

Bankruptcy

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I. INTRODUCTION

In bankruptcy circles, the year 2002 likely will be remembered as the year of the big bankruptcy case. Five of the ten biggest Chapter 11 cases ever filed were filed in 2002, including the biggest of them all, Worldcom, Inc.¹ Not one of them, however, arose in the Eleventh Circuit. Instead, consumer issues dominated the bankruptcy landscape in Alabama, Florida, and Georgia. Among the notable topics were state sovereign immunity, judicial estoppel, repossessed vehicles as property of the estate, modification of secured claims following stay relief and foreclosure, and discharge of student loans.

This Article does not attempt to address all of the more than two hundred bankruptcy cases decided and published in the Eleventh Circuit in 2002. Rather, it reviews the most significant of those cases and provides a general overview of legal developments.²

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1. The five bankruptcies were Worldcom, Inc. (largest filing); Consecro, Inc. (3rd largest); Global Crossing Ltd. (6th largest); UAL Corp. (7th largest); and Adelphia Communications (8th largest). New Generation Research, Inc., *The Largest Bankruptcies 1980-Present*, available at http://www.bankruptcydata.com/Research/15_Largest.htm (visited January 31, 2003).

2. This Article covers bankruptcy and bankruptcy-related cases from the United States Supreme Court, the Eleventh Circuit Court of Appeals, and all courts within the Eleventh Circuit that were both decided and published in 2002, as well as more recent developments relating to those decisions.

II. PRELIMINARY ISSUES

A. *State Sovereign Immunity*

The Eleventh Amendment,³ as interpreted by the United States Supreme Court, grants states immunity from suits initiated against them by their own citizens or by citizens of other states.⁴ Section 106(a) of the Bankruptcy Code⁵ purports to abrogate the sovereign immunity of governmental units, including states, as to virtually every significant portion of the Code.⁶ Last year, courts in Alabama, Georgia, and Florida found § 106(a) to be unconstitutional as applied to the states.⁷

The courts based their decisions on Supreme Court cases holding that Congress cannot abrogate state sovereign immunity pursuant to various Article I powers,⁸ including the Commerce Clause,⁹ the Indian Commerce Clause,¹⁰ and the Patent Clause.¹¹ The Supreme Court has not specifically considered the Bankruptcy Clause in this context. Nevertheless, the courts in *Alabama Department of Human Resources v. Lewis*, *King v. Florida Department of Revenue (In re King)*, and *Venable v. Acosta (In re Venable)* concluded that Congress cannot abrogate state sovereign immunity through any of its Article I powers, including the bankruptcy power.¹²

Although the Eleventh Circuit Court of Appeals has not decided the constitutionality of § 106(a), the results in the above cases are consistent with the conclusion reached by the majority of circuit courts to consider the issue.¹³ The Eleventh Circuit's results conflict, however, with three

3. U.S. CONST. amend. XI.

4. See *Alden v. Maine*, 527 U.S. 706, 727-28 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996).

5. Unless otherwise indicated, all statutory references, including references to the "Bankruptcy Code" or to the "Code," are to Title 11 of the United States Code.

6. 11 U.S.C. § 106(a) (2000).

7. Ala. Dep't of Human Res. v. Lewis, 279 B.R. 308, 319 (S.D. Ala. 2002); King v. Fla. Dep't of Revenue (*In re King*), 280 B.R. 767, 777 (Bankr. S.D. Ga. 2002); Venable v. Acosta (*In re Venable*), 280 B.R. 916, 918 (Bankr. M.D. Fla. 2002).

8. *Lewis*, 279 B.R. at 318-19; *King*, 280 B.R. at 774; *Venable*, 280 B.R. at 919.

9. *Seminole Tribe*, 517 U.S. at 65-66.

10. *Id.* at 47.

11. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 636 (1999).

12. *Lewis*, 279 B.R. at 319; *King*, 280 B.R. at 774; *Venable*, 280 B.R. at 919.

13. Nelson v. La Crosse County Dist. Atty., 301 F.3d 820, 832 (7th Cir. 2002); Mitchell v. Franchise Tax Bd. (*In re Mitchell*), 209 F.3d 1111, 1121 (9th Cir. 2000); Sacred Heart Hosp. of Norristown v. Pa. Dep't of Pub. Welfare (*In re Sacred Heart Hosp. of Norristown*), 133 F.3d 237, 245 (3d Cir. 1998); Schlossberg v. Maryland (*In re Creative Goldsmiths of*

earlier cases out of the Bankruptcy Court for the Southern District of Georgia, in which the court held that Congress passed § 106(a) pursuant to its power to enforce the Privileges and Immunities Clause of the Fourteenth Amendment.¹⁴

Although the Supreme Court has held that Congress may abrogate state sovereign immunity pursuant to its power to enforce the Fourteenth Amendment, the Court has articulated a stringent test for doing so.¹⁵ As a result, the privileges and immunities argument has not gained widespread approval as the basis of Congress's authority to pass § 106(a).¹⁶

B. *Judicial Estoppel*

A debtor who fails to list a cause of action as an asset in his bankruptcy schedules may be foreclosed from pursuing that claim under the principle of judicial estoppel. This issue began to gain significant notice in Georgia in 2001.¹⁷ In 2002 both state and bankruptcy courts continued to shape the law in this area.

Judicial estoppel is intended to protect the integrity of the judicial system by preventing a party from asserting inconsistent positions in two different courts.¹⁸ The topic first gained the attention of bankrupt-

Washington, D.C., Inc.), 119 F.3d 1140, 1147 (4th Cir. 1997); Dep't of Transp. & Dev. v. PNL Asset Mgmt. Co. (*In re Estate of Fernandez*), 123 F.3d 241, 246 (5th Cir. 1997) (all holding that Congress may not abrogate state sovereign immunity). *Contra Hood v. Tenn. Student Assistance Corp.* (*In re Hood*), 2003 U.S. App. LEXIS 1755, at *30 (6th Cir. February 3, 2003) (holding that Congress may abrogate state sovereign immunity pursuant to its power under the Bankruptcy Clause).

14. *Wilson v. S.C. State Educ. Assistance Auth.* (*In re Wilson*), 258 B.R. 303, 307-08 (Bankr. S.D. Ga. 2001); *Burke v. Georgia* (*In re Burke*), 203 B.R. 493, 497 (Bankr. S.D. Ga. 1996); *Headrick v. Georgia* (*In re Headrick*), 203 B.R. 805, 809 (Bankr. S.D. Ga. 1996). *Burke* and *Headrick* were consolidated on appeal and affirmed on other grounds. *Ga. Dep't of Revenue v. Burke* (*In re Burke*), 146 F.3d 1313, 1317 (11th Cir. 1998). Each of these cases was decided by Chief Judge Dalis. *King*, a Southern District of Georgia case decided by Judge Walker, rejected the privileges and immunities argument. 280 B.R. at 775.

However, the court in *King* did set forth, in dicta, an alternative argument for denying sovereign immunity. *Id.* at 770-72. According to the court, § 106(a) is unnecessary with respect to states because they surrendered their sovereign immunity in bankruptcy when they ratified the U.S. Constitution. *Id.* This rationale was rejected by the court in *Lewis* and by the Seventh Circuit Court of Appeals in *Nelson*. 279 B.R. at 314-15 & n.3; *Nelson*, 301 F.3d at 833. However, it was incorporated into the rationale of the Sixth Circuit Court of Appeals in *Hood*. 2003 U.S. App. LEXIS 1755, at *31.

15. See *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

16. See, e.g., *Sacred Heart Hosp.*, 133 F.3d at 244-45; *Creative Goldsmiths*, 119 F.3d at 1146-47; *Fernandez*, 123 F.3d at 245.

17. See Robert B. Chapman, *Bankruptcy*, 53 MERCER L. REV. 1199, 1211-19 (2002).

18. See 28 AM. JUR. 2D *Estoppel and Waiver* § 34 (2000).

cy practitioners when the Georgia Supreme Court issued *Wolfork v. Tackett*,¹⁹ holding that judicial estoppel prevents a debtor from pursuing a cause of action in state court when he has omitted that claim from his bankruptcy schedules.²⁰ However, *Wolfork* probably raised more questions than it answered, making it the target of criticism.²¹ More recent cases have helped clarify the court's position.

In *IBF Participating Income Fund v. Dillard-Winecoff, LLC*,²² the Georgia Supreme Court discussed the test for the applicability of judicial estoppel in the bankruptcy context.²³ First, it noted that when the prior proceeding is a bankruptcy case, federal law applies.²⁴ It then listed three factors for consideration:

- (1) the party's later position must be "clearly inconsistent" with its earlier position;
- (2) the party must have succeeded in persuading a court to accept the party's earlier position; . . . and
- (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."²⁵

The Eleventh Circuit Court of Appeals further explained the requirements of judicial estoppel in *Billups v. Pemco Aeroplex, Inc. (In re Burnes)*.²⁶ Courts must consider the totality of the circumstances, and the omission must have been intentional.²⁷ Furthermore, the court stated that "judicial estoppel protects the integrity of the judicial system, not the litigants" so that detrimental reliance by the defendant is not necessary.²⁸

19. 273 Ga. 328, 540 S.E.2d 611 (2001).

20. *Id.* at 329, 540 S.E.2d at 612.

21. See Hon. William Brown Houston et al., *Debtors' Counsel Beware: Use of the Doctrine of Judicial Estoppel in Nonbankruptcy Forums*, 75 AM. BANKR. L.J. 197, 206-07 (2001).

22. 275 Ga. 765, 573 S.E.2d 58 (2002).

23. *Id.* at 766-67, 573 S.E.2d at 60.

24. *Id.* at 766, 573 S.E.2d at 59.

25. *Id.* at 766-67, 573 S.E.2d at 60 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001)). The court found that when the bankruptcy case in which the debtor omitted a claim was dismissed, the parties had returned to their pre-petition positions, giving the debtor no advantage by omitting the claim. *Id.* Thus, judicial estoppel was an inapplicable defense. *Id.*

26. 291 F.3d 1282 (2002).

27. *Id.* at 1286.

28. *Id.* Although the debtor in *Burnes* had been ordered by the bankruptcy court to amend his schedules when he converted his case from Chapter 13 to Chapter 7, he failed to add an employment discrimination claim that had arisen postpetition. *Id.* at 1284. As a result, the court concluded that the debtor acted deliberately in failing to update his schedules; thus, judicial estoppel was a valid defense to be used against him. *Id.* at 1286-

Wolfork prompted several debtors to seek to reopen their bankruptcy cases to disclose a previously unscheduled cause of action. Like the court in *Burnes*, the bankruptcy courts have generally been concerned with intent and have been willing to aid the debtor when the omission was unintentional. For example, in *In re Barger*,²⁹ the debtor's litigation counsel had disclosed her employment discrimination claim to her bankruptcy attorney, and the debtor had informed the trustee of the claim at the meeting of creditors. However, her attorney had failed to list it on the bankruptcy schedules.³⁰ Finding that the circumstances indicated that the debtor had not "concealed" the cause of action, the court allowed the debtor to reopen her closed Chapter 7 case to amend her schedules.³¹

The nonbankruptcy courts have favored debtors when they have been allowed by the bankruptcy court to amend their schedules. In one case, a court indicated that the mere attempt to amend could prevent judicial estoppel.³² In *Rowan v. George H. Green Oil, Inc.*,³³ the Georgia Court of Appeals outlined a relaxed rule, stating that a debtor

"can avoid the application of judicial estoppel simply by filing a motion to amend the debtor's bankruptcy petition or a motion to reopen the debtor's bankruptcy case to declare the omitted claim or cause of action." Indeed, "amending the bankruptcy petition to include the claim, even after the bankruptcy case was closed, precludes judicial estoppel from barring the claim."³⁴

88. However, it could not be used to prevent the debtor from pursuing injunctive relief because such relief would not "have changed the bankruptcy court's determination about how to proceed with the debtor's bankruptcy." *Id.* at 1289.

29. 279 B.R. 900 (Bankr. N.D. Ga. 2002).

30. *Id.* at 902-03.

31. *Id.* at 908-09. See also *In re Tarrer*, 273 B.R. 724, 735 (Bankr. N.D. Ga. 2002) (allowing debtors to reopen their case to add an omitted cause of action in part because the court found the omission of a claim by the debtor to be unintentional). In *Barger* the court said it was not attempting to determine the applicability of judicial estoppel, yet it made its opposition (at least in this case) known by stating that application of judicial estoppel would hurt innocent third parties—the debtor's creditors. *Id.* at 908. "[T]here are punishments other than judicial estoppel that can be directed at a debtor, rather than the estate and creditors, such as sanctions under Fed. R. Bankr. P. 9011, revocation of the discharge, or denial of any exemption in the claim and its proceeds." *Id.* (citing *In re Lewis*, 273 B.R. 739, 748 (Bankr. N.D. Ga. 2001)).

32. *Rowan v. George H. Green Oil, Inc.*, 257 Ga. App. 774, 776, 572 S.E.2d 338, 339 (2002).

33. 257 Ga. App. 774, 572 S.E.2d 338 (2002).

34. *Id.* at 776, 572 S.E.2d at 339 (quoting *Cochran v. Emory Univ.*, 251 Ga. App. 737, 740, 555 S.E.2d 96, 100 (2001) (Miller, J., concurring specially); *Jowers v. Arthur*, 245 Ga. App. 68, 70, 537 S.E.2d 200, 201 (2000)).

In *Period Homes, Ltd. v. Wallick*,³⁵ the Georgia Supreme Court concluded that even when a debtor fails to amend (or attempt to amend) his schedules to reveal a previously omitted cause of action, he may still avoid judicial estoppel.³⁶ The court rejected application of judicial estoppel in that case because the debtor had informally recognized the asset by telling the bankruptcy trustee about it.³⁷ In addition, because all the creditors were paid in full in the bankruptcy case, no benefit accrued to the debtor and no harm accrued to his creditors as a result of the omission.³⁸

The court of appeals deferred to the bankruptcy court's judgment in *Chicon v. Carter*.³⁹ The debtor in *Carter* filed a Chapter 13 petition. After her plan was confirmed, she was injured in an auto accident that gave rise to a tort claim. The debtor filed a motion to amend her schedules to avoid application of judicial estoppel to the tort claim.⁴⁰ The bankruptcy court denied the motion, stating that because the claim arose post-confirmation, it was not part of the bankruptcy estate; thus, the debtor did not have to amend her schedules, and judicial estoppel would not apply.⁴¹ The court of appeals relied on the bankruptcy court's conclusion to deny judicial estoppel: "[I]t stands to reason that the Georgia court in which the tort claim is asserted should honor the bankruptcy court's actions.' . . . The bankruptcy court's conclusion that the Carters' tort claim never formed part of their bankruptcy estate forbids the application of judicial estoppel to their claim."⁴²

The court in *Traylor v. Ford*⁴³ reached a different result, allowing a defense of judicial estoppel even though the debtor had successfully amended his schedules.⁴⁴ Defendant claimed judicial estoppel in a discrimination action filed by the debtor on the ground that the debtor had not disclosed the claim in his bankruptcy schedules. In response, the debtor amended his schedules.⁴⁵ Nevertheless, the district court dismissed the debtor's discrimination case, reasoning that he had

35. 275 Ga. 486, 569 S.E.2d 502 (2002).

36. *Id.* at 486-88, 569 S.E.2d at 503-04.

37. *Id.* at 488-89, 569 S.E.2d at 504.

38. *Id.* at 489, 569 S.E.2d at 504.

39. 258 Ga. App. 164, 573 S.E.2d 413 (2002).

40. *Id.* at 164, 573 S.E.2d at 414.

41. *Id.* at 164-65, 573 S.E.2d at 414.

42. *Id.* at 166, 573 S.E.2d at 415 (quoting *Jowers v. Arthur*, 245 Ga. App. at 70-71, 537 S.E.2d at 202).

43. 185 F. Supp. 2d 1338 (N.D. Ga. 2002).

44. *Id.* at 1340.

45. *Id.* at 1339. The debtor in this case amended his schedules by right and had not obtained formal approval by the bankruptcy court to do so. *Id.*

amended his schedules only after being forced to do so by the prospect of judicial estoppel.⁴⁶ Because the debtor, who had filed his bankruptcy petition pro se, had omitted the cause of action on his schedules and told the trustee he had no causes of action, the court was in “no doubt that [] plaintiff *concealed* the existence of this lawsuit.”⁴⁷

In a similar case, the Eleventh Circuit Court of Appeals affirmed a district court’s application of judicial estoppel to the debtor’s employment discrimination claim.⁴⁸ Although the claim had arisen post-petition, the debtor failed to fulfill his continuing duty to amend his schedules.⁴⁹ The fact that he only sought to amend after judicial estoppel was raised showed a motive to conceal an “intent ‘to make a mockery of the judicial system.’”⁵⁰ These cases are consistent with the determination of the court of appeals that amending schedules will not save a debtor who intentionally omitted a cause of action.⁵¹

C. Class Certification

In *Chrysler Financial Corp. v. Powe*,⁵² the Eleventh Circuit Court of Appeals refused to review a bankruptcy court’s order certifying a class of plaintiffs.⁵³ The issue, raised sua sponte by the court of appeals, was whether the circuit court had jurisdiction over an interlocutory appeal from a bankruptcy court.⁵⁴ Federal Rule of Civil Procedure (“FRCP”) 23(f) provides that the circuit court may grant interlocutory review of a district court order certifying a class.⁵⁵ Federal Rule of Bankruptcy Procedure (“FRBP”) 7023 incorporates FRCP 23 with FRBP 9002, instructing that the phrase “district court” should be substituted by “bankruptcy court.”⁵⁶ Thus, according to appellant, the circuit court was authorized to review a class certification order from the bankruptcy court.⁵⁷ The court of appeals disagreed.⁵⁸ It determined that the purpose of FRCP 23(f) is to allow for interlocutory appeal of a district

46. *Id.* at 1340.

47. *Id.* (emphasis added).

48. *Leon v. ComCar Ind., Inc.*, No. 02-13688, 2003 WL 347643 (11th Cir. Feb. 18, 2003).

49. *Id.* at *1.

50. *Id.* at *2. The court also noted in this case that the standards for judicial estoppel have uniform application in bankruptcy regardless of the chapter. *Id.* at *1.

51. *Burnes*, 291 F.3d at 1286.

52. 312 F.3d 1241 (11th Cir. 2002).

53. *Id.* at 1247.

54. *Id.* at 1242.

55. *Id.* at 1243 (citing FED. R. CIV. P. 23(f)).

56. *Id.* at 1243-44 (citing FED. R. BANKR. P. 9002(4)).

57. *Id.* at 1244.

58. *Id.* at 1246-47.

court's order of class certification without seeking the district court's approval, which is usually required for an interlocutory appeal.⁵⁹ However, because the advisory committee notes to FRCP 23(f) state that the rule was passed pursuant to the Supreme Court's authority under 28 U.S.C. § 2072⁶⁰ to promulgate rules of procedure for the district courts, rather than its authority under 28 U.S.C. § 2075⁶¹ to promulgate rules for the bankruptcy courts, FRCP 23(f) could not provide the basis for appeal from the bankruptcy court to the circuit court.⁶² Furthermore, the court noted that an interlocutory appeal to the district court may be filed pursuant to 28 U.S.C. § 158(a).⁶³ Thus, potential appellants are not foreclosed from appealing their cases; they are merely foreclosed from bypassing the district court in the appeals process.⁶⁴

III. DEBTOR PROTECTIONS

A. Automatic Stay

1. Violations. Refusal to release a pre-petition garnishment is not a violation of the automatic stay according to bankruptcy courts in the Middle Districts of Florida and Georgia. In *In re Giles*,⁶⁵ a judgment creditor obtained a writ of garnishment on the debtor's bank accounts prior to the bankruptcy filing. Upon filing bankruptcy, the debtor insisted that the creditor release the garnishment, but the creditor refused to do so.⁶⁶ The court first found that under Florida law, the writ of garnishment created a lien against the debtor's bank accounts.⁶⁷ Although the creditor could not take further action without obtaining stay relief, refusal to release the pre-existing garnishment did not violate

59. *Id.* at 1245-46. Generally, an interlocutory appeal requires that "the district court certify the certification ruling for appeal" or that the district court find that the matter "involve[s] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Id.* at 1245 (quoting 28 U.S.C. § 1292(b) (1994)).

60. 28 U.S.C. § 2072 (2000).

61. 28 U.S.C. § 2075 (2000).

62. 312 F.3d at 1245.

63. *Id.* at 1246. Except in very narrow circumstances, the appellant must obtain leave of the bankruptcy court to file an interlocutory appeal in the district court. 28 U.S.C. § 158(a) (2000). See also *Powe*, 312 F.3d at 1246 n.6.

64. *Id.* at 1246.

65. 271 B.R. 903 (Bankr. M.D. Fla. 2002).

66. *Id.* at 904.

67. *Id.* at 905-06.

the stay.⁶⁸ To rule otherwise, the court reasoned, would infringe upon the creditor's lien rights.⁶⁹

*Buchanan v. First Family Financial Services (In re Buchanan)*⁷⁰ presented a different type of garnishment. In *Buchanan* the creditor obtained a writ of garnishment against the debtor's wages prior to the bankruptcy filing. When the creditor was notified of the bankruptcy filing, it immediately sought to stay the garnishment. It filed a notice of stay of the garnishment with the appropriate court and repeatedly instructed the debtor's employer to halt garnishment. Nevertheless, the employer continued to garnish the debtor's wages post-petition. The debtor argued he was entitled to sanctions because the creditor did not release the garnishment.⁷¹ The court held that when a garnishment is filed pre-petition, the creditor must take affirmative action to stay the garnishment (which the creditor in *Buchanan* did), but it need not actually release the garnishment.⁷² Thus, while the employer may have been in violation of the stay due to the post-petition wage garnishment, the creditor was not.⁷³ As in *Giles*, the automatic stay did not require the creditor to surrender rights it obtained pre-petition.

2. Pre-petition Waiver. A debtor who enters into a pre-petition agreement to waive the automatic stay of a particular creditor may find that agreement enforceable in bankruptcy. *In re Excelsior Henderson Motorcycle Manufacturing Co.*⁷⁴ and *Southwest Georgia Bank v. Desai (In re Desai)*⁷⁵ presented similar facts. In each case, a Chapter 11 debtor entered into a post-petition debt restructuring agreement with a secured creditor that provided that the debtor would not oppose stay relief in a future bankruptcy proceeding that affected the creditor's collateral. That agreement was incorporated into the Chapter 11 plan, which was subsequently confirmed. After the debtor defaulted on the plan, the creditor began foreclosure proceedings and the debtor made a new Chapter 11 filing.⁷⁶

68. *Id.* at 906.

69. *Id.*

70. 273 B.R. 749 (Bankr. M.D. Ga. 2002).

71. *Id.* at 750.

72. *Id.* at 751.

73. *Id.* Because the debtor sought sanctions only against the creditor, the court did not consider whether the employer was in violation of the stay. *Id.*

74. 273 B.R. 920 (Bankr. S.D. Fla. 2002).

75. 282 B.R. 527 (Bankr. M.D. Ga. 2002).

76. *Id.* at 528-29; 273 B.R. at 921-22.

The question in the subsequent bankruptcy filing was whether the waiver of stay was enforceable.⁷⁷ The court in *Excelsior* found the waiver enforceable and granted stay relief because the debtor had bargained for the waiver and had received consideration.⁷⁸ The court also found it significant that the exchange had been made in the course of a prior Chapter 11 plan.⁷⁹ In addition, the court noted that its holding was consistent with the policy of favoring out-of-court settlements.⁸⁰

The court in *Desai* held that waivers of stay relief may be enforceable but said they are not per se enforceable or self-executing.⁸¹ Rather, the court should consider the following factors in deciding whether to enforce the waiver: "(1) the sophistication of the party making the waiver; (2) the consideration for the waiver, including the creditor's risk and the length of time the waiver covers; (3) whether other parties are affected including unsecured creditors and junior lienholders, and; (4) the feasibility of the debtor's plan."⁸² Another factor the court considered was whether the debtor had equity in the collateral.⁸³ Because the creditor failed to prove a lack of equity, the court did not enforce the waiver and denied stay relief to the creditor.⁸⁴

B. Discrimination

In *Federal Communications Commission v. Nextwave Personal Communications, Inc.*,⁸⁵ the United States Supreme Court held that the FCC violated § 525 of the Bankruptcy Code⁸⁶ when it cancelled Chapter 11 debtor Nextwave's wireless spectrum licenses.⁸⁷ Nextwave had purchased a block of licenses at auction for a total of nearly five billion dollars and executed a security agreement and promissory note in favor of the FCC, agreeing to pay the debt in installments. According to the security agreement, failure to make an installment payment would result in automatic cancellation of the licenses. The debtor experienced financial difficulties and, despite options for restructuring the debt, defaulted on the note after filing a Chapter 11 petition. The FCC

77. 282 B.R. at 529; 273 B.R. at 922.

78. 273 B.R. at 925.

79. *Id.* at 924.

80. *Id.*

81. 282 B.R. at 532.

82. *Id.*

83. *Id.* at 532-33.

84. *Id.*

85. 123 S. Ct. 832 (2003).

86. 11 U.S.C. § 525 (1994).

87. 123 S. Ct. at 839.

claimed that the licenses had been automatically cancelled when the debtor missed a note payment.⁸⁸ The issue before the Supreme Court was whether that cancellation violated § 525(a).⁸⁹

Section 525(a) prohibits a governmental unit from revoking a license granted to a debtor solely because that debtor “has not paid a debt that is dischargeable” in bankruptcy.⁹⁰ The FCC agreed that the cause of cancellation was failure to pay but argued that it had a valid regulatory motive for cancellation.⁹¹ The Court was not persuaded by this argument, stating that Congress did not include a regulatory motive exception in the statute.⁹² To read such an exception into the statute would not only deprive § 525(a) of force, it would also render superfluous those regulatory exceptions Congress has expressly included in the Code.⁹³ Based on this reasoning, a federal agency cannot rely on its regulatory power to evade the mandates of the Bankruptcy Code, and Nextwave was allowed to keep its licenses.⁹⁴

Section 525(b) of the Bankruptcy Code was at issue in *Kepple v. Miller*.⁹⁵ The statute prohibits a private employer from discriminating against or terminating an employee solely due to her failure to pay a debt dischargeable in bankruptcy.⁹⁶ In *Kepple* the Georgia Court of Appeals considered whether that section applies to independent contractors.⁹⁷ This issue arose in a breach of contract claim filed by the debtor, a real estate agent who had been working as an independent contractor for ReMax Advantage. The debtor filed for bankruptcy, and approximately eighteen months after receiving a discharge of debts, including unpaid fees owed to ReMax, the debtor was terminated. The debtor alleged a violation of § 525(b)(3) in her suit against ReMax.⁹⁸

88. *Id.* at 836-38.

89. *Id.* at 836.

90. *Id.* at 838 (quoting 11 U.S.C. § 525(a)).

91. *Id.*

92. *Id.* at 839.

93. *Id.* (citing 11 U.S.C. § 362(b)(4) (1998)). The Court also rejected the argument that § 525 did not apply because the debt was not dischargeable, stating that it was the regulatory exemption argument dressed up differently. *Id.* at 840. In addition, the Court found no conflict between § 525 and the Communications Act of 1934, 47 U.S.C. §§ 151 to 6155 (2000). *Id.*

94. *Id.*

95. 257 Ga. App. 784, 572 S.E.2d 687 (2002).

96. *Id.* at 785, 572 S.E.2d at 688.

97. *Id.*

98. *Id.* at 784-85, 572 S.E.2d at 688.

The court considered, and rejected, the conclusion of a Georgia bankruptcy court that § 525(b) applies to independent contractors.⁹⁹ The court preferred the reasoning of a Virginia bankruptcy court that relied on the plain language of the statute to deem it inapplicable to independent contractors.¹⁰⁰ Because the statute “uses the terms ‘employer’ and ‘employment’ without any reference to independent contractors or other such business relationships,” the court concluded that “the debtor must be an employee of the employer-defendant in order to be protected by the Code section. If Congress had intended a more expansive interpretation of § 525(b) to include independent contractors, it could have plainly stated it.”¹⁰¹

IV. BANKRUPTCY ESTATE

A. *Property of the Estate*

1. Vehicles Repossessed Pre-petition. In 1998 the Eleventh Circuit Court of Appeals held that under Alabama law, an automobile repossessed pre-petition is not subject to turnover because it is not property of the estate.¹⁰² Last year the court came to the same conclusion under Florida law. In *Bell-Tel Federal Credit Union v. Kalter (In re Kalter)*,¹⁰³ the court determined that while Florida’s version of the Uniform Commercial Code (“UCC”) is silent on when ownership passes, Florida’s Certificate of Title statute “plainly recognizes that ownership of a vehicle passes to secured creditors upon repossession.”¹⁰⁴ The court declined to construe the UCC as providing for retention of ownership rights by the debtor.¹⁰⁵ In so doing, it rejected arguments that the UCC provisions requiring (1) reasonable care of the collateral by the creditor, (2) passage of debtor’s rights in the collateral upon sale to a third party, and (3) a debtor’s right to redeem implied that ownership remained with the debtor.¹⁰⁶

99. *Id.* at 785-86, 572 S.E.2d at 688-89 (citing *In re McNeely*, 82 B.R. 628, 632 (Bankr. S.D. Ga. 1987)).

100. *Id.* (citing *In re Hardy*, 209 B.R. 371, 375 (Bankr. E.D. Va. 1997)).

101. *Id.*

102. *Lewis v. Charles R. Hall Motors, Inc. (In re Lewis)*, 137 F.3d 1280, 1285 (11th Cir. 1998).

103. 292 F.3d 1350 (11th Cir. 2002).

104. *Id.* at 1353.

105. *Id.* at 1354.

106. *Id.* at 1354-56.

In Georgia, however, a vehicle repossessed pre-petition remains property of the estate if it has not been sold by the creditor. The court in *Rozier v. Motors Acceptance Corp. (In re Rozier)*¹⁰⁷ concluded that while the Georgia UCC is substantially the same as Florida's UCC, case law interpreting Georgia's UCC compels a different result than *Kalter*.¹⁰⁸ "According to the [Georgia Court of Appeals] in *Jeweler's Financial Services, Inc. v. Chapes, Ltd.*, the default provisions in Georgia's U.C.C. statute do not automatically transfer title to a secured creditor upon debtor's default."¹⁰⁹ Furthermore, unlike Florida's title statute, Georgia's transfer of vehicle title statute provides that the debtor's ownership interest does not terminate unless the vehicle is sold.¹¹⁰ Consequently, the court held the creditor in contempt for failing to turn over the debtor's vehicle.¹¹¹

2. Self-Settled Spendthrift Trusts. In *Menotte v. Brown (In re Brown)*,¹¹² the Eleventh Circuit Court of Appeals held that the debtor's interest in the income stream of a spendthrift trust that was settled by the debtor is property of the estate but that the corpus of the trust is not.¹¹³ Using an inheritance, the debtor established an irrevocable spendthrift trust that paid her a monthly income but gave her no rights to the principal, which ultimately would go to charity.¹¹⁴ The court found that under Florida law, a spendthrift provision in a self-settled trust is void as to the settlor's creditors to the extent it benefits the settlor.¹¹⁵ As in that case, "[w]here the only interest a settlor has retained for herself under a trust is the right to income for life, it is solely this interest which her creditors can reach."¹¹⁶ Thus, the court

107. 283 B.R. 810 (Bankr. M.D. Ga. 2002), *aff'd sub nom.* *Motors Acceptance Corp. v. Rozier*, 290 B.R. 910 (M.D. Ga. 2003).

108. *Id.* at 812-13.

109. *Id.* at 813 (citing *Jeweler's Fin. Servs., Inc. v. Chapes, Ltd.*, 181 Ga. App. 872, 872-73, 354 S.E.2d 200, 201 (1987)) (internal citations omitted).

110. *Id.* (quoting O.C.G.A. § 40-3-34(b) (2001)). *Cf.* *Bell v. Instant Car Title Loans (In re Bell)*, 279 B.R. 890, 895-97 (Bankr. N.D. Ga. 2002) (holding that when the vehicle was pawned by debtor and the pawnshop repossessed the vehicle upon the pre-petition expiration of the redemption period, the vehicle was not property of the estate pursuant to Georgia pawnshop statutes).

111. 283 B.R. at 813.

112. 303 F.3d 1261 (11th Cir. 2002).

113. *Id.* at 1268-69.

114. *Id.* at 1263-64.

115. *Id.* at 1266-68.

116. *Id.* at 1268.

found the debtor's income stream from the trust to be property of the estate while the trust corpus was excluded from the estate.¹¹⁷

B. *Objection to Exemptions*

The time period for objecting to a debtor's exemptions starts anew when the debtor converts from Chapter 11 to Chapter 7, according to *In re Lang*.¹¹⁸ Bankruptcy Rule 4003(b) gives the trustee and creditors thirty days from the end of the meeting of creditors to object to the debtor's claimed exemptions.¹¹⁹ Rule 1019(2) provides for certain new filing periods upon conversion from Chapter 11, 12, or 13 to Chapter 7; it does not specify a new period for objecting to exemptions.¹²⁰ In *Lang* the bankruptcy court had extended the time to object to exemptions in the Chapter 11 case until February 8, 2001. The debtor converted his case before that date. A new meeting of creditors was held in the Chapter 7 case, and the trustee filed an objection to exemptions within thirty days of the end of the meeting pursuant to Rule 4003(b). The debtor argued that the objection was untimely because it was not offered within thirty days of the conclusion of the Chapter 11 meeting of creditors.¹²¹ The court disagreed.¹²²

The court first considered the strict constructionist approach to the question.¹²³ Courts following that approach reason that the absence of a new filing period for objections to exemptions in Rule 1019 indicates that Congress did not intend to create a renewed filing period.¹²⁴ Furthermore, "since conversion does not change the dates of filing, commencement of the case, and order for relief . . . and the Code is otherwise silent on this issue, for a bankruptcy court to provide for a renewed period to objection to exemptions after conversion would amount to re-writing the Code."¹²⁵

117. *Id.* at 1270. The court also found that the trust was not a support trust because the debtor's income stream was based on a percentage of the principal, not on her actual support needs. *Id.* at 1271.

118. 276 B.R. 716, 722 (Bankr. S.D. Fla. 2002).

119. FED. R. BANKR. P. 4003(b).

120. FED. R. BANKR. P. 1019(2).

121. 276 B.R. at 717-18.

122. *Id.* at 722.

123. *Id.* at 718-19.

124. *Id.* at 718.

125. *Id.* The court specifically rejected the case *In re Ferretti*, 230 B.R. 883 (Bankr. S.D. Fla. 1999), which had adopted the strict constructionist approach and was affirmed without opinion by the Eleventh Circuit Court of Appeals. 276 B.R. at 718-19. The court distinguished *Ferretti* on two grounds: First, the case had been converted from Chapter 13, and the scrutiny applied to exemptions in Chapter 13 is far greater than that in Chapter 11. *Id.* at 719. Second, the bankruptcy court in *Ferretti* had made a finding that

The court rejected the strict constructionist approach in favor of the liberal constructionist approach, which infers a renewed filing period from the requirement in Rule 1019(5)(A)(i) that the debtor in possession or trustee file, within fifteen days of conversion, a schedule of debts incurred post-petition and Rule 4003(b)'s provision for a thirty-day period for objection to exemptions after the filing of supplemental schedules.¹²⁶ In addition, the conversion gives rise to a new meeting of creditors, which in turn should give rise to a new period to object to exemptions.¹²⁷ The court also concluded that public policy supports finding a new objection period.¹²⁸ Without the renewed period, "the scenarios of abuse are legion. Debtors could intentionally file a petition under Chapter 11 and claim as exempt property not otherwise allowed as exempt knowing full well that their case will soon be converted to a proceeding under Chapter 7."¹²⁹ The Chapter 7 trustee would be unable to object and would be unable to effectively carry out his duties.¹³⁰ The court allowed the Chapter 7 trustee's objection to the debtor's exemptions, holding that conversion created a new period for objecting.¹³¹

C. Valuation

*In re Ard*¹³² raised the question of how to value an automobile for redemption purposes.¹³³ In their bankruptcy schedules, the debtors valued their car at \$2,500. When the creditor whose claim¹³⁴ was secured by the car sought stay relief, the debtors attempted to redeem the car for its fair market value, which they claimed had dropped to \$1,500. The creditor argued that the redemption amount should be the car's retail value of \$3,995.¹³⁵ Because § 722 requires the debtor to pay the amount of the allowed secured claim in order to redeem,¹³⁶ the court considered the definition of an "allowed secured claim."¹³⁷

the debtor was entitled to the exemption prior to conversion. *Id.*

126. *Id.*

127. *Id.* at 719-20.

128. *Id.* at 721.

129. *Id.*

130. *Id.*

131. *Id.* at 722.

132. 280 B.R. 910 (Bankr. S.D. Ala. 2002).

133. *Id.* at 913.

134. The parties agreed that debtor owed the creditor \$2,484.55 plus interest. *Id.* at 911.

135. *Id.* at 911-13.

136. 11 U.S.C. § 722 (2000).

137. 280 B.R. at 914.

According to § 506(a), an allowed claim is secured “to the extent of the value of the creditor’s interest” in the collateral.¹³⁸ The value is determined “in light of the purpose of the valuation and of the proposed disposition or use of such property.”¹³⁹ Although creditors frequently argue for application of the *Rash* replacement value standard,¹⁴⁰ the court followed the majority view in holding that “the appropriate starting point for valuing collateral in a Chapter 7 redemption proceeding is liquidation/foreclosure value.”¹⁴¹ The court opined that a different standard applies in redemption than in cramdown because redemption eliminates any further risk of default and depreciation by providing a lump sum payment of the collateral’s value.¹⁴² Applying the liquidation standard, the court found the appropriate value of the car for redemption purposes to be \$1,500.¹⁴³

V. CLAIMS

A. *Standing*

A creditor’s servicing agent has standing to file a proof of claim, according to the Eleventh Circuit Court of Appeals. In *Greer v. O’Dell*,¹⁴⁴ the creditor sold the debtor’s credit card account to Max Flow Corporation, but title to the account did not pass prior to debtor’s bankruptcy filing. Nevertheless, according to an interim agreement between the creditor and Max Flow, Max Flow was responsible for servicing the account until title did transfer. Max Flow filed a proof of claim in the debtor’s case on behalf of the creditor. The debtor objected to the claim, and the bankruptcy court sustained the objection.¹⁴⁵ The district court reversed, and the circuit court affirmed the district court, holding that a “servicer is a party in interest in proceedings involving loans which it services.”¹⁴⁶ Because the interim agreement obligated Max Flow to take all steps necessary to protect the claim in a bankruptcy proceeding and because Max Flow had a direct economic interest in

138. *Id.* (quoting 11 U.S.C. § 506(a) (2000)).

139. *Id.* (quoting 11 U.S.C. § 506(a)).

140. *Id.* The Court in *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997), required that, in a Chapter 13 cramdown proceeding, a secured creditor’s collateral be valued according to replacement value. 280 B.R. at 914 (citing *Rash*, 520 U.S. at 955-56).

141. *Id.* at 915.

142. *Id.*

143. *Id.* at 916.

144. 305 F.3d 1297, 1299 (11th Cir. 2002).

145. *Id.* at 1299-1301.

146. *Id.* at 1302.

the claim, the court concluded that it had “a clear and practical stake in the . . . bankruptcy proceedings.”¹⁴⁷ In fact, the court found Max Flow to be the owner of the claim, but even if it were not the owner, its interest in the claim would be sufficient to give it standing to file a proof of claim.¹⁴⁸

The issue in *Westwood Community Two Ass'n v. Barbee (In re Westwood Community)*¹⁴⁹ was not whether the complaining party, homeowners, had standing to file a claim, but whether the party had standing to appeal a motion to reconsider the allowance of a claim.¹⁵⁰ In this case, certain creditors filed claims based on the debtor homeowners association's violation of the Fair Housing Act.¹⁵¹ The bankruptcy court allowed the claims over the trustee's partial objection. The trustee levied a special assessment on the homeowners to pay the claims. In response, the homeowners challenged the assessment and sought reconsideration of the order allowing the claims. After losing on both issues, the homeowners appealed. The trustee won dismissal of the appeal in the district court on the ground that the homeowners lacked standing to appeal.¹⁵²

The circuit court determined that the rule for who has standing to appeal a bankruptcy court order is the “person aggrieved” standard.¹⁵³ The court defined a “person aggrieved” as one who has a “direct and substantial interest in the question being appealed.”¹⁵⁴ That interest must be a financial stake that has been adversely affected.¹⁵⁵ Because the homeowners were charged by the trustee with paying the claims at issue, they had a direct pecuniary interest in the orders and thus met the person aggrieved standard for purposes of appealing.¹⁵⁶

147. *Id.* at 1303.

148. *Id.*

149. 293 F.3d 1332 (11th Cir. 2002).

150. *Id.* at 1334.

151. 42 U.S.C. § 3601 (2000).

152. 293 F.3d at 1333-34.

153. *Id.* at 1334-35. The court noted that while the Bankruptcy Code does not define who has standing to appeal, every circuit court that considered the issue concluded that Congress did not intend to change the standard that applied under the Bankruptcy Act, which was the “person aggrieved” standard. *Id.*

154. *Id.* at 1335 (quoting *In re Odom*, 702 F.2d 962, 963 (11th Cir. 1983)) (internal citations omitted).

155. *Id.* (citing *In re Troutman Enter., Inc.*, 286 F.3d 359, 364 (6th Cir. 1996)).

156. *Id.* at 1336-37. The court noted that the standard for standing to be heard in the bankruptcy court, the “party in interest” standard, is not the same as the standard for standing to appeal. *Id.*

B. Modification

The Eleventh Circuit Court of Appeals was faced with an issue of first impression in *American General Finance v. Paschen (In re Paschen)*.¹⁵⁷ Whether the Chapter 13 debtors could bifurcate and cramdown a short-term mortgage on their residence.¹⁵⁸ In an effort to remedy their financial troubles, the debtors had taken out a loan for approximately \$12,000, secured by a second mortgage on their home. However, their money problems persisted, and the debtors filed a Chapter 13 petition. In their plan, the debtors proposed to bifurcate the loan into secured and unsecured portions and to cramdown the unsecured portion. The creditor argued that because the loan was secured by a residence, it was not subject to the type of modification proposed by the debtors.¹⁵⁹ Nevertheless, the bankruptcy court affirmed the plan over the creditor's objection. The district court and the appeals court affirmed.¹⁶⁰

The court of appeals began its analysis by examining the language of the relevant Bankruptcy Code provisions.¹⁶¹ The court first noted that by reading §§ 1325(a) and 506(a) together, a debtor may modify a secured claim by bifurcating it into secured and unsecured components.¹⁶² However, under § 1322(b)(2), a Chapter 13 debtor may not modify a claim "secured only by a security interest in real property that is the debtor's principal residence."¹⁶³ Thus, the outcome in the case hinged on the court's interpretation of § 1322(c)(2), which the debtor argued created an exception to § 1322(b)(2).¹⁶⁴

Beginning with the plain language of § 1322(c)(2),¹⁶⁵ the court said, it "indicates a clear congressional intent to except certain short-term mortgages from the general rule prohibiting the modification of claims

157. 296 F.3d 1203 (11th Cir. 2002).

158. *Id.* at 1204.

159. *Id.* at 1204-05.

160. *Id.* at 1205, 1210.

161. *Id.* at 1207.

162. *Id.* at 1207-08 (citing 11 U.S.C. § 1325(a) (2000)).

163. *Id.* at 1208 (quoting 11 U.S.C. § 1322(b)(2) (2000)).

164. *Id.* at 1206-07.

165. The statute provides as follows:

[N]otwithstanding subsection (b)(2) and applicable nonbankruptcy law—

...

(2) in a case in which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor's principal residence is due before the date on which the final payment under the plan is due, the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title.

11 U.S.C. § 1322(c)(2) (2000).

secured only by an interest in a debtor's primary residence in a [C]hapter 13 proceeding."¹⁶⁶ The court rejected the creditor's argument that the provision is ambiguous.¹⁶⁷ The creditor argued that the statute could be read either as permitting modification of the claim or as permitting modification of the payment.¹⁶⁸ The court dismissed this argument as presenting "a grammatically strained reading of the statute" that "contradicts the rule of the last antecedent"¹⁶⁹ and fails to explain the statute's express reference to § 1325(a)(5), which permits modification of claims, not payments.¹⁷⁰ Thus, the court held that according to the plain language of subsection (c)(2), the debtors could bifurcate and cramdown a short-term residential mortgage.¹⁷¹

The court of appeals addressed a different type of claim modification in *Systems & Services Technologies, Inc. v. Davis (In re Davis)*.¹⁷² The issue before the court was whether the bankruptcy court had properly granted a discharge to the debtor upon completion of a Chapter 13 plan that had been unilaterally modified by the trustee.¹⁷³ The complaining creditor held a claim for \$8,298.11 secured by the debtor's vehicle. Because the vehicle was worth only \$6,000, the creditor's claim was bifurcated, with the \$6,000 secured and the \$2,298.11 unsecured portions treated differently under the Chapter 13 plan. After the debtor failed to make plan payments for five months, the creditor obtained stay relief, repossessed, and later sold the vehicle. The debtor was thereafter granted a discharge based on the trustee's representations that the debtor had fulfilled her obligations under the plan. The trustee's final report indicated that he had reduced the creditor's secured claim to \$673.01 (the total amount it had received under the plan) and marked it as "paid out" and disallowed the unsecured claim. The creditor sought to have the discharge vacated on the ground that its claims had been improperly modified.¹⁷⁴

Based on §§ 1327¹⁷⁵ and 1329¹⁷⁶ of the Bankruptcy Code, the court determined that a confirmed plan has a res judicata effect, binding the

166. 296 F.3d at 1207.

167. *Id.* at 1208-09 (citing *In re Witt*, 113 F.3d 508, 511 (4th Cir. 1997)).

168. *Id.* at 1208.

169. *Id.* at 1208-09.

170. *Id.* at 1209.

171. *Id.*

172. 314 F.3d 567 (11th Cir. 2002).

173. *Id.* at 568.

174. *Id.* at 568-69.

175. 11 U.S.C. § 1327 (2000).

176. 11 U.S.C. § 1329 (2000).

parties to its terms unless modified by court order.¹⁷⁷ Furthermore, a claim cannot be disallowed absent an objection by a party in interest.¹⁷⁸ The trustee in this case acted without court authorization, thus denying the creditor an opportunity to be heard with respect to the alteration of its claim.¹⁷⁹ As a result, the claim modification was invalid.¹⁸⁰ Because the debtor had not completed her obligations under the original plan, the court of appeals vacated her discharge.¹⁸¹

Davis is consistent with an unpublished case decided by the circuit court under similar facts but in a different procedural posture. *Systems & Services Technologies v. Dykes (In re Dykes)*¹⁸² involved the post-confirmation foreclosure of an undersecured creditor's collateral. As in *Davis*, the creditor sold the collateral, and the Chapter 13 trustee marked the creditor's secured claim as paid and the unsecured claim as disallowed.¹⁸³ However, in *Dykes* the court of appeals considered whether the bankruptcy court had improperly denied the creditor's motion to compel reinstatement of its claims.¹⁸⁴ The court concluded that the trustee did not have the authority to unilaterally alter the creditor's claims.¹⁸⁵ The court also concluded that the bankruptcy court's order approving modification of the Chapter 13 plan could not serve as court approval of modification of the claims because no specific request had been made to modify the claims.¹⁸⁶ Because there had not been a proper modification, the court ordered reinstatement of the creditor's claims.¹⁸⁷

These cases leave open the question of how a creditor's claims may be modified when it forecloses on its collateral post-confirmation. The circuit court has indicated that there must be some formal request made to, and approved by, the bankruptcy court.¹⁸⁸ The bankruptcy court in *In re Morris*¹⁸⁹ outlined a procedural path for the parties to follow.¹⁹⁰ The court suggested that the creditor could amend its claim

177. 314 F.3d at 570.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 570-71.

182. No. 01-15683, slip op. (11th Cir. April 26, 2002) (unpublished).

183. *Id.* at 2-3.

184. *Id.* at 3-4.

185. *Id.*

186. *Id.* at 4-5.

187. *Id.* at 5.

188. *Davis*, 314 F.3d at 570.

189. No. 01-41877-JDW, slip op. (Bankr. S.D. Ga. December 10, 2002).

190. *Id.* at 5-6.

and allow interested parties to object or an interested party could move for reconsideration of the creditor's claim under § 502(j).¹⁹¹ In either case, the court of appeals concern about giving the creditor an opportunity to be heard should be satisfied.

VI. CONSUMER ISSUES

A. Discharge

1. Taxes. Last year the United States Supreme Court decided *Young v. United States*,¹⁹² a case that implicated § 523(a)(1)(A) of the Bankruptcy Code, which provides for the nondischargeability of income taxes entitled to priority under § 507(a)(8).¹⁹³ Section 507(a)(8) applies to those income taxes for which a return was due during the three-year period prior to the bankruptcy filing (commonly known as the lookback period).¹⁹⁴ The debtor in *Young* tried to take advantage of an apparent loophole in the Code by filing a Chapter 13 case, waiting until the lookback period expired, then dismissing the case, filing a Chapter 7 case, and discharging the tax debt that would have been nondischargeable in the earlier case.¹⁹⁵ The Court effectively closed the loophole by finding that the “lookback period is a limitations period because it prescribes a period within which certain rights . . . may be enforced.”¹⁹⁶ Because it is a statute of limitations, it is subject to equitable tolling.¹⁹⁷ The Court stated that equitable tolling should always apply, “whether the Chapter 13 petition was filed in good faith or solely to run down the lookback period,” because “[i]n either case, the IRS [is] disabled from protecting its claim during the pendency of the Chapter 13 petition” due to the automatic stay.¹⁹⁸

2. Settled Fraud Claims. The Supreme Court tackled another nondischargeability issue in 2003. In *Archer v. Warner*,¹⁹⁹ a 7-2 opinion, the majority held that a debt incurred in the settlement of state law fraud claims may be subject to a determination of nondischargeabil-

191. *Id.* 11 U.S.C. § 502(j) (2000). *See also* *Baxter v. Sys. & Servs. Tech. (In re Dykes)*, 287 B.R. 298, 302-03 (Bankr. S.D. Ga. 2002).

192. 535 U.S. 43 (2002).

193. 11 U.S.C. § 523(a)(1)(A) (2000).

194. 535 U.S. at 46 (citing 11 U.S.C. § 507(a)(8)(A)(i) (2000)).

195. *Id.* at 46-47.

196. *Id.* at 47.

197. *Id.*

198. *Id.* at 50.

199. No. 01-1418, 2003 WL 1611437 (U.S. March 31, 2003).

ity under § 523(a)(2).²⁰⁰ In *Warner* the creditors filed a state law claim for fraud against the debtors. The parties settled the claim, and the creditors dismissed the case. As part of the settlement, the debtors executed a promissory note in favor of the creditors for \$100,000. Both parties signed a release stating that the settlement did not constitute an admission of liability. After the debtors defaulted on the promissory note and filed for bankruptcy, the creditors filed a complaint to determine dischargeability under § 523(a)(2), which precludes discharge of debts that were “obtained by . . . fraud.”²⁰¹ The debtors argued that the settlement agreement had transformed the fraud claim into a dischargeable contract claim. The bankruptcy court, district court, and court of appeals all agreed that the debt was dischargeable because the settlement agreement had acted as a novation, thereby altering the nature of the debt.²⁰² The Supreme Court reversed.²⁰³

The Court concluded that its earlier opinion in *Brown v. Felsen*²⁰⁴ controlled. *Brown* presented facts virtually identical to those of *Warner*, the only significant difference being that in *Brown*, the settlement of the state law fraud claim resulted in a consent order entered by the trial court.²⁰⁵ Based on *Brown*, when the parties have failed to establish that the settlement intended to resolve the issue of fraud for purposes of determining dischargeability in bankruptcy, the bankruptcy court should look behind the settlement agreement.²⁰⁶ “[T]he mere fact that a conscientious creditor has previously reduced his claim to judgment should not bar further inquiry into the nature of the debt.”²⁰⁷ *Warner* effectively upholds the Eleventh Circuit decision in *Greenberg v. Schools*,²⁰⁸ in which the court ruled that settlement of a state court fraud claim does not automatically preclude a § 523(a)(4) nondischargeability action for fiduciary fraud in bankruptcy.²⁰⁹

200. *Id.* at *2.

201. 11 U.S.C. § 523(a)(2)(A).

202. 2003 WL 1611437, at *2-3.

203. *Id.* at *3.

204. 442 U.S. 127 (1979).

205. 2003 WL 1611437 at *5.

206. *Id.* at *4-5.

207. *Id.* at *4 (quoting *Brown*, 442 U.S. at 138). The dissent argued that unlike in *Brown*, the debtor in *Warner* signed a blanket release. *Id.* at *7 (Thomas J., dissenting). The release and promissory note had the effect of discharging the underlying debt and creating a new debt in contract. *Id.*

208. 711 F.2d 152 (11th Cir. 1983).

209. *Id.* at 156.

3. Student Loans. District courts in the Northern and Middle Districts of Georgia have rejected partial discharge of student loans, and at the time of writing, the issue is under consideration by the Eleventh Circuit Court of Appeals.²¹⁰ In *Illinois Student Assistance Commission v. Cox*,²¹¹ the debtor, an attorney, sought to discharge \$114,000 in student loans. Although the bankruptcy court found that the debtor failed the *Brunner* test because his financial situation was unlikely to be permanent, the court nevertheless allowed the debtor to discharge \$64,000 of the loan.²¹² The district court held that student loans are either fully dischargeable or fully nondischargeable and any failure to satisfy the *Brunner* test renders the debt nondischargeable in its entirety.²¹³ The bankruptcy court does not have discretion to allow a partial discharge of the loan.²¹⁴

The court in *Educational Credit Management Corp. v. Carter*²¹⁵ reached substantially the same conclusion.²¹⁶ The debtor had obtained an undergraduate degree, and twice began but did not complete graduate studies. The bankruptcy court found that repayment of the loans incurred as a result of the debtor's forays into education would create an undue hardship and fully discharged the debtor's student loans.²¹⁷

On appeal the district court considered whether it could impose a partial discharge based on a debtor's partial satisfaction of the *Brunner* test.²¹⁸ The court considered the plain language of § 523(a)(8) and found that it did not contemplate partial discharge:

In contrast to other provisions in the statute which provide explicit directions as to how bankruptcy courts should fashion remedies, § 523(a)(8) does not permit the [c]ourt to restructure debt or limit

210. The Ninth Circuit Court of Appeals recently joined the Sixth Circuit in allowing partial discharge of student loan debt. *Saxman v. Educ. Credit Mgmt. Corp.* (*In re Saxman*), 325 F.3d 1168, 1173 (9th Cir. 2003); *Tenn. Student Assistance Corp. v. Hornsby* (*In re Hornsby*), 144 F.3d 433, 438-39 (6th Cir. 1998).

211. 273 B.R. 719 (N.D. Ga. 2002).

212. *Id.* at 721-22. The *Brunner* test is a three-part test developed by the Second Circuit Court of Appeals that has gained virtually universal acceptance in determining whether a student loan creates an undue hardship. *Id.* at 723 (citing *Brunner v. N.Y. State Higher Educ.*, 831 F.2d 395, 396 (2d Cir. 1987)).

213. *Id.*

214. *Id.* at 723-24.

215. 279 B.R. 872 (M.D. Ga. 2002).

216. *Id.* at 876.

217. *Id.* at 874-75.

218. *Id.* 876-77.

repayment amounts[.] . . . Without the inclusion of such guidance and limitations, therefore, the [c]ourt is unable to conclude that Congress intended § 523(a)(8) to allow for the partial discharge of debt incurred through educational loans.²¹⁹

The court further concluded that courts should not allow equitable considerations to override the plain meaning of a statute.²²⁰ “[B]ecause Congress has left no room for the [c]ourt to exercise its equitable powers under this portion of the Bankruptcy Code, the [c]ourt will not consider partially discharging [a]ppellee’s student loan debt.”²²¹

B. Chapter 20

A bankruptcy court has upheld the debtor’s right to convert²²² a Chapter 7 case in which the debtor had received a discharge to a case under Chapter 13.²²³ The debtor had equity in real property, and after the court entered a discharge, the trustee indicated his intent to sell the property. In response, the debtor filed a motion to convert, to which the trustee objected.²²⁴ The court first determined that a debtor does not have an “absolute” one-time right to convert from Chapter 7 to Chapter 13.²²⁵ Rather, such a conversion can be denied if the debtor fails to meet the eligibility requirements for Chapter 13 or in “extreme circumstances.”²²⁶ In addition, the court found no basis for vacating the Chapter 7 discharge before allowing conversion to Chapter 13; there is no statutory requirement for doing so, and any policy concerns can be addressed through other means, such as denying conversion, denying plan confirmation, or reconverting the case.²²⁷ As a result, the debtor was allowed to protect her equity through the post-discharge conversion.²²⁸

219. *Id.* at 876.

220. *Id.* at 876-77.

221. *Id.* at 877.

222. Generally, “Chapter 20” refers to the successive filing of a Chapter 7 and Chapter 13 case. However, post-discharge conversion leads to the same effect.

223. *In re Carter*, 285 B.R. 61, 69 (Bankr. N.D. Ga. 2002).

224. *Id.* at 62.

225. *Id.* at 65.

226. *Id.* The court declined to define “extreme circumstances.” *Id.* However, it noted that one consideration would be whether a debtor is attempting to evade payment of its creditors. *Id.* Furthermore, the court stated that the traditional measures of a Chapter 13 plan, such as feasibility and bad faith, should be considered at the confirmation stage, not the conversion stage. *Id.*

227. *Id.* at 66-68. The court noted that the debtor expressed a willingness to relinquish her Chapter 7 discharge. *Id.* at 66. It is unclear whether she would do so under the court’s ruling.

228. *Id.* at 69.

C. Chapter 11

The absolute priority rule is normally an issue in a corporate bankruptcy filing. However, in *In re Gosman*,²²⁹ a bankruptcy court held that in an individual's bankruptcy case, exempt property is not excluded from the absolute priority rule.²³⁰ Under the absolute priority rule, in a Chapter 11 plan, unsecured dissenting creditors must be paid in full before junior creditors may receive or retain any property.²³¹ In *Gosman* the debtor proposed to retain his interest in certain exempt property, including, among other things, a beachfront mansion and a multimillion dollar art collection, while providing the unsecured creditors with only partial payment. Not surprisingly, the unsecured creditors objected to the plan. That objection implicated the cramdown provisions of § 1129(b).²³²

The court relied on the plain language of the statute to reject the debtor's argument that the "property" denied to junior creditors under § 1129(b)(2)(B)(ii) refers only to nonexempt property.²³³ The only modifier for the word "property" in the statute is the word "any," "a word which, by definition, sets no boundaries."²³⁴ By contrast, when Congress has intended to exclude exempt property, it has referred to "property of the estate."²³⁵ No such reference is made in § 1129(b).²³⁶ Thus, the court concluded that the debtor's retention of exempt property violated the absolute priority rule so that his plan could not be confirmed over the objection of the unsecured creditors.²³⁷

VII. CORPORATE ISSUES

As noted in the introduction, corporate bankruptcies did not drive much of the case law in the Eleventh Circuit this year. Nevertheless, the year was not without some developments in Chapter 11 law. Most notable was *Cash Cow Services, LLC v. United States Trustee (In re Cash Cow Services)*,²³⁸ in which the Eleventh Circuit Court of Appeals held that consumer loans made by the debtor were disbursements

229. 282 B.R. 45 (Bankr. S.D. Fla. 2002).

230. *Id.* at 52.

231. *Id.* at 48 (citing 11 U.S.C. § 1129(b)(2)(B)(ii) (2000)).

232. *Id.* at 46-47; 11 U.S.C. § 1129.

233. 282 B.R. at 49.

234. *Id.*

235. *Id.*

236. *Id.* at 49-50.

237. *Id.* at 50.

238. 296 F.3d 1261 (11th Cir. 2002), *cert. denied*, 71 U.S.L.W. 3488 (January 21, 2003).

subject to the trustee's fees.²³⁹ Cash Cow Services, the Chapter 11 debtor, offered title loans, in which the consumer offered his car as security for a high-interest-rate loan, and check-cashing loans, in which the consumer wrote a check to Cash Cow in exchange for a lesser amount of money, on the condition that Cash Cow would hold the check for two weeks before cashing it.²⁴⁰ The issue was whether these loans were distributions subject to trustee fees under 28 U.S.C. § 1930.²⁴¹ The court of appeals upheld the bankruptcy court and reversed the district court in concluding that the loans were disbursements.²⁴²

The court considered the definitions of "disburse" and "disbursement" by analyzing their use in case law and their dictionary definitions.²⁴³ As a result, the court concluded that "to disburse" means "(a) to pay out or expend money; (b) to pay or defray costs, expenses, or charges; (c) to distribute; or (d) to pay for or on account of some thing."²⁴⁴ A disbursement can be the act of disbursing or the thing disbursed.²⁴⁵ The court found no basis for distinguishing a loan from a disbursement but instead cited several statutes in which Congress referred to the disbursement of a loan and numerous cases in which courts did the same.²⁴⁶ The court further found no cases specifically interpreting § 1930 as limiting the term "disbursement" to exclude loans.²⁴⁷ Thus, the court concluded that the loans were disbursements to be used in the calculation of trustee fees.²⁴⁸

VIII. CONCLUSION

In closing, it probably would be fruitless to try to predict what 2003 will bring. Nevertheless, at the time of this writing, the House of Representatives has passed a bankruptcy reform bill and referred it to the Senate.²⁴⁹ If history is any guide, Congress's efforts will amount to nothing. The same cannot be said of the Supreme Court which has two bankruptcy cases pending. Decisions in *United States Trustee v.*

239. *Id.* at 1265.

240. *Id.* at 1262-63.

241. *Id.* at 1263. 11 U.S.C. § 1930 (2000).

242. 296 F.3d at 1263.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* at 1263-64.

247. *Id.* at 1264-65.

248. *Id.* at 1265.

249. Bankruptcy Abuse & Consumer Protection Act of 2003, H.R. 975, 108th Cong. (2003).

Equipment Services, Inc. (In re Equipment Services, Inc.),²⁵⁰ which considers compensation for a debtor's attorney pursuant to § 330(a)(1), and *In re Kontrick*,²⁵¹ which considers whether deadlines for objecting to discharge are jurisdictional, should be announced this year.

250. 290 F.3d 739 (4th Cir. 2002), *cert. granted sub nom.* Lamie v. U.S. Trustee, 123 S. Ct. 1480 (2003).

251. 295 F.3d 724 (7th Cir. 2002), *cert. granted sub nom.* Kontrick v. Ryan, No. 02-819, 2003 WL 1956039 (U.S. Apr. 28, 2003).