publication" analogous to the type of public disclosure that is required as an element of the tort of public disclosure. Under the guidance of *Transunion* as applied to the FDCPA, a similar type of publicity as required for the tort would be required to show a concrete injury and establish Article III standing. The type of publication (qualitative, not quantitative) must be analogous to the tort-level publication that leads to a matter being conveyed to the public in general or becoming a matter of public knowledge. Finding that the plaintiff did not allege any publicity at all as that term is understood in the context of the "common-law comparator" tort, the degree of publicity was not even an issue. Without an allegation of that type of publication, there is "no harm, at least not one that is similar to that suffered after a public disclosure." 48 F.4th at 1245. A third-party service provider seeing the content of the collection letter it mailed was not similar enough to a tortious type of publication of private information. Judge Newsom argued in dissent that the court had expanded the requirement for publication under the FDCPA to be an exact duplicate of what the tort required rather than a "close enough" analogous type of publication, in keeping with the *Transunion* standard. The majority countered that the dissent was focused on the degree of exposure rather than the type of exposure required to state a claim.

Baker v. Sepich, 2022 WL 4594318 (11th Cir. Sept. 30, 2022) (per curiam) (Jordan, Rosenbaum, and Grant, JJ.).

Code § / Rule: § 362(k)

Held: The purchaser at a foreclosure sale, which purchaser was alleged to have taken no action in violation of the stay after becoming aware of the stay's existence, was not in willful violation of the stay.

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

Facts: The pro se debtor filed a chapter 13 petition the day before a scheduled foreclosure sale of the debtor's Sandy Springs, Georgia property. The debtor claimed that she faxed the notice of her bankruptcy to the mortgagee, Bank of America, on the sale date. The sale was completed, and the property was sold to an entity which was not alleged to have had any knowledge of the bankruptcy petition. The purchaser posted eviction notices on the property the following day, and at that time, the debtor informed the purchaser of the bankruptcy filing. The pro se chapter 13 case was dismissed for failure to file documents almost two months later, at which time the purchaser again posted a notice of eviction. Approximately ten days after the case was dismissed, Bank of America executed the foreclosure deed to the purchaser. Approximately six months after that, the debtor filed a complaint against Bank of America and the purchaser in district court for violation of the automatic stay under § 362(k). The bankruptcy court in the original bankruptcy case then granted Bank of America's request for nunc pro tunc stay relief and prospective stay relief regarding the property. The district court and the Eleventh Circuit affirmed.

The debtor then dismissed Bank of America from the stay violation suit but continued to pursue the purchaser for damages for allegedly violating the stay. The district court found that collateral estoppel prevented the debtor from relitigating the violation of the stay because that relief should apply to both Bank of America and to the purchaser, or alternatively, because the debtor failed to allege that the purchaser acted willfully in violating the stay. The Eleventh Circuit affirmed dismissal of the complaint against the purchaser on the basis that the debtor did not allege that the purchaser acted willfully in posting eviction notices and pursuing possession because she did not allege that the purchaser knew of the stay or acted intentionally after it found out about the stay. In fact, the debtor admitted in her pleading that the purchaser took no action to gain possession from the time she informed it she had filed bankruptcy until after her bankruptcy was dismissed. Thus, no claim for a willful stay violation could be stated on those facts. Further, denying her leave to amend the complaint was no abuse of discretion by the district court because the debtor did not propose the substance of her proposed amendment and request that it be allowed, but instead merely asked in a footnote of her brief to be given a chance to fix any problems noted by the court.

Thakkar v. Good Gateway, LLC (In re Bay Circle Property, LLC), 2022 WL 16002916 (11th Cir. Oct. 28, 2022) (per curiam) (Wilson, Tjoflat, and Anderson, JJ.).

Code § / Rule: standing

Held: A member of the debtor-LLC had no pecuniary interest in the outcome sufficient to satisfy the "person aggrieved" standard so that his appeal of the denial of a sanctions order was dismissed for lack of subject matter jurisdiction.

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

Facts: One of the most prolific pro se plaintiffs in the past eight years, Thakkar is the manager and member of several chapter 11 debtor companies. Good Gateway, LLC obtained prepetition judgments against both Thakkar and one of those companies, Nilhan Developers, LLC. Several years after Nilhan's chapter 11 petition (and after the bankruptcy court appointed a trustee) Good Gateway sought a charging order in state court to allow it to reach any funds Thakkar might be entitled to as a member of Nilhan. The bankruptcy court ordered mediation of the issue of Gateway's right to a charging order, but in the meantime, the state court heard the motion and granted the charging order. Thakkar then moved for sanctions against Gateway under § 362(k) but the bankruptcy court denied the motion. Thakkar was not the debtor, was not a creditor of the debtor, and was only a member of the debtor. Therefore, he was not "aggrieved" and had no standing to move for sanctions. The district court and Eleventh Circuit agreed with the bankruptcy court and the appeal was dismissed for lack of subject matter jurisdiction.

Article III standing requires a case or controversy. The plaintiff must have an actual or imminent, concrete and particularized, injury in fact; which injury is fairly traceable to the defendant; and which injury is likely to be redressed by a favorable ruling. More specifically, only a "person aggrieved" by "having a direct and substantial interest in the question being appealed" may appeal a bankruptcy court ruling. *In re Ernie Hare Ford, Inc.*, 764 F.3d 1321, 1325 (11th Cir. 2014). A pecuniary, financial stake in the outcome as well as an interest that is protected or regulated by the Bankruptcy Code is required. *Id.* Under Georgia law, a member of an LLC has no ownership interest in the specific assets of the LLC. Thakkar, as a member and manager, held only an indirect interest in the sanctions order. He was not personally aggrieved by the denial of the sanctions order.

Engineered Floors, LLC v. Beaulieu of America, Inc. (In re Beaulieu Group, LLC), 2022 WL 16570890 (11th Cir. Nov. 1, 2022) (per curiam) (Wilson, Branch, and Brasher, JJ.).

Code § / Rule: § 363 sale, warranty claims for sale of goods under Georgia law

Held: The debtor was not liable for warranty claims asserted by a customer when it sold its carpet inventory as part of an asset purchase agreement during bankruptcy, and the carpet was then sold to the customer by the asset purchaser.

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

Facts: Early in its bankruptcy case, Beaulieu sold non-real estate assets to Engineered Floors. The sale included carpet inventory. After the sale, one of Beaulieu's pre-asset-sale customers then sued Engineered Floors for warranty claims alleging defective carpet. In response, Engineered Floors filed an AP seeking a determination that its asset purchase agreement with the debtor did not allow for the warranty claims to be asserted against it as purchaser, and also alleging that the customer had violated the sale order and was in contempt when it sued Engineered Floors in state court on warranty claims that were not its liability as purchaser of the debtor's assets. The issues were what impact the bankruptcy sale order had on warranty claims against Engineered Floors as to three types of claims: (1) carpet manufactured and sold by the debtor; (2) carpet manufactured by the debtor but sold by Engineered Floors; and (3) carpet manufactured and sold by Engineered Floors. The first category was resolved as the debtor's liability and the third category as the responsibility of Engineered Floors. The real rub on appeal was over the second category of claims. The bankruptcy court found that those claims were not the debtor's responsibility because it was not the seller of the goods under Georgia law. That was a different issue from whether the purchaser had a claim against Engineered Floors. "Thus, the bankruptcy court simply found that any potential liability arising from the [second category of] claims must not be borne by [the debtor] because [the debtor] did not sell those goods."

See also Engineered Floors, LLC v. Beaulieu of America, Inc. (In re Beaulieu Grp., LLC), 2022 WL 2903402 (11th Cir. July 22, 2022) (per curiam) (Wilson, Branch, and Brasher, JJ.) (circuit court lacked jurisdiction over appeal of the district court's non-final order that (1) reversed the bankruptcy court's decision that it lacked jurisdiction over Engineered Floors' civil contempt claim against Lakeshore and (2) remanded to the bankruptcy court the contempt claim against Lakeshore).

Ohlsson v. U.S. Bank Nat'l Ass'n (In re Ohlsson), 2022 WL 16985512 (11th Cir. Nov. 17, 2022) (per curiam) (Rosenbaum, Brasher, and Anderson, JJ).

Code § / Rule: *Rooker-Feldman* doctrine; effect on a lien under Rule 3002 and § 506(d) when creditor does not file a proof of claim

Held: The failure to file a proof of claim did not undermine the validity of the mortgage under state law, and the bankruptcy court could not consider invalidating a mortgage for which the state court had issued a judgment of foreclosure after finding the mortgage valid and enforceable prepetition.

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

Facts: A pro se debtor appealed the dismissal of her AP against US Bank in which she sought to invalidate the bank's mortgage against her Florida home. The bank held a prepetition foreclosure judgment, which recited that the bank held a first-priority mortgage securing a debt in excess of $300,000.00 and that the bank was entitled to conduct a foreclosure although the sale had not yet taken place when the debtor filed chapter 7. The bank moved for stay relief to allow it to pursue the property. In response, the debtor filed an AP seeking to invalidate the mortgage and also asserting that the bank could not pursue its lien because it had not filed a proof of claim in the bankruptcy case. The bank moved to dismiss, and the bankruptcy court granted that motion on *Rooker-Feldman* grounds, as the relief requested by the debtor would be tantamount to invalidating the state court's foreclosure judgment. The circuit court agreed. The circuit court also agreed with the bankruptcy court that although *Rooker-Feldman* did not bar the debtor's argument about the failure of the bank to file a proof of claim, that argument was flawed on the merits. Rule 3002 specifies that the failure to file a proof of claim does not, in and of itself, void any lien. The same can be said of § 506(d). Additionally, the case was a "no-asset" chapter 7 so that all creditors had been informed that filing a proof of claim was not necessary. Even if it had been an asset case, "[the bank]'s failure to file a proof of claim would not undermine the validity of its mortgage lien or its rights under state law."

Rohe v. Wells Fargo Bank, NA (In re Rohe), 2022 WL 17752372 (11th Cir. Dec. 19, 2022) (per curiam) (William Pryor, C.J.; Jill Pryor and Grant, JJ.).

Code § / Rule: removal; res judicata

Held: Following an invalid removal, the final judgment of the state court was entitled to res judicata effect under the factors set out in *In re Piper Aircraft Corp.*, 244 F.3d 1289, 1296 (11th Cir. 2001).

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

Facts: Wells Fargo was awarded a judgment of foreclosure in Florida state court. The homeowner filed bankruptcy and attempted to remove her appeal of the foreclosure judgment to the federal court. The debtor filed several motions and proceedings in an attempt to delay the foreclosure sale, including challenging an order that lifted the stay and allowed the foreclosure sale to proceed and objecting to Wells Fargo's claim and filing an action under the All Writs Act. All were denied or dismissed. Then the state court affirmed the foreclosure judgment, and the sale date was set. The district court found that the debtor's attempted removal of the state court appeal was a nullity, that the claims regarding the foreclosure action were barred by the res judicata effect of the state court foreclosure judgment, and that the automatic stay had not been violated.

First, removal of the state court action on appeal was ineffective and void because there was no "pending" claim or action—the foreclosure action had been tried and the trial level adjudication was complete. Also, the *Rooker-Feldman* doctrine prohibits direct appeal to a federal court of a state court judgment. The state appeals court did not have to treat the invalid removal as having been effective when it was not valid on its face as having been filed after the trial court ruling. The state appellate proceedings were therefore valid.

Second, the final judgment of the state court was entitled to res judicata effect as to the debtor's claims in the bankruptcy (her objection to the proof of claim, and her claims of fraud regarding the promissory note). The res judicata elements in this circumstance are: (1) a prior decision rendered by a court of competent jurisdiction; (2) the final judgment must be on the merits; (3) both cases involve the same parties or their privies; and (4) both cases involve the same cause of action. The "same cause of action" prong was involved here as the first three elements were indisputably met. The fourth element was also met because the debtor's attack on the proof of claim and promissory note in bankruptcy court was based on the "same nucleus of operative facts" as the claims she made in state court, which were rejected. The same facts and legal theories were at play, so the same cause of action prong was satisfied.

Third, the state appellate court decision on the merits was not void as it was not issued in violation of the automatic stay. Miscellaneous orders (ordering a response and denying an extension of time) issued by the state appellate court before the stay relief became effective did not affect the merits and treating them as ineffective would not help the debtor. The state appellate court decision on the merits by contrast was issued more than a month after the bankruptcy court lifted the stay.

A & S Entertainment, LLC v. Florida Dep't of Rev. (In re A & S Entertainment, LLC), 2022 WL 17752234 (11th Cir. Dec. 19, 2022) (William Pryor, C.J.; Newsom and Grant, JJ.).

Code § / Rule: finality; timeliness of appeal of an order establishing tax priority status and amount

Held: Priority ruling and order denying reconsideration were final orders and must have been appealed within 14 days after the reconsideration order was entered.

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

Facts: The bankruptcy court entered an order following a hearing on the amount and priority of a state tax claim in a chapter 11 case. The debtor moved for reconsideration and the bankruptcy court denied that motion. The debtor then proposed and confirmed a plan with the acceptance of all impaired classes. Only then did the debtor filed a notice of appeal aimed at the confirmation order, the ruling on reconsideration of the tax claim ruling, and the tax claim ruling. The State moved to dismiss the appeal of the tax claim and reconsideration rulings as untimely, and the district court agreed and granted the motion. The district court said the tax claim and reconsideration orders were final orders for purposes of appeal so that the appeal clock expired after 14 days from entry. The Eleventh Circuit agreed. The claim ruling and the denial of reconsideration resolved that discrete dispute (amount and priority of the tax claim) within the larger bankruptcy proceeding. *See Bullard v. Blue Hills Bank*, 575 U.S. 496, 501 (2015); *see also Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 657 n.3 (2006). Accordingly, the orders were immediately appealable as soon as the bankruptcy court entered its order denying reconsideration. Because the debtor did not appeal until months later, following confirmation, the appeal was untimely, and the district court had no jurisdiction over the appeal so that dismissal was appropriate.

Braun v. America-CV Station Group, Inc. (In re America-CV Station Group, Inc.), 56 F.4th 1302 (11th Cir. January 5, 2023) (William Pryor, C.J.; Jill Pryor, and Grant, JJ.) (opinion by Grant, J.).

Code § / Rule: preconfirmation modification of a plan under § 1127(a); deemed rejection for equity owners under § 1126(g); and disclosure under Rule 3019(a)

Held: "When a modification to a Chapter 11 reorganization plan materially and adversely affects the treatment of a class of claim or interest holders, those claim or interest holders are entitled to a new disclosure statement and another opportunity to vote."

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

Facts: The debtors proposed a modified chapter 11 plan just prior to confirmation. Before the modification, the plan proposed to divide the equity in the reorganized companies among four shareholders. The debtors filed an emergency motion to modify prior to confirmation proposing instead to strip three of four equity holders of their interests and instead give full ownership to the fourth owner (which fourth owner was an entity controlled by the debtor's CEO, who also was to provide all the exit financing under the plan as modified). The negatively impacted equity owners knew something was afoot with alternative exit financing but had been assured that a solution was being sought that included a wire transfer of funds from pre-petition equity holders in exchange for equity in the reorganized companies. The evidence did not show that they knew the motion to modify the plan on the eve of confirmation had been filed nor that they were aware of its terms or of the change to give all equity to the fourth owner in exchange for that owner's sole provision of the exit financing. The court proceeded to confirmation immediately on the plan as modified and treated the failure of the equity holders to vote on the original plan (which the bankruptcy court read as extinguishing prepetition equity interests with no value given in return) as a deemed rejection under § 1126(g), confirming the plan as modified under the cramdown provisions of § 1129(b). The impacted equity owners had no reason to suspect they were going to lose their equity interest, having timely performed their funding obligation under the original plan as proposed. When they realized what had happened, the other equity owners, whose interests had been extinguished, asked the court to reconsider its order confirming the plan as modified. They argued they were entitled to disclosure of the modified terms but were denied that opportunity, and they also argued that they should be revested with the equity lost at confirmation. The bankruptcy court refused on grounds of no newly discovered evidence and no manifest error of law or fact—since the other equity owners were already deemed to have rejected the original plan, they were not entitled to any additional disclosure or voting on the modified plan. The district court agreed but the Eleventh Circuit reversed.

First, the circuit said the bankruptcy court erred in deeming the equity class to have rejected the original plan (although that finding would not have changed the outcome since new disclosure and balloting were required for the impacted class members). Under § 1126(g), a class of equity interests is deemed to reject the plan only if the plan does not provide for them to receive or retain any interest. Since the original plan did provide an exclusive opportunity for the impacted equity owners to receive an interest in exchange for exit financing, the failure of that class to vote for the original plan did not amount to a rejection because the exclusive opportunity was a property interest received on account of their prepetition interest. *See Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 455-56 (1999).

Second, modifications of a chapter 11 plan prior to confirmation must comply with the requirements of § 1127(a), including the same treatment for each member of a class in the absence of consent. Modified plans must also be preceded by adequate disclosure statements first approved. The disclosure statement must contain sufficient information to allow an informed vote. When a plan is modified after a disclosure statement has already been approved and after votes have been cast, no new disclosure statement is required unless the modification "materially and adversely changes the way that claim or interest holder is treated." 56 F.4th at 1309 (quoting *In re New Power Co.*, 438 F.3d 1113, 1117-18 (11th Cir. 2006)). The bankruptcy court must review for materiality and adverse impact in determining whether further disclosure is required under Rule 3019(a) and it matters not whether the impacted interest holder has rejected the plan prior to modification. Additional disclosure and a re-vote are required for any claim or interest holder that is adversely impacted by the modification even if the claim or interest holder had not accepted the prior version of the plan. That determination is unique to each creditor or interest holder, and is not made based on class.

The modification stripped the other equity holders of the opportunity to provide financing and receive interest in the reorganized companies, so they were materially and adversely affected. That triggered the requirement for an accurate disclosure statement and re-voting as to the interest holders so affected, regardless of whether they had accepted or rejected the prior version of the plan. This case well illustrated the practical impact of re-soliciting votes from adversely affected creditors or interest holders (even if the prior vote was a rejection or a no-vote deemed rejection) because on the merits, the modification at issue violated the Code's prohibition on discriminating among holders of interests in the same class in a way that the prior plan version did not. The modification took what had been the opportunity for all equity holders to contribute and receive interests and instead gave that opportunity to only one of the equity holders, which violated § 1123(a)(4), made applicable to the modification by § 1127(a). Finally, notice given only the day before the hearing on the modification was not equivalent to the new disclosures required under the circumstances. There is a distinction between notice of a hearing and Code-sufficient disclosures of a chapter 11 plan's proposed treatment. The district court's finding that effective judicial relief was still possible had not been challenged on appeal, so the appeal was not equitably moot, with the "exact contours of that relief" being left to the bankruptcy court.

Mortgage Corp. of the South v. Bozeman (In re Bozeman), 57 F.4th 895 (11th Cir. Jan. 10, 2023) (Rosenbaum, Tjoflat, and Moody, JJ.) (opinion by Rosenbaum, J.).

Code § / Rule: § 1322(b)(2); § 1327

Held: The antimodification provision of § 1322(b)(2) applied post-confirmation to prevent the bankruptcy court from releasing a lien that was within that section's protection when the debt secured thereby had not been paid in full, even though it had been paid all that the confirmed chapter 13 plan proposed to pay.

History: Eleventh Circuit reversed the Bankruptcy Court for the Middle District of Alabama (Judge Sawyer) as well as the District Court for the Middle District of Alabama (Judge Huffaker), which had affirmed the bankruptcy court.

Facts: The debtor filed chapter 13 while in arrears on her long-term mortgage. The mortgagee filed an arrears-only claim, delineated as such on the face of the claim. The arrears were approximately $6,800 while the total debt was in excess of $17,000. The plan showed the total debt and proposed to pay $454 per month to the mortgage creditor for 58 months (which would total approximately $26,332 over the life of the plan). This was listed in the "short-term" debt section of the plan rather than the "cure-and-maintain" section of the plan, and the plan provided that creditors would only get paid if they filed a proof of claim. The plan also provided that liens would be retained only until the completion of payments under the plan. The trustee filed a plan summary that listed the mortgagee as the only secured creditor, showed the value of the collateral as $17,180 with an interest rate of 7.57%, and monthly payments of $454. The plan, treating the long-term mortgage as though it were short-term but showing payments for 58 months that appeared sufficient to pay the debt in full, was confirmed without objection. A year later, the mortgagee moved to dismiss the case because the debtor defaulted in her payments to the trustee, but that motion was resolved and withdrawn. At some point, the mortgagee attempted to amend its claim and the bankruptcy court denied the amendments as untimely.

Two years into the 58 months of payments, the trustee filed a notice of final cure saying the entire mortgage debt had been paid in full because the claim, which no one disputed showed only the arrears and not the full balance of the long-term mortgage debt, had been paid. The mortgagee objected. It agreed the arrears had been paid in full by payments through the plan to date but said that the mortgage debt of over $15,000 remained owing. The mortgagee also moved for relief from stay. Apparently before the motion for relief was adjudicated, and approximately three months after the motion for relief was filed, the debtor moved for an order releasing the mortgage lien against her home based on having paid the entire proof of claim. The mortgagee objected and raised four arguments: (1) the plan showed on its face that the debt was $17,180 and proposed 58 months of payments that would have paid that amount in full with interest; (2) the plan impermissibly modified the long-term mortgage in contravention of § 1322(b)(2); (3) the lien could not be invalidated by less than full payment under these circumstances and should "pass through" the chapter 13 case; and (4) the controlling authority of *Universal Am. Mortg. Co. v. Bateman (In re Bateman)*, 331 F.3d 821, 822 (11th Cir. 2003) required that § 1322(b)(2) be given effect, thus not allowing the long-term mortgagee's rights to be violated despite the confirmed plan's attempt to do so.

The debtor countered with four points: (1) by only filing an arrears claim and not filing a full-balance claim before the claims bar date, the mortgagee agreed to accept only the arrears in exchange for its lien regardless of the fact that the plan acknowledged the amount of the full debt --the plan had misclassified the mortgage as short-term so that a timely full-balance claim was required for payment (the mortgage was long-term and indisputably fell under § 1322(b)(2)); (2) the debtor would be prejudiced by not releasing the lien because she had to pay her unsecureds in full, apparently as a function of the best interest or disposable income tests, when the plan distribution was calculated as paying only the arrears and not the full mortgage balance; (3) the plan admittedly showed the full debt and the contract rate of interest, but the claim was only filed for the arrears; and (4) *Bateman* was no longer good law on the effect of improper mortgage classification in light of *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010). The bankruptcy court ruled in the debtor's favor and discharged her case while deeming the mortgage lien satisfied in full. The district court affirmed the decision to deem the lien satisfied (which was the only issue appealed) and the Eleventh Circuit reversed.

The only issue before the Eleventh Circuit was whether paying off the plan (i.e., paying the arrears claim only because it was the only claim timely filed and not paying the full balance of the long-term mortgage debt) entitled the debtor to an order declaring the mortgage satisfied and releasing the lien. The circuit court ruled that the mortgagee was entitled to the protection of the antimodification provision of § 1322(b)(2) as interpreted in *Bateman,* which remained good law post-*Espinosa*. The circuit court further ruled that under these facts, a confirmed plan that violated the antimodification provision would not compel the lien to be released under § 1327 because although entitled to preclusive effect, the confirmed plan cannot be used in a manner that would violate the antimodification provision.

There was no dispute that the mortgage was long-term and otherwise fit within the parameters of § 1322(b)(2) and (b)(5), and there was no dispute that the plan on its face violated § 1322(b)(2). There was also no dispute that the mortgagee did not object to confirmation. As *Bateman* and *Nobelman v. Am. Savs. Bank,* 508 U.S. 324, 332 (1993) elucidate, the antimodification provision of § 1322(b)(2) by its plain terms protects "rights" of mortgage holders, not "claims" as that subsection provides that a chapter 13 "plan may –(2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence." As recognized in *Dukes v. Suncoast Credit Union (In re Dukes)*, 909 F.3d 1306, 1331 (11th Cir. 2018) (quoting *Nobelman*, 508 U.S. at 329-30), that bundle of protected rights includes the original rights under the loan documents according to state law. This includes the right to full payment per the contract terms before release of the lien (regardless of value and its effect on the secured claim under §506(a) –rights and not claims are protected by § 1322(b)(2) as *Nobelman* makes clear), as well as the ability to foreclose in the event of default (which is checked only by the automatic stay).

Similarly, *Bateman* dealt with a scenario where the plan paid less than the full arrears on a cure-and-maintain long-term mortgage protected by the antimodification provision and was confirmed without objection. The Eleventh Circuit held in *Bateman* that the amount of arrears actually owing survived confirmation of the plan that showed a lesser amount because the plan could not modify the mortgagee's rights despite having been confirmed showing that it intended to do so. *Bateman* established that the antimodification provision of § 1322(b)(2) means that a mortgage lien as described therein survives confirmation even of a plan that purports to modify the lien rights protected by § 1322(b)(2). Confirmation is given preclusive effect under § 1327 but that preclusive effect cannot be used to circumvent the antimodification provision, even in the absence of objection. Similarly, in *Dukes*, the circuit again focused on the "rights" language and held that even if a plan "provided for" a mortgage, discharging personal liability under a long-term mortgage was not permissible under § 1322(b)(2) as it would amount to a modification of the mortgagee's rights even if the in rem rights were unaffected (the right to pursue an in personam deficiency judgment against the debtor following foreclosure was a right provided by the mortgage documents that could not be modified).

The Code protects principal residence long-term mortgagees against any modification of their rights and releasing the mortgage lien is a dramatic modification (even moreso than the plans at issue in *Bateman* and *Dukes*). The protections of § 1322(b)(2) "prohibit releasing a lien before the terms of the primary-residential mortgage are satisfied." 57 F.4th at 909. The court rejected the debtor's argument that paying the arrears-only *claim* as filed by the mortgagee is all that is required because that argument overlooks that *rights* under the mortgage cannot be modified regardless of the amount of the claim, as elucidated in *Nobelman* and the controlling authority of *Bateman*. "So while it's true that the sole timely proof of claim that [the mortgagee] filed during the bankruptcy proceeding sought only $6,817.42 in arrears, nothing about that claim (or the absence of any additional claim) changed the fact that [the mortgagee] was entitled under the terms of the mortgage and Alabama law to receive full payment on the balance of its loan. In fact, our precedent is clear that a secured creditor is not required to file a claim at all, as 'it will always be able to look to the underlying collateral to satisfy its lien.'" *Id.* at 909-10. (quoting *Bateman*, 331 F.3d at 827). The claim did not change the nature of the rights under the contract and state law, and it is those rights that cannot be modified.

The debtor attempted to distinguish the holdings of *Bateman* and *Dukes* by arguing those cases dealt with cure-and-maintain plans and not with full-pay plans like the one the debtor proposed. But that distinction did not change the key factor: the prohibition on the modification of rights for a long-term principal residence mortgage. A full-pay plan would be acceptable, but only if it did not modify the mortgagee's rights including but not limited to its right to be paid the entirety of the debt under state law before being forced to release its lien. In other words, cure-and-maintain treatment is not required for every long-term mortgage under § 1322(b)(2), but if full-pay treatment is instead proposed, that treatment still must satisfy the antimodification requirement. Obviously, the challenge to proposing a full pay plan for a long-term mortgage would be feasibility. And *Nobelman* indicates than any exception to the antimodification provision must be text-based: § 1322(b)(5) allowing cure-and-maintain plans and § 362, which does not alter any future rights of mortgagees, are two such provisions. *Id.* at 910 (citing *Nobelman*, 508 U.S. at 330). But "no statutory exception spares a full-payment plan from the antimodification provision." *Id.* at 911.

The burden is not on the creditor holding a § 1322(b)(2) mortgage to make sure the plan complies with the antimodification provision or suffer the release of its lien—the obligation is on the debtor to make sure the plan complies with the antimodification provision or the lien will not have to be released:

> Bozeman seemingly knew this—her Plan proposed paying [the mortgagee] [its full debt plus contract interest]. But because of [the mortgagee's] arrearages-only claim, Bozeman sought to satisfy the full scope of her obligation by paying only those arrearages and ignoring the remaining balance owed to [the mortgagee]. But this maneuver purports to modify [the mortgagee's] right to receive full payment before its lien is released, so the antimodification provision forbids it. If Bozeman had, in fact, used her full-payment plan to pay off the full balance she owed, releasing [the mortgagee's] lien at this stage would be entirely appropriate.

Id.

The circuit court also ruled that *Espinosa* did not overrule *Bateman*'s rationale nor did *Espinosa* swing wide open the door to using § 1327 to cure otherwise improper plan provisions so long as the affected creditor received notice. *Espinosa* instead dealt with a Rule 60(b)(4) motion filed ten years after confirmation (six years after discharge of student loan interest that should not have been dischargeable under § 523(a)(8)). *Espinosa* established that Rule 60(b)(4) does not make a judgment void simply because the judgment was legal error, nor does such a motion substitute for an appeal of a judgment. Rather, *Espinosa* explained that seeking relief under Rule 60(b)(4) only works if the error at issue affected jurisdiction or was one that deprived a party of notice sufficient to satisfy due process. *Espinosa*'s discussion of the confirmation order and its effect was thus limited to whether the erroneous judgment confirming the plan amounted to a failure of jurisdiction or due process, and the Supreme Court in that case found that it did not.

Accordingly, *Espinosa* had no effect on *Bateman*'s holding for 5 reasons:

(1) *Espinosa*'s holding was expressly limited to the context of Rule 60(b)(4) collateral attacks on confirmed chapter 13 plans whereas *Bateman* was not a Rule 60(b)(4) case nor was the instant case, and that difference made *Espinosa* inapplicable to either *Bateman* or the instant case;

(2) *Espinosa* dealt with a motion filed postdischarge, whereas the creditor raised the challenge in *Bateman,* as in the instant case, prior to discharge, so that while the challenge to the plan's provisions as not being allowed by the code was in one sense collateral, the challenge to the nature and amount of the debt to be discharged upon plan completion was not collateral but instead the creditor timely objected to the motion to release its lien;

(3) *Espinosa* dealt with determining what it means to "void" a judgment under Rule 60(b)(4) based on the bankruptcy court's legal error in confirming the plan and rejected the attempt to expand Rule 60(b)(4) relief to cover a broader universe of judgment defects;

(4) *Bateman* did not rest on a collateral attack of the plan as improperly confirmed (that framing of the issue was rejected) but instead held that because the creditor did not object to improper treatment of its mortgage, it was bound by § 1327—"confirmed bankruptcy plans are immune from collateral attack, even if they were erroneously confirmed;" and

(5) *Bateman's* holding was reinforced by the holding in *Dukes*, which *further* held that notwithstanding the res judicata effect of the confirmed plan, the attempt to force a discharge

> of a homestead mortgage that was protected by the antimodification provision would not be allowed, no matter that the confirmed plan provided for the discharge.

Notably, *Dukes* was decided post-*Espinosa*, as was *Hope v. Acorn Fin., Inc*., 731 F.3d 1189 (11th Cir. 2013) (relying on *Bateman* post-*Espinosa*). The bottom line was that *Bateman* was not impacted by *Espinosa*, and that *Bateman* compelled the result that releasing the mortgagee's lien in exchange for only the arrears payments—despite the confirmed plan and claim process leading to that result—would be an improper modification of the mortgagee's rights under § 1322(b)(2).

The circuit court also agreed that preclusion under § 1327 is given the same effect as any judgment on the merits, even if the plan violates the code. Because this plan violated § 1322(b)(2), it should not have been confirmed. But the plan was confirmed despite that provision and remains enforceable and valid. That means the mortgagee is bound by the confirmed plan (and should have noticed the problems with the plan sooner than it did). But while it was too late to change the plan (at least at the mortgagee's insistence), it was not appropriate to give effect to the plan's attempt to violate the antimodification provision because the lien had not yet been released. In other words, the Code protects long-term residence mortgage liens even if the confirmed plan purported to modify the rights of the mortgagee. The lien could not be modified as requested in the motion to release its lien. The mortgagee retained the right to full payment before it could be compelled to release its lien. "While the finality provision confirms that it is too late to alter the [p]lan, it is not too late for [the mortgagee] to invoke the Code's special protection for homestead mortgages." *Id.* at 916. While the mortgagee should have raised the issue earlier, and could have prevented confirmation of the plan, the mortgage lien cannot be deemed satisfied by the plan's treatment, which violates § 1322(b)(2) and which challenge the mortgagee timely raised when faced with the motion to declare the lien void.

Landcastle Acquisition Corp. v. Renasant Bank, 57 F.4th 1203 (11th Cir. Jan. 12, 2023) (opinion by Hull, J., joined by Grant, J.) (Willam Pryor, C.J., dissenting).

Substantive law: Federal Deposit Insurance Act, 12 U.S.C. § 1823(e); *D'Oench, Duhme* estoppel doctrine

Held: Under the *D'Oench, Duhme* estoppel doctrine, which bars claims or defenses that rely on evidence outside a failed bank's official records in an action against a successor bank following FDIC receivership, no evidence outside the failed bank's records prior to receivership could be used to attack the validity of the transaction documents whereby a law partner pledged the law firm's CD to secure the partner's personal obligation.

Facts: A law firm partner and manager pledged a certificate of deposit owned by the firm to secure the partner's personal loan to the bank, prior to the bank's failure and FDIC receivership. The bank records did not contain any of the law firm's documents or any records that would establish that the partner did not actually have the authority to pledge the CD. Upon default, the bank's successor following receivership liquidated the CD and applied it to the partner's loan balance. The law firm's assignee then sued for breach of contract and conversion under state law, arguing that the partner did not have the authority to pledge the firm's CD to secure his personal debt. Under the *D'Oench, Duhme* estoppel doctrine, which bars claims or defenses that rely on evidence outside a failed bank's official records in an action against a successor bank following FDIC receivership, no evidence outside the failed bank's records prior to receivership could be used to attack the validity of the transaction documents. *D'Oench, Duhme* established that the FDIC takes a sort of federal common-law super holder-in-due-course protection that allows it to quickly assess the official records of a failed bank to make reliable evaluations and quickly transfer the failed bank's assets to a solvent institution, even if the transactions might be voidable by the complaining party if the documents outside the official records could be considered. Judge Pryor in dissent stressed that the majority was allowing an agent (the law partner) without authority to bind the principal (the law firm) to a contract (the pledge of the CD). The majority responded that the issue was not precluding the challenge to the agent's ability to bind the principal but rather whether anything outside the bank's official records could be used to mount that challenge (and under the *D'Oench, Duhme* doctrine as applied by the panel majority, it could not).

Esteva v. UBS Financial Servs., Inc. (In re Esteva), 60 F.4th 664 (11th Cir. Feb. 16, 2023) (William Pryor, C.J.; Rosenbaum and Marcus, JJ.) (opinion by Marcus, J.).

Code § / Rule: Finality of bankruptcy orders; stipulated dismissal under Rule 41(a)(1)(A)

Held: The circuit court did not have jurisdiction over an appeal from a bankruptcy court order granting summary judgment on less than all claims in an adversary proceeding, even after the parties stipulated to dismiss the remaining claim during the appeal.

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

Facts: The debtor and his wife filed an AP against UBS Financial to recover frozen funds held by UBS, which was owed a debt by the debtor. The bankruptcy court granted partial summary judgment in favor of the debtor and his wife as to all but one claim (that one claim being unjust enrichment). UBS appealed and the district court affirmed the bankruptcy court's grant of summary judgment. UBS then appealed to the circuit court, which would only have jurisdiction over a final decision of the bankruptcy court, asking for the finality concept to be interpreted flexibly. Under Eleventh Circuit precedent, an order in an adversary proceeding must resolve all claims against all parties to be considered final. *Dzikowski v. Boomer's Sports & Rec. Ctr., Inc. (In re Boca Arena, Inc.)*, 184 F.3d 1286, 1287 (11th Cir. 1999). This idea of finality in the context of an adversary proceeding distinguished the instant proceeding from the "discrete dispute" resolution paradigm for determining finality in a non-adversary proceeding bankruptcy matter, as set forth in *Bullard v. Blue Hills Bank*, 575 U.S. 496 (2015) and *Ritzen Grp., Inc., v. Jackson Masonry, LLC*, 140 S. Ct. 582 (2020).

In this adversary proceeding, at the time the appeal was filed, the unjust enrichment claim was unadjudicated and still needed to be tried. The circuit court found that none of the three exceptions to the "final judgment" rule applied. First, the partial summary judgment was not a collateral order so the collateral order exception to the finality requirement was not implicated. Second, the marginal finality doctrine also did not apply because no unsettled issue of national significance was involved. Third, the practical finality doctrine also did not apply because there was no showing of irreparable harm (money damages being an adequate remedy for any harm to the account at issue) if appellate review were delayed until the entire adversary proceeding concluded. This case did not present the types of extraordinary circumstances required to amount to irreparable harm (despite the defendant being in bankruptcy, the plan and disclosure statement actually supported an ability to pay rather than making a showing of an extraordinary risk of collectability).

The other possible exception to the finality requirement, which would allow the circuit to hear a premature appeal from an interlocutory order, was the doctrine of cumulative finality, sometimes called the "*Jetco* exception." The *Jetco* exception would only apply if the interlocutory order was appealable under Rule 54(b) and if final judgment was entered with no new notice of appeal having been filed. *Jetco Elec. Indus. Inc. v. Gardiner*, 473 F.2d 1228 (5th Cir. 1973). To consider this doctrine, the circuit court allowed the parties to supplement the record on appeal to include their voluntary dismissal of the unjust enrichment claim. But there were two main problems with the cumulative finality argument-- no final judgment had been entered by any court, and the stipulation was invalid under Rule 41(a)(1)(A). Rule 41(a)(1) deals with the dismissal of "actions" meaning the entire lawsuit and not merely "claims" or particular demands within the lawsuit. Eleventh Circuit precedent clearly established that Rule 41(a)(1)(A) could not be used by a plaintiff to dismiss anything less than all the claims in a lawsuit. *Perry v. Schumacher Grp. of La.,* 891 F.3d 954, 958 (11th Cir. 2018). The same rule applies to adversary proceedings under Fed. R. Bankr. P. 7041. Thus, the unjust enrichment claim still existed and must be disposed of in some way, either by the bankruptcy court's ruling on it, or by the plaintiff seeking leave to amend the complaint to remove that claim. The parties also could have asked for Rule 54(b) certification before filing the appeal (and the circuit court points out the parties may do so following the appeal's dismissal). However, stipulating to dismissal of the unjust enrichment claim while the appeal to the circuit court was pending did not bring the case within the doctrine of cumulative finality because only the entire case—not just one discreet claim—can be dismissed under Fed. R. Civ. P. 41(a)(1)(A).

Wisner v. Piedmont Bank (In re Wisner), 2023 WL 2706302 (11th Cir. Mar. 30, 2023) (per curiam) (Wilson, Jill Pryor, and Hull, JJ.).

Code § Rule: § 523(a)(6)

Held: Under Georgia law, filing and serving an action to levy on corporate stock, without having possession of the stock certificate, does not give the judgment holder that is attempting to levy a property interest in the stock sufficient to maintain a claim under § 523(a)(6).

History: Eleventh Circuit affirmed in part the District Court for the Northern District of Georgia, which had reversed the Bankruptcy Court for the Northern District of Georgia; and vacated in part and remanded to the District Court with instructions to remand to the Bankruptcy Court for further findings.

Facts: Wisner owned ninety percent of the outstanding shares of Atlanta Arms & Ammo, Inc. ("AA&A"), and possessed a stock certificate to that effect. Piedmont Bank obtained a judgment against Wisner pursuant to personal guaranty of a third party's debt and filed a collateral action seeking a charging order and a levy of Wisner's AA&A stock shares. After the bank filed the collateral action, but before the bank levied on the stock, Wisner sold the assets of AA&A. The sale agreement was dated February 1, 2014, and recited that the transfer would be deemed to have occurred on February 6, 2014, although the deal did not close until April 1, 2014. In the meantime, on February 28, 2014, the state court issued an injunction forbidding Wisner from transferring or disposing of the AA&A stock certificate in his possession. The state court set a hearing for early March, and prior to the hearing date, Wisner relinquished the stock certificate to the bank and the bank agreed to cancel the hearing, while the bank remained unaware that Wisner had agreed to the sale of AA&A's assets. The bank asked the state court to hold Wisner in contempt of the injunction, but Wisner argued the sale occurred before the injunction so that he was not in contempt. The state court held Wisner in contempt and entered the parties' consent order that set up a repayment schedule to purge the contempt. Wisner performed under the payment schedule for about two years before filing chapter 7.

In the bankruptcy case, the bank filed a complaint against Wisner under § 523(a)(6), alleging that the sale of the company's assets willfully and maliciously damaged the bank's interest in the stock certificate by reducing its value. The bankruptcy court denied Wisner's motion for summary judgment. It held that although the bank never had possession of the stock certificate, it nonetheless had an "interest" in the stock because it was an asset for which an attempt to levy had been made (although never concluded). The bankruptcy court further held that the judgment lien attached to the stock certificate when the charging order and levy action was served on Wisner. Following trial, the bankruptcy court ruled from the bench that the sale of the underlying assets of AA&A was a willful and malicious act that injured the bank's interest in the stock certificate and that any debt attributable to that sale of AA&A was nondischargeable. The bankruptcy court further held that the equipment and inventory were paid for and bill of sale received on February 6, 2014, while also inexplicably (and perhaps contradictorily) reciting that the sale of AA&A's assets was consummated on February 26, 2014. On appeal, the district court reversed and ruled that the judgment lien did not attach to Wisner's stock certificate by virtue of his being served with the levy action. Also, the district court ruled that the bank did not have a property interest in Wisner's stock certificate until it was turned over to the bank on March 14, 2014, so that no claim for nondischargeability under § 523(a)(6) could lie under these facts (while noting the bankruptcy court had not made clear whether the sale was consummated on February 6 or 26, but that it did not matter because either date was prior to March 14).

On appeal to the circuit, the issue was whether the bank had sufficient interest in the stock certificate to support a claim under § 523(a)(6) premised upon the sale of the assets of AA&A. The Eleventh Circuit affirmed in part and vacated in part, remanding for further findings. Under Georgia law, a judgment lien does not automatically attach to a chose in action (such as the stock) unless a statute so provides. The bank agreed that it never actually levied on the stock but argued that filing the levy action was nonetheless sufficient to give it an *interest* in the stock for purposes of § 523(a)(6). But under the express statutory language of Georgia law (O.C.G.A.§ 11-8-112), the judgment lien could attach to the stock only after actual seizure of the stock certificate under these facts, and the service of the collateral action was insufficient to create a property interest in the stock. An issue remained, however, as to whether the bank took a security interest in the stock certificate when it was turned over to the bank on March 14. If it did, and if the sale was not consummated until sometime after that date (such as on the April 1 effective date recited in the sales agreement), then the (a)(6) claim could be cognizable. The bankruptcy court did not reach that issue based on its erroneous ruling that service of the collateral action was sufficient to attach the judgment lien to the stock. Because the issue was not addressed and because the bankruptcy court's statements regarding the sale consummation date were ambiguous, the case was remanded for further fact findings as to whether the bank gained a property interest as a result of the physical surrender of the certificate relative to the sale date (which needed to be clarified), as well as the extent of any injury caused by Wisner's sale of the company's assets if such a property interest in the stock certificate existed prior to the sale date.

Iriele v. Griffin, --- F.4th --- , Case No. 21-12570 (11th Cir. Apr. 17, 2023) (Branch, Brasher, and Ed Carnes, JJ.) (opinion by Branch, J.).

Code § / Rule: Whether an executor can represent an estate pro se when the executor is not the sole beneficiary and the estate has at least one creditor; and if not, what is the effect of a pro se complaint filed in violation of the representation requirement of 28 U.S.C. § 1654.

Held: On an issue heretofore unanswered by the Eleventh Circuit in a published opinion, under the terms of 28 U.S.C. § 1654, an executor may not represent an estate pro se if the estate has either (1) other beneficiaries, or (2) outstanding creditors because in either situation, the executor is not bringing his "own case." Further, if a complaint is filed by a pro se executor in violation of the requirement for legal counsel under this standard, the complaint is not a nullity. The pro se executor must be given a reasonable opportunity to retain counsel before the complaint is dismissed. Finally, the amended complaint filed by counsel here was proper under Fed. R. Civ. P. 15(a) and the new claims related back to the original complaint filing date.

History: Eleventh Circuit reversed and remanded to the District Court for the Northern District of Alabama (Coogler, J.).

Facts: This is a non-bankruptcy case with potential bankruptcy-related ramifications. A son filed a pro se complaint against federal prison officials on behalf of his deceased mother's estate, alleging Eighth Amendment *Bivens* violations for his mother's death while in federal prison. The pro se complaint was filed by the son as the estate's representative one day before the statute of limitations for the *Bivens* claims expired. The plaintiff also timely began the notification process under the Federal Tort Claims Act. The district court ordered the plaintiff to explain whether his mother had died intestate, whether others were entitled to inherit or were beneficiaries, and whether the estate had any creditors. Having just engaged counsel, the estate responded that there were three children and a surviving spouse, no will, and one creditor. Counsel for the plaintiff also filed an amended complaint, adding new *Bivens* claims and FTCA claims, all arising from the same facts and involving the mother's death while incarcerated. At this point in the case, approximately eight months after the complaint was filed, no defendant had filed any responsive pleading or motion. The district court, guided by precedent from other circuits, ruled that the pro se complaint filed by the son on behalf of the estate was a nullity under 28 U.S.C. § 1654, which provides that "[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." The Second, Third, Fifth, Sixth, and Eighth Circuits had each held that a decedent's estate representative is pursuing his "own case" only if he is the sole beneficiary and there are no estate creditors. Here, there were others who would also inherit under Alabama's intestate provisions and there was at least one outstanding estate creditor. The district court therefore dismissed the complaint without prejudice as a nullity, guided by the Eighth Circuit's ruling on an almost identical scenario. The amended complaint therefore accomplished nothing under the district court's ruling because there was no original complaint to amend.

The Eleventh Circuit reversed on appeal. Addressing the issue head-on for the first time, the Eleventh Circuit agreed with the other circuits that under the terms of 28 U.S.C. § 1654, an estate representative may not represent an estate pro se if the estate has either (1) other beneficiaries, or (2) outstanding creditors because in either situation, the executor is not bringing his "own case." The Eleventh Circuit disagreed, however, with the Eighth Circuit's further ruling that a complaint filed by an estate representative pro se is a nullity and reversed the district court on that issue. Under federal law, a pro se litigant under these circumstances must be given an opportunity to cure the defect within a reasonable time. Here, the defect of being unrepresented had been cured before the district court dismissed the case so the dismissal was due to be reversed. Additionally, because the complaint was not a nullity, the amended complaint was proper under Fed. R. Civ. P. 15 because no responsive pleading or motion had been filed. On its substance, the new *Bivens* claims asserted in the amended complaint all related back to the filing of the original complaint because they arose from the same facts as the original timely *Bivens* claims, and the FTCA claims were also timely on their own merits.

In the bankruptcy context, we often see pro se non-individual creditors and caution them that 28 U.S.C. § 1654 means they must be represented by counsel to pursue an objection to confirmation, or an adversary proceeding (to name two of the most common scenarios). The Eleventh Circuit's guidance here indicates the pleadings and perhaps even oral objections of such creditors are not nullities and should not be dismissed or denied unless the creditors are first given a reasonable opportunity to obtain counsel.

Wortley v. Juranitch (In re Wortley), 2023 WL 3093571 (11th Cir. Apr. 26, 2023) (per curiam) (Wilson, Jordan, and Branch, JJ.).

Code § / Rule: Mandate on remand

Held: The bankruptcy court appropriately followed the Eleventh Circuit's mandate from a prior order and deviated only where new evidence supported the departure.

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

Facts: Wortley, Juranitch, and Tarrant were business partners in Global Energies, LLC. After much dispute, Juranitch and Tarrant developed a strategy to put the company into an involuntary chapter 11 at the behest of Chrispus, a corporation owned by Tarrant. During the chapter 11 case, the bankruptcy court approved the sale of the company's assets to Tarrant's corporation. Wortley moved to dismiss the case for bad faith and was denied with prejudice following an evidentiary hearing. In the meantime, ongoing state court litigation discovery revealed suspicious emails that Wortley believed supported his bad faith argument, and he moved for rehearing on that basis. The bankruptcy court denied the motion for rehearing and the district court affirmed. On appeal of the failure to grant rehearing, the Eleventh Circuit reversed and found the bankruptcy court had abused its discretion by applying the wrong legal standard in ruling on Wortley's Rule 60(b) motion. The circuit court reversed and remanded with instructions. The circuit included strong language in its order:

> On remand, the bankruptcy court shall grant Wortley's Rule 60(b)(2) motion and vacate its order approving the sale of Global's assets to Chrispus. This should be without prejudice to any innocent third parties, whose rights and interests are derived and dependent upon the sale. The bankruptcy court then shall conduct any hearings necessary in the exercise of all its powers at law or in equity and issue appropriate orders or writs, including without limitation orders requiring an accounting and disgorgement, orders imposing sanctions, writs of garnishment and attachment, and the entry of judgments to ensure that Chrispus, Juranitch, Tarrant, and [another party] do not profit from their misconduct and abuse of the bankruptcy process. The bankruptcy court shall vacate the sanctions imposed upon Wortley and ensure that he is fully compensated for any and all damages, including awarding Wortley attorneys' fees and costs. The only reason that this court does not impose any of these remedies is that Chrispus, Juranitch, Tarrant, and [another party] have not had an appropriate hearing, which will be conducted before the bankruptcy court.

In re Glob. Energies, LLC, 763 F.3d 1341, 1350 (11th Cir. 2014).

The bankruptcy court followed the circuit court mandate and vacated the order denying Wortley's motion for rehearing, then granted the motion for rehearing, and also vacated its order approving the sale of the assets to Tarrant's corporation. Wortley's motion to dismiss was set for a hearing, which the court consolidated with the trial of an adversary proceeding filed by Wortley against Tarrant and Juranitch, among others. The bankruptcy court again denied the motion to dismiss with prejudice. The district court remanded, finding that the bankruptcy court had not followed the circuit court's mandate from its Rule 60(b) ruling. The Eleventh Circuit on appeal and petition for mandamus disagreed with the district court and ruled that the bankruptcy court had not violated the mandate. The district court then affirmed the bankruptcy court on the merits and Wortley appealed.

On appeal, Wortley argued the bankruptcy court's finding that the case was filed in good faith was a violation of the mandate from the Rule 60(b) order and that the bankruptcy court should have instead found bad faith and awarded attorney fees and sanctions against the respondents. But the bankruptcy court considered new evidence, which put the suspicious emails into a different and less egregious context. Importantly, the presentation of new evidence is sufficient reason to depart from the "law of the case" effect of the circuit court's mandate on remand. Here, the bankruptcy court found the involuntary filing was an appropriate strategy to break the deadlock among members and not a bad faith manipulation, after considering the new evidence in addition to the suspicious emails. The bankruptcy court also assessed the credibility of the witnesses and found Wortley to be lacking in all credibility. Under the improper purpose, improper use, and Rule 9011 tests for bad faith employed in the Eleventh Circuit, the bankruptcy court's determinations were not clearly erroneous and were supported by plausible factual determinations. "In sum, the bankruptcy court complied with our mandate by holding an appropriate hearing, and its deviation in other respects was justified due to the presentation of new evidence." Opinion at *5.

OTHER CASES:

Soler-Somohano v. Fed. Housing Fin. Agency, 2022 WL 18214111 (11th Cir. Aug. 19, 2022) (per curiam) (Wilson, Branch, and Luck, JJ.) (circuit court dismissed pro se party's appeal of district court order from the Southern District of Florida as not being taken from a final order and not having been certified for immediate appeal).

Williams v. Golden Peanut Co., LLC, 2022 WL 3867557 (11th Cir. Aug. 30, 2022) (per curiam) (Luck, Brasher, and Ed Carnes, JJ.) (circuit court affirmed magistrate judge for the Middle District of Alabama's ruling that the plaintiff in race discrimination and retaliation case was judicially estopped from bringing the claims because he was represented in his bankruptcy case, did not contest that he took inconsistent positions in his bankruptcy case, knew that he could have amended his schedules, but never disclosed the claims to the bankruptcy court, his creditors, or the trustee, all of which outweighed his lack of sophistication under *Slater v. U.S. Steel Corp*., 871 F.3d 1174 (11th Cir. 2017)).

Walker v. Ozment (In re Walker), 2022 WL 4477259 (11th Cir. Sept. 27, 2022) (per curiam) (Jordan, Newsom, and Lagoa, JJ.) (circuit court affirmed the District Court for the Southern District of Florida's refusal to grant injunctive relief to pro se chapter 13 debtors seeking a return of records from counsel and seeking to force nonparties to stop paying the debtors' insurance and tax obligations, because the debtors failed to address in their brief how the district court abused its discretion in denying the injunctive relief; accusations abounded but any connection to the relief requested was missing even under the liberal standard applied to pro se briefs; other motions were denied for lack of specificity); ***Walker v. U.S. Bank Nat'l Ass'n,*** 2022 WL 5237915 (11th Cir. Oct. 6, 2022) (per curiam) (Jordan, Newsom, and Lagoa, JJ.) (pro se chapter 13 debtors abandoned their challenge to the dismissal of their case by failing to argue their position or cite any authority in support of their position in their lengthy brief; a bare assertion with no support or argument is insufficient even for pro se litigants); ***Walker v. Mittelberg (In re Walker)***, 2022 WL 14440021 (11th Cir. Oct. 25, 2022) (Jordan, Newsom, and Lagoa, JJ.) (pro se chapter 13 debtors' challenge to the allowance of a late-filed proof of claim and order granting relief from stay in favor of an attorney who represented Walker in a personal injury action was mooted by the dismissal of the chapter 13 case); ***Peele and Walker v. Weiner***, 2022 WL 18936223 (11th Cir. Dec. 2, 2022) (per curiam) (Jordan, Jill Pryor, and Grant, JJ.) (dismissing pro se debtors' appeals from various bankruptcy court orders, which were affirmed by the district court, as moot based on the dismissal of the underlying chapter 13 and based on one of the appeals having been filed before the order at issue was ever entered by the bankruptcy court).

1944 Beach Blvd., LLC v. Live Oak Banking Co. (In re NRP Lease Holdings, LLC), 50 F.4th 979 (11th Cir. Sept. 29, 2022) (Newsom, Lagoa, and Anderson, JJ.) (opinion by Lagoa, J.) (involving an issue unique to Florida's UCC and filing office system, the circuit court reversed the District Court for the Middle District of Florida, which had affirmed the Bankruptcy Court for the Middle District of Florida, based on Florida Supreme Court's response that because Florida does not use any standard search logic in its secured transaction registry but will instead return a list of twenty names that are the closest match from which the searcher may then proceed, there is no safe harbor available and a debtor must be correctly named in a UCC-1 or else the UCC-1 is seriously misleading and therefore unperfected—using "Blvd." instead of "Boulevard" on the UCC-1 was seriously misleading as a matter of law even though a search under the correct name would show the UCC-1 at issue on a visible page preceding the twenty closest named "results" page).

Ohlsson v. U.S. Bank Nat'l Ass'n (In re Ohlsson), 2022 WL 6959294 (11th Cir. Oct. 12, 2022) (per curiam) (Wilson, Lagoa, and Anderson, JJ.) (bank holding judgment of foreclosure against the debtor's property is a party in interest even if it does not file a proof of claim and state court foreclosure judgment could not be reviewed by federal court under the *Rooker-Feldman* doctrine; pro se chapter 7 debtor appealed the District Court for the Middle District of Florida's order that affirmed the Bankruptcy Court for the Middle District of Florida having granted the bank's motion for in rem relief from the stay).

Heghmann v. Hafiani, 2022 WL 14803783 (11th Cir. Oct. 26, 2022) (per curiam) (Rosenbaum, Branch, and Grant, JJ.) (pro se debtor, an attorney with a history of meritless litigation noted by the district court, was not entitled to liberal construction of pleadings normally afforded pro se litigants; the District Court's dismissal of all claims was affirmed where former debtors sued not only former landlord but also former hometown, former neighbors and their children, as well as 6,000 of the town's residents for buying debtors' property at a yard sale conducted in violation of the stay 17 years prior; the writ of possession was executed properly but yard sale was in violation of the automatic stay and debtors had already been awarded damages for the value of the items sold; the Middle District of Florida had no personal jurisdiction over the New Hampshire hometown).

Loder v. Icemakers, Inc. (In re Loder), 2022 WL 17973587 (11th Cir. Dec. 28, 2022) (per curiam) (Jordan, Branch, and Grant, JJ.) (circuit court affirmed the District Court for the Northern District of Alabama (Judge Coogler) which had affirmed the Bankruptcy Court for the Northern District of Alabama's (Judge Crawford) denial of pro se plaintiff's motion to enforce settlement, finding no error in bankruptcy court's findings that a later consent judgment was not mutually intended by the parties to replace a prior state-court judgment; seventeen years or more spent arguing over less than $6,000 in state and federal courts).

Mizell v. Citizens Bank, 2023 WL 140191 (11th Cir. Jan. 10, 2023) (per curiam) (Wilson, Luck, and Anderson, JJ.) (circuit court affirmed the District Court for the Middle District of Alabama and rejected plaintiff's attempt to raise a new theory that the bank's failure to produce the original promissory note prior to the sale of a radio station during a 2008 bankruptcy gave rise to a claim against the bank under Fed. R. Evid. 1002; federal rules do not abridge, enlarge, or modify substantive rights and do not create causes of action or provide standing).

SUPREME COURT BANKRUPTCY DECISIONS

Siegel v. Fitzgerald, 142 S. Ct. 1770 (June 6, 2022) (Sotomayor, J., authored the opinion for a unanimous Court).

This case came to the Supreme Court on cert from the Fourth Circuit, which had agreed with the Eleventh and Fifth Circuits that the action taken by Congress in 2017 (the "2017 Act") to increase fees immediately in UST jurisdictions, while anticipating but not requiring that the Judicial Conference also increase fees simultaneously in BA jurisdictions, did not violate the Bankruptcy Clause requirement that laws concerning bankruptcy be applied uniformly. The opinion points out the different funding mechanisms for the two systems: the UST program is funded by the UST Fund with money primarily sourced from debtors' filing fees and quarterly fees, which were temporarily increased by the 2017 Act to meet a shortfall in the UST Fund. The BA system is funded as part of the judiciary's general budget. When Congress acted to cure the shortfall in the UST Fund, it did not then require the Judicial Conference to make the same fee increases in BA jurisdictions (the statutory language said the Judicial Conference "may" increase the BA fees in lockstep but did not require the increase), which led to debtors in the UST jurisdictions paying significantly more in fees than identical debtors in BA jurisdictions. Congress amended the Act in 2021 to require the Judicial Conference to keep BA fees equal to UST fees going forward (the "may" became a "shall"). In the meantime, however, Circuit City Stores, Inc. paid over $550,000 more in fees than it would have had it been in a BA jurisdiction. The Fourth Circuit upheld the fee increase as applied to Circuit City on the basis that it had not been arbitrary but was instead targeted to a geographically specific problem unique to UST jurisdictions.

The Supreme Court disagreed and found the 2017 Act unconstitutional as not being geographically uniform as to identically situated debtors (identical in all relevant respects, but not as to their geographical location). The Tenth and Second Circuits had found the 2017 Act to be unconstitutional because it did not require the Judicial Conference to immediately impose the same fee increases in BA districts and the Supreme Court agreed. The geographically disparate application was not permissible even though the fee increase was designed to solve a geographical problem, which problem was a budget shortfall in the UST jurisdictions. The uniformity requirement did not allow Congress to treat debtors differently based solely on their location even if that was in pursuit of solving a geographically distinct problem that existed only in those debtors' locations under the UST program. "To survive scrutiny under the Bankruptcy Clause, a law must at least apply uniformly to a defined class of debtors." Opinion at 1781 (quoting *Railway Labor Executives' Assn. v. Gibbons*, 455 U.S. 457, 473 (1982)). Congress was not empowered to address a regional bankruptcy issue based on regional differences unless it first identified a material difference between debtors across those regions. No such difference in debtors was identified as to the fee increase.

The Court went further and described the dual administrative systems as an arbitrary creation when discussing the UST Fund shortfall: "That shortfall, however, existed only because Congress itself had arbitrarily separated the districts into two different systems with different cost funding mechanisms, requiring Trustee Program districts to fund the Program through user fees while enabling Administrator Program districts to draw on taxpayer funds by way of the Judiciary's general budget." Opinion at 1782. Although that language leaves little to the imagination for how a constitutional challenge to the dual systems would fare, the Court pointed out that it was not addressing the constitutionality of the dual systems, nor did it interpret the uniformity requirement as forbidding Congress from ever crafting different relief for different debtors based on geographically unique issues. "The Court holds only that the uniformity requirement of the Bankruptcy Clause prohibits Congress from arbitrarily burdening only one set of debtors with a more onerous funding mechanism than that which applies to debtors in other States." Opinion at 1782-83. The Court remanded for the Fourth Circuit to consider the appropriate remedy for the discrepancy in the fees paid by the debtor in the instant case. On remand, the Fourth Circuit then remanded to the Bankruptcy Court for the Eastern District of Virginia, which held the Liquidating Trustee was entitled to a refund of the unconstitutional overpayment amount. *Siegel v. U.S. Trustee Program (In re Siegel)*, 2022 WL 17722849 (Bankr. E.D. Va. 2022).

The Court's ruling abrogated the Eleventh Circuit's decision in *In re Mosaic Management Group, Inc.*, 22 F.4th 1291 (11^{th} Cir. 2022) (finding the 2017 Act to be constitutional even though it did not require the Judicial Conference to impose fee increases equally across both BA and UST jurisdictions, which requirement was then added by the 2021 amendment).

Bartenwerfer v. Buckley, 143 S. Ct. 665 (Feb. 22, 2023) (Barrett, J., authored the opinion for a unanimous Court; Sotomayor, J., also concurred and was joined by Jackson, J.).

This case came to the Supreme Court from the Ninth Circuit, which held that an innocent debtor could not discharge a debt obtained by her partner's fraud when that fraud was imputed to her under agency principles, regardless of the debtor's personal lack of knowledge of the wrongdoing. Kate and David Bartenwerfer formed a legal partnership to renovate and sell for profit a home they owned in San Francisco. David handled the project almost exclusively with little involvement from Kate. After closing, the purchasers discovered several undisclosed defects and won a judgment against both David and Karen for over $200,000 in damages. The Bartenwerfers soon filed chapter 7 and the purchasers sued for nondischargeability of their judgment under § 523(a)(2)(A). After a two-day trial, the bankruptcy court ruled in favor of the purchasers, finding that David had committed actual fraud and imputing that fraud to Kate under state-law agency principles based on their legal partnership. On appeal, the BAP reversed and said Kate could only be denied the discharge of the judgment debt if she was found to have reason to know of David's fraud.

On remand, the bankruptcy court found Kate did not have reason to know of David's fraud in concealing the known defects in the home and allowed her to discharge the debt. The BAP then affirmed but the Ninth Circuit reversed under the long-standing authority of *Strang v. Bradner*, 114 U.S. 555 (1885), which held that a debtor liable for fraud under agency principles could not discharge a debt obtained by a partner's fraud when that fraud was imputed to the otherwise-innocent debtor. The Eleventh Circuit had also cited the authority of *Strang* in *Hoffend v. Villa* (*In re Villa)*, 261 F.3d 1148, 1151 (11th Cir. 2001) (citing *Strang* for the principle that there be no discharge for a debt obtained by another's actual fraud when that fraud is imputed to the debtor under agency principles, but declining to extend that rationale to a controlling person under the Securities and Exchange Act, which was not an agency relationship). The Supreme Court granted cert to resolve a lack of uniformity among the Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits as to what level of culpability and knowledge was required to establish nondischargeability for a partner's fraud. The Supreme Court agreed with the Ninth Circuit (and as a practical matter, agreed with the Eleventh Circuit's discussion of the agency issue in *Villa*).

The text of § 523(a)(2)(A) is written in the passive voice, and as a result, the statutory requirements include the commission of fraud, but do not specify the identity of the fraudulent actor:

> A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt . . .
>
> > (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
> >
> > > (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition."

"Passive voice pulls the actor off the stage." Opinion p.5. Just as there is no limitation on the identity of the fraudulent actor in the text, the common law of fraud has long held that liability for fraud is not limited to the wrongdoer and has long held principals responsible for their agents' fraud. The Court reinforced this interpretation of the statute by noting that subsections § 523(a)(2)(B) and (a)(2)(C) were drafted differently and expressly require the debtor to be the bad actor. Additionally, after the *Strang* decision, Congress amended § 523(a)(2)(A)'s predecessor provision under the Act to eliminate any reference to the "bankrupt" as the bad actor, thus bringing the statute into conformity with the Court's ruling in *Strang* on agency principles. The fresh start is not without exceptions, and the breadth of the fraud exception as the Court interprets it rests not on the statute itself but on the underlying state law to "define the scope of one person's liability for another's fraud." Opinion p.11. Justice Sotomayor concurred, joined by Justice Jackson, and while agreeing with the main opinion, the concurrence stressed that the holding was limited only to fraud by agents and partners in pursuit of the partnership.

MOAC Mall Holdings, LLC v. Transform Holdco LLC, 143 S. Ct. 927 (Apr. 19, 2023) (Jackson, J., authored the opinion for a unanimous Court).

This case came to the Supreme Court from the Second Circuit and centered on § 363(m), which provides that "[t]he reversal or modification on appeal of an authorization under [§ 363(b) or § 363(c)] of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith ... unless such authorization and such sale or lease were stayed pending appeal."

The underlying facts arose in the Sears chapter 11 case, in which Transform Holdco purchased most of the assets of Sears, including the right to designate to whom a lease involving Sears would be assigned. The lease at issue was the Sears lease with MOAC (at the Minnesota Mall of America). Transform designated the assignment of the MOAC lease to a company that was a wholly owned subsidiary of Transform and MOAC objected on grounds that it was not adequately assured of future performance under § 365(f)(2)(B). The bankruptcy court allowed the assignment and denied a request to stay the assignment order, reasoning that the assignment order was not the type of order covered by § 363(m), and apparently believing Transform had explicitly agreed to not invoke § 363(m) in the event of an appeal. The assignment was accomplished, since it was not stayed, and MOAC appealed to the district court. The district court agreed with MOAC that adequate assurances were lacking and vacated the assignment order insofar as it approved the assignment to Transform's subsidiary. On its request for rehearing in district court after losing on the merits of the appeal, Transform for the first time raised the § 363(m) argument, which the district court criticized but found it was bound, under Second Circuit precedent, to respect. The Second Circuit had established that the provisions of § 363(m) were jurisdictional and thus were not subject to waiver or estoppel (for not having been raised by Transform before rehearing). The district court found that § 363(m) applied and required it to dismiss the appeal of the assignment order for lack of jurisdiction. The Second Circuit agreed.

The Second Circuit ruled that § 363(m) was jurisdictional (meaning it could be invoked at any time without regard to waiver or estoppel arguments in opposition), whereas the Eleventh and Third Circuits had ruled to the contrary and held that § 363(m) was a limitation on remedy but was not a jurisdictional provision. *See In re Stanford*, 17 F.4th

116, 122 (11th Cir. 2021). The Supreme Court granted cert to resolve the split and reversed the Second Circuit (agreeing with the Eleventh and Third Circuits). First, the Court was not persuaded that the appeal was moot. Mootness arguments are disfavored, and the Court refused to look at whether any relief remained available, noting that it was sufficient that the possibility of available relief was neither frivolous nor implausible. One could question whether this statement foreshadows the death of equitable mootness.

Next, the Court addressed the merits of the § 363(m) issue and found it was not a jurisdictional provision. Jurisdictional rules relate to the power of the court, and not to the rights of the parties. Slip Op. at 8 (citing *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010)). Congress must clearly state its intent for a provision to be treated as jurisdictional given the severity of the consequences, although no magic words are required. The Court cites *Boechler v. Commissioner*, 596 U.S. --- (2022) (Slip Op. at 3) as recent "clear statement" precedent. Nothing in the text of § 363(m) limits a court's power to adjudicate. The text is instead "merely cloaking certain good-faith purchasers or lessees with a targeted protection of their newly acquired property interest, applicable even when an appellate court properly exercises jurisdiction." Slip Op. at 7. Context confirmed the Court's conclusion, as the code speaks directly to a court's ability to adjudicate when that is Congressional intent, such as in § 305(c), which expressly curtails the ability of a court of appeals to review abstention orders. The Court was unpersuaded by Transform's argument that the bankruptcy court lost jurisdiction over the res once the sale or lease was accomplished, in part because that argument proved too much—that logic would deprive the court of the ability to reverse or modify the sale or lease if it were shown that a bad faith purchaser was involved, which is expressly contemplated by the statutory language at issue. The Court vacated and remanded and refused to opine on other issues raised by the parties regarding § 363(m).