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Bankruptcy

by **Hon. James D. Walker, Jr.***
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I. INTRODUCTION

Bankruptcy law has had a heightened presence in the national consciousness recently due to the downturn in the economy and high profile filings, such as Lehman Brothers and Chrysler. The negative effect on the housing market and increasing defaults by homeowners have renewed interest in primary residence mortgage cram-down legislation. However, except for an increase in overall filings, the recession has yet to have a significant impact on the development of bankruptcy law—at least with respect to cases arising in the Eleventh Circuit in 2008, as this Article demonstrates.¹

II. ADMINISTRATION AND PROCEDURE

A. *Jurisdiction*

Four years into an involuntary bankruptcy case, the debtor in *Trusted Net Media Holdings, LLC v. The Morrison Agency, Inc. (In re Trusted Net Media Holdings, LLC)*² sought a dismissal for lack of subject matter jurisdiction because the petitioning creditor did not satisfy § 303(b),³ which provides that an involuntary petition may be “commenced” “(1) by

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1. Unless otherwise stated, all mentions of “the Bankruptcy Code,” “the Code,” or specific statutory provisions are references to Title 11 of the United States Code.

2. 550 F.3d 1035 (11th Cir. 2008) (en banc).

3. 11 U.S.C. § 303(b) (2006).

three or more creditors holding non-contingent, undisputed claims against th[e] debtor, or (2) by a single holder of a non-contingent, undisputed claim” if the debtor has fewer than twelve creditors.⁴ The United States Court of Appeals for the Eleventh Circuit concluded that these requirements do not implicate subject matter jurisdiction.⁵

Preliminarily, the court noted that bankruptcy jurisdiction is established in Title 28 and generally covers all cases and proceedings under Title 11.⁶ The provision at issue, § 303(b), merely “sets forth the prerequisites for commencing an involuntary petition, specifically who is qualified to do so.”⁷ Although circuit courts are split on the issue—with the United States Court of Appeals for the Ninth Circuit holding that § 303(b) does not implicate subject matter jurisdiction⁸ and the United States Court of Appeals for the Second Circuit holding that it does⁹—the weight of authority favors the nonjurisdictional conclusion.¹⁰

The Eleventh Circuit agreed with the majority view.¹¹ “To implicate subject matter jurisdiction, a statutory requirement must speak not just to the parties’ substantive rights, but also to a particular court’s power.”¹² In this case, § 303(b) contains no jurisdictional language.¹³ In fact, the language it does use—“commencement of a case”—had previously been deemed nonjurisdictional by the court as used in § 546(a)¹⁴ and § 549(d).¹⁵ Furthermore, 28 U.S.C. § 157(a)¹⁶ grants bankruptcy courts the power to hear all cases under Title 11, which “unquestionably” includes involuntary cases.¹⁷ For those reasons, the

4. *In re Trusted Net Media Holdings, LLC*, 550 F.3d at 1037 (citing 11 U.S.C. § 303(b) (2000) (current version at 11 U.S.C. § 303(b) (2006))).

5. *Id.* at 1038.

6. *Id.* at 1039 (citing 28 U.S.C. §§ 1334(a)-(b) (2006)).

7. *Id.* at 1040.

8. *See Rubin v. Belo Broad. Corp. (In re Rubin)*, 769 F.2d 611, 615 (9th Cir. 1985).

9. *See Key Mech. Inc. v. BDC 56 LLC (In re BDC 56 LLC)*, 330 F.3d 111, 118 (2d Cir. 2003).

10. *In re Trusted Net Media Holdings, LLC*, 550 F.3d at 1041.

11. *See id.* at 1043.

12. *Id.* at 1042 (citing *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 468 (2007)).

13. *Id.* at 1043.

14. 11 U.S.C. § 546(a) (2006).

15. 11 U.S.C. § 549(d) (2006); *In re Trusted Net Media Holdings, LLC*, 550 F.3d at 1043 (citing *Pugh v. Brook (In re Pugh)*, 158 F.3d 530 (11th Cir. 1998)).

16. 28 U.S.C. § 157(a) (2006).

17. *In re Trusted Net Media Holdings, LLC*, 550 F.3d at 1044 (citing 28 U.S.C. § 157(a)).

court held that § 303(b) is nonjurisdictional and that its requirements can be waived.¹⁸

The Eleventh Circuit considered a different aspect of jurisdiction in *Futch v. Roberts (In re Roberts)*.¹⁹ In this case, the United States Bankruptcy Court for the Southern District of Georgia disallowed a creditor's untimely proof of claim. The creditor appealed the ruling, and while his appeal was pending, the bankruptcy court granted the debtor's voluntary dismissal of her case. The creditor argued that the court lacked jurisdiction to dismiss the case while his appeal was pending.²⁰ The circuit court rejected this argument.²¹ As a general rule, a notice of appeal "divests the [lower] court of its control over those aspects of the case involved in the appeal" but does not prevent it from overseeing collateral matters.²² In this case, the order dismissing the case was unrelated to the matter on appeal—the disallowance of the creditor's claim.²³ Thus, the bankruptcy court's jurisdiction was not affected by the appeal.²⁴ Furthermore, because the dismissal of the bankruptcy case prevented the circuit court from providing the creditor with any relief, the creditor's appeal of the disallowance of his claim was moot.²⁵

B. Settlement Agreements

Pursuant to Federal Rule of Bankruptcy Procedure 9019,²⁶ a bankruptcy court may approve a settlement agreement "[o]n motion by the trustee and after notice and a hearing."²⁷ Two cases from Florida considered the effectiveness of a settlement agreement in the absence of full compliance with the rule.

In *Stathopoulos v. Leader Healthcare Management, Inc. (In re Safe Harbour Florida Health Care Properties, Inc.)*,²⁸ the parties announced at a hearing that they had reached a settlement in a dispute over certain executory contracts. The United States Bankruptcy Court for the Middle District of Florida stated that the settlement would bind all the parties

18. *Id.* at 1046. The court expressly overruled *All Media Properties, Inc. v. Best (In re All Media Properties, Inc.)*, 646 F.2d 193 (5th Cir. Unit A May 1981) to the extent it conflicts with this holding. *In re Trusted Net Media Holdings, LLC*, 550 F.3d at 1044.

19. 291 F. App'x 296 (11th Cir. 2008).

20. *Id.* at 297.

21. *See id.* at 298-99.

22. *Id.* at 298 (quoting *In re Mosely*, 494 F.3d 1320, 1328 (11th Cir. 2007)).

23. *Id.*

24. *Id.*

25. *Id.* at 299.

26. FED. R. BANKR. P. 9019.

27. *Id.* at 9019(a).

28. 395 B.R. 176 (Bankr. M.D. Fla. 2008).

and ordered the debtor to file and send notice of the necessary motion to approve the settlement. More than six months later, no such motion had been filed, and the case converted from Chapter 11 to Chapter 7. The Chapter 7 trustee then filed suit against a party to the settlement agreement. The defendant filed a motion for summary judgment, claiming equitable estoppel based on the settlement agreement.²⁹ The court rejected the defense because despite its pronouncement that the settlement agreement would be binding, the debtor never filed a motion to approve, the debtor never provided notice of the settlement terms to the appropriate parties, and the court never entered an order approving the settlement.³⁰

In *Musselman v. Stanonik (In re Seminole Walls & Ceilings Corp.)*,³¹ the motion and notice requirements were satisfied, but the Middle District of Florida Bankruptcy Court never entered an order. The case involved a dispute over the bankruptcy estate's interest in a collection of celebrity photographs. In the course of proceedings, the photographer, one of the defendants in the dispute, and the trustee entered into and executed a written settlement agreement. The trustee filed a motion to approve the agreement, but a guardian for the photographer sought to rescind the agreement on grounds of incapacity and mistake.³² The bankruptcy court granted the motion to rescind and denied the motion to approve the settlement.³³ Although the court rejected incapacity and mistake as grounds for rescission, it stated that the photographer could "unilaterally rescind the agreement" because it had not been approved by the court.³⁴ The trustee appealed.³⁵

The United States District Court for the Middle District of Florida noted that the Eleventh Circuit had not ruled on the issue of "whether parties are bound to a settlement agreement submitted for approval before the bankruptcy judge passes on it," and that bankruptcy courts across the country are split on the issue.³⁶ In reaching a decision, the court noted that "in other areas where court approval of settlements is required, the Eleventh Circuit has held that one party may not unilaterally repudiate the agreement before the court has a chance to approve it or even before it is submitted for court approval."³⁷ Further-

29. *Id.* at 177-78.

30. *Id.* at 178.

31. 388 B.R. 386 (M.D. Fla. 2008).

32. *Id.* at 388-89.

33. *Id.* at 390.

34. *Id.*

35. *Id.*

36. *Id.* at 391-92 n.3.

37. *Id.* at 393-94.

more, policy considerations support a limitation on unilateral repudiation to protect parties who may act in reliance on the agreement, for example, by terminating discovery.³⁸ For those reasons, the court held that the right to unilaterally repudiate a settlement agreement is cut off at the time the motion to approve is filed, even though the agreement may not yet be enforceable.³⁹

C. Final Orders

In *Barben v. Donovan (In re Donovan)*,⁴⁰ the Eleventh Circuit held that a denial of an involuntary dismissal is not a final, appealable order.⁴¹ The debtor filed a Chapter 13 case prior to the 2005 amendments to the Bankruptcy Code and made regular plan payments for approximately one year. After the amendments became effective, fluctuations in his income affected his ability to make his monthly plan payments, and consequently, he converted his case to Chapter 7. His former wife, as an unsecured creditor, filed a motion to dismiss on the ground that the conversion was presumptively abusive because the debtor's income exceeded the state's median income. The Middle District of Florida Bankruptcy Court denied the motion because the 2005 law did not apply to the case. The ex-wife appealed.⁴²

The circuit court noted that it only has jurisdiction over final judgments, which in the bankruptcy context requires an order that “completely resolve[s] all of the issues pertaining to a discrete claim, including issues as to the proper relief.”⁴³ In this case, the order denying dismissal for abuse was not final because the bankruptcy case continued to move forward.⁴⁴ “The court did not conclusively resolve the bankruptcy case as a whole, nor did the court resolve any adversary proceeding or claim.”⁴⁵ The court noted that its conclusion is consistent with at least three other circuit court decisions that considered the issue.⁴⁶

38. *Id.* at 395.

39. *Id.* at 395-96.

40. 532 F.3d 1134 (11th Cir. 2008).

41. *Id.* at 1137.

42. *Id.* at 1135-36.

43. *Id.* at 1136-37 (quoting *In re Atlas*, 210 F.3d 1305, 1308 (11th Cir. 2000)).

44. *Id.* at 1137.

45. *Id.*

46. *Id.* (citing *In re Jartran*, 886 F.2d 859, 864 (7th Cir. 1989); *In re 405 N. Bedford Dr. Corp.*, 778 F.2d 1374, 1379 (9th Cir. 1985); *In re Comm. of Asbestos-Related Litigants*, 749 F.2d 3, 5 (2d Cir. 1984)). The court also noted one circuit court that has come to the contrary conclusion. *See id.* (citing *In re Brown*, 916 F.2d 120, 123-24 (3d Cir. 1990)).

III. PROFESSIONALS

In *In re Casavalencia*,⁴⁷ the United States Bankruptcy Court for the Southern District of Florida held that the debtor's Chapter 13 petition was filed in bad faith to evade creditors who he induced to purchase fraudulent securities.⁴⁸ The bankruptcy petition contained gross inaccuracies, including the debtor's name and details about his assets.⁴⁹ The court held the debtor's attorney responsible for the bad faith filing, stating, "No reasonable or responsible lawyer could have filed a petition and schedules so replete with misstatements if that lawyer had done anything approaching the 'reasonable inquiry' requirements of Federal Rule of Bankruptcy Procedure 9011."⁵⁰ In addition, at least some of the misrepresentation—particularly the debtor's false name—would have been discovered "upon the exercise of reasonable care" by the debtor's attorney as required by § 526(a)(2).⁵¹ Because the attorney shared in the responsibility for the bad faith filing, the court awarded sanctions against the debtor and his attorney, jointly and severally, for the opponent's attorney fees and costs of \$8,739.56.⁵²

In *In re Haque*,⁵³ it was the creditor's counsel, Florida Default Law Group (FDLG), who faced sanctions for lackadaisical work—in this case for a "casual response" to false affidavits submitted by its client, the debtor's mortgage creditor.⁵⁴ The creditor sought stay relief. An affidavit attached to its motion for relief included a charge for penalty interest—a fee that only attaches if the debtor prepays its mortgage within the first three years of its term. The Southern District of Florida Bankruptcy Court, having concerns about the charge, conducted a hearing at which no one could explain the charge or how it appeared in

47. 389 B.R. 292 (Bankr. S.D. Fla. 2008).

48. *Id.* at 295-96.

49. *Id.* at 296.

50. *Id.*; FED. R. BANKR. P. 9011.

51. *In re Casavalencia*, 389 B.R. at 296; 11 U.S.C. § 526(a)(2) (2006). Section 526(a)(2) provides the following:

A debt relief agency shall not . . . make any statement, or counsel or advise any assisted person . . . to make a statement in a document filed in a case or proceeding under this title, that is untrue and misleading, or that upon the exercise of reasonable care, should have been known by such agency to be untrue or misleading.

11 U.S.C. § 526(a)(2).

52. *In re Casavalencia*, 389 B.R. at 297.

53. 395 B.R. 799 (Bankr. S.D. Fla. 2008).

54. *Id.* at 803.

the affidavit. The court granted a continuance of the hearing to give the creditor and FDLG time to investigate the charge.⁵⁵

When the hearing reconvened, a lawyer for FDLG⁵⁶ could not explain how the error occurred, who prepared the affidavit, or how many other cases were affected by similar false charges. She did, however, offer vague assurances that no foreclosure would include the charge because a payoff quote for foreclosure would be reviewed by an attorney. However, FDLG offered no reassurance that lawyers were reviewing relevant documents in the context of bankruptcy cases.⁵⁷ “FDLG seems to suggest that state court foreclosure actions are real and important” while in a bankruptcy proceeding, “filing any old pleading without undertaking any investigation into its accuracy is perfectly acceptable practice.”⁵⁸ The court stated that it cannot craft proper relief when attorneys “treat the stay relief process with casual disdain.”⁵⁹ The court relied on its authority under § 105(a)⁶⁰ to sanction FDLG for “engag[ing] in the systematic process of churning out unrefined and unexamined form pleadings, instead of producing and filing carefully considered legal papers.”⁶¹ The court-issued sanctions of \$95,130.45 were based on the amount falsely charged multiplied by an estimated number of false affidavits filed in bankruptcy cases.⁶²

IV. AUTOMATIC STAY

In *Cline v. Deutsche Bank National Trust Co. (In re Cline)*,⁶³ the United States Bankruptcy Court for the Northern District of Alabama considered the effect of plan confirmation on preexisting stay termination orders.⁶⁴ The debtors had filed multiple prior bankruptcy cases, which allowed them to evade payments on their mortgage for three-and-a-half years while avoiding foreclosure due to the automatic stay. In the current case, their prior filings subjected them to the limited automatic stay, which the debtors sought to extend. The mortgage creditor objected, and the court ordered that the stay as to that creditor would expire on January 31, 2007. Shortly before expiration of the stay, the

55. *Id.* at 801.

56. The creditor retained new counsel to represent it at the hearing. The creditor's original counsel, Florida Default Law Group, represented itself at the hearing. *Id.*

57. *Id.* at 802.

58. *Id.*

59. *Id.*

60. 11 U.S.C. § 105(a) (2006).

61. *In re Haque*, 395 B.R. at 805.

62. *Id.*

63. 386 B.R. 344 (Bankr. N.D. Ala. 2008).

64. *See id.* at 350-53.

debtors confirmed a plan that provided for payment of the mortgage arrears and regular monthly payments. The creditor subsequently filed a notice of foreclosure. The debtors responded with an adversary proceeding for violation of the confirmation order, including a request for emotional distress damages.⁶⁵

The debtors argued that the plan confirmation effectively cut off the creditor's stay relief and right to foreclose, relying on the principle that "[u]nder Section 1327(a),⁶⁶ the terms of a confirmed plan control the debtor-creditor relationship, notwithstanding any pre-confirmation stay relief granted to a creditor."⁶⁷ The court rejected that argument stating, "[O]nce a court finds there is no sufficient reason to justify an extension or imposition of the stay under Sections 362(c)(3) or (4),⁶⁸ confirmation of a plan should neither change that finding nor interfere with the creditor's uninterrupted right to exercise its remedies post-confirmation without seeking additional relief from the court."⁶⁹ Thus, the court concluded that a confirmation order does not overrule a prior order providing for termination of the automatic stay.⁷⁰

Plan confirmations are not the only type of orders to intersect with the automatic stay. In *Williford v. Williford (In re Williford)*,⁷¹ a divorce decree caused the dispute. The debtors filed for divorce in April 2003. They subsequently filed a joint Chapter 11 petition in October 2003, which acted to stay their divorce proceedings. After the bankruptcy filing, the state court entered a divorce decree and an order awarding all marital property to the wife. The husband sought to have the order vacated because it violated the stay. The United States Bankruptcy Court for the Middle District of Alabama, instead, annulled the stay to validate the divorce order. The husband appealed.⁷²

The Eleventh Circuit held that the bankruptcy court did not abuse its discretion in annulling the stay.⁷³ The husband was aware of the pending divorce proceeding when he filed the bankruptcy case but made no effort to have the proceeding stayed.⁷⁴ In fact, he appealed the

65. *Id.* at 345-47.

66. 11 U.S.C. § 1327(a) (2006).

67. *In re Cline*, 386 B.R. at 351-52.

68. 11 U.S.C. §§ 362(c)(3), (4) (2006).

69. *In re Cline*, 386 B.R. at 352.

70. *Id.* The court noted that a creditor's actions after confirmation of the plan (such as accepting payments) could open the creditor to estoppel arguments regarding the effect of confirmation. *Id.* at 354.

71. 294 F. App'x 518 (11th Cir. 2008).

72. *See id.* at 519-21.

73. *Id.* at 522.

74. *Id.*

property settlement to the state court without attempting to obtain stay relief.⁷⁵ Furthermore, the court of appeals explained that the bankruptcy court considered all available options before choosing an option that did not run afoul of the purpose of the automatic stay—to abate the financial pressure on debtors while ensuring that creditors are unharmed by a premature disposal of assets.⁷⁶ The annulment of the stay also allowed the bankruptcy court to avoid interfering with the state court’s “jurisdiction over family affairs.”⁷⁷

V. BANKRUPTCY ESTATE

A. Exemptions

Last year, this Article reported on *In re Mazon*,⁷⁸ in which the United States Bankruptcy Court for the Middle District of Florida allowed a surcharge against several of the debtor’s exemptions as a remedy for his concealment and postpetition disposition of nonexempt assets.⁷⁹ That decision was reversed by the United States District Court for the Middle District of Florida in *Mazon v. Tardif (In re Mazon)*.⁸⁰ The district court noted that the two circuit courts to consider the issue reached different results, with the United States Court of Appeals for the Ninth Circuit allowing surcharge⁸¹ and the United States Court of Appeals for the Tenth Circuit barring it.⁸² On appeal in *In re Mazon*, the district court agreed with the reasoning of the Tenth Circuit.⁸³

First, nothing in the Bankruptcy Code “specifically authorizes a surcharge on otherwise exempt property” when the debtor conceals and dissipates assets.⁸⁴ Second, the bankruptcy court’s power under § 105(a)⁸⁵ to issue orders “necessary or appropriate” to effectuate the Bankruptcy Code cannot contravene the Code.⁸⁶ Debtors are permitted

75. *Id.*

76. *Id.*

77. *Id.*

78. 368 B.R. 906 (Bankr. M.D. Fla. 2007), *rev’d*, 395 B.R. 742 (M.D. Fla. 2008); *see* Hon. James D. Walker, Jr. & Amber Nickell, *Bankruptcy*, 59 MERCER L. REV. 1093, 1100-01 (2008).

79. *See In re Mazon*, 368 B.R. at 908-12.

80. 395 B.R. 742 (M.D. Fla. 2008).

81. *Id.* at 749 (citing *Latman v. Burdette*, 366 F.3d 774, 785 (9th Cir. 2004)).

82. *Id.* (citing *In re Scrivner*, 535 F.3d 1258, 1264 (10th Cir. 2008)).

83. *See id.*

84. *Id.* at 748.

85. 11 U.S.C. § 105(a) (2006).

86. *In re Mazon*, 395 B.R. at 748 (quoting 11 U.S.C. § 105(a)).

to exempt certain property and retain it for their own use.⁸⁷ Because the Code “contains express exceptions to the rule that exempted property cannot be used to satisfy pre-petition debts or administrative expenses,” a court may not use § 105(a) to create additional exceptions, such as a surcharge.⁸⁸ The court should, instead, rely on the Code provisions that offer specific remedies for a debtor’s misconduct, such as a denial or a revocation of discharge.⁸⁹ Third, while a bankruptcy court retains inherent power to impose sanctions, no appellate decisions have found a surcharge of exemptions to be an appropriate use of that power.⁹⁰ For those reasons, the bankruptcy court could not impose a surcharge on the debtor’s exemptions in the circumstances of this case.⁹¹

B. Postpetition Property

In two Chapter 13 cases, the debtors acquired assets after filing their petitions. In both cases, the asset was a legal claim arising from a motor vehicle accident. In *Thompson v. Quarles*,⁹² the claim arose prior to confirmation.⁹³ In *Waldron v. Brown (In re Waldron)*,⁹⁴ the claim arose after confirmation.⁹⁵ At issue in both cases was whether the claim was property of the estate.⁹⁶

In *Quarles* the debtors did not disclose the claim in the bankruptcy court before pursuing it in state court. The defendant in the state court action raised judicial estoppel as a defense.⁹⁷ The United States Bankruptcy Court for the Southern District of Georgia relied on the Eleventh Circuit’s opinion in *Burnes v. Pemco Aeroplex, Inc.*⁹⁸ to conclude that a debtor has an ongoing affirmative duty to disclose assets acquired postpetition that are property of the estate.⁹⁹ The remaining question was whether the claim was property of the estate.¹⁰⁰

87. See 11 U.S.C. § 522 (2006).

88. *In re Mazon*, 395 B.R. at 750; see 11 U.S.C. §§ 522(c), (k).

89. *In re Mazon*, 395 B.R. at 750; see 11 U.S.C. §§ 727(a)(2),(d) (2006).

90. *In re Mazon*, 395 B.R. at 750.

91. *Id.*

92. 392 B.R. 517 (S.D. Ga. 2008).

93. *Id.* at 519.

94. 536 F.3d 1239 (11th Cir. 2008).

95. *Id.* at 1241.

96. See *in re Waldron*, 536 F.3d at 1239; *Quarles*, 392 B.R. at 517.

97. *Quarles*, 392 B.R. at 519, 520.

98. 291 F.3d 1282 (11th Cir. 2002).

99. *Quarles*, 392 B.R. at 520 (citing *Burnes*, 291 F.3d at 1286).

100. *Id.* at 521-22.

Under § 541(a)(7)¹⁰¹ and § 1306(a),¹⁰² certain property acquired postpetition is property of the estate.¹⁰³ The circuit court's decision in *Telfair v. First Union Mortgage Corp.*¹⁰⁴ provides that at plan confirmation, property unnecessary to the plan is revested in the debtor.¹⁰⁵ However, that case is not a license for debtors to conceal assets acquired preconfirmation and then "argue that [the] lawsuit has vested in them because confirmation has occurred in the meanwhile."¹⁰⁶ For the foregoing reasons, the court concluded that the claim was property of the estate and that the debtors should have amended their schedules to include the claim.¹⁰⁷ However, the court declined to apply judicial estoppel to bar the claim because it found that the omission was neither "intentional . . . [nor] calculated to make a mockery of the judicial system."¹⁰⁸

In *In re Waldron*, the Eleventh Circuit faced the more difficult issue of whether property acquired postconfirmation is estate property.¹⁰⁹ Although *Telfair*—which as noted above held that confirmation causes property not necessary to completion of the plan to revest in the debtor¹¹⁰—would seem to complicate the analysis, the court held that it was inapplicable to the case: "We did not address in *Telfair* entirely new property interests acquired by the debtor after confirmation and unencumbered by any preexisting obligation."¹¹¹ Because assets that did not exist at confirmation cannot revest at confirmation, they are controlled solely by § 1306(a),¹¹² which provides that postpetition property becomes property of the estate.¹¹³

Having determined that the debtor's claim was property of the estate, the court next considered whether the debtor was required to amend his schedules to disclose the claim.¹¹⁴ In *Quarles* the court relied on *Burnes* to find such a duty.¹¹⁵ In *In re Waldron* the court also recog-

101. 11 U.S.C. § 541(a)(7) (2006).

102. 11 U.S.C. § 1306(a) (2006).

103. See *Quarles*, 392 B.R. at 523-24 (citing 11 U.S.C. §§ 541(a)(7), 1306(a)).

104. 216 F.3d 1333 (11th Cir. 2000).

105. *Quarles*, 392 B.R. at 523 (citing *Telfair*, 216 F.3d at 1340).

106. *Id.*

107. *Id.* at 524.

108. *Id.* at 529.

109. See *In re Waldron*, 536 F.3d at 1240.

110. *Telfair*, 216 F.3d at 1340.

111. *In re Waldron*, 536 F.3d at 1242.

112. *Id.* at 1242-43.

113. *Id.* at 1241 (citing 11 U.S.C. § 1306(a)).

114. See *id.* at 1244.

115. See *Quarles*, 392 B.R. at 520.

nized the duty to amend, as articulated in *Burnes*¹¹⁶ as well as *DeLeon v. Comcar Industries, Inc.*¹¹⁷ and *Ajaka v. BrooksAmerica Mortgage Corp.*¹¹⁸ Consequently, the court held that the bankruptcy court did not abuse its discretion in requiring the debtor to amend.¹¹⁹ However, the court declined to issue a bright-line rule: “We do not hold that a debtor has a free-standing duty to disclose the acquisition of any property interest after the confirmation of his plan under Chapter 13.”¹²⁰ Instead, the issue is left to the bankruptcy court’s discretion.¹²¹

VI. AVOIDANCE

The Eleventh Circuit considered the scope of the “substantially contemporaneous” defense to a preference action in *Gordon v. Novastar Mortgage, Inc. (In re Hedrick)*.¹²² The debtors refinanced two mortgages on their home, using the new loans to pay off the original loans. Although the loans closed outside the ninety-day preference period, the new security deeds were perfected during the preference period.¹²³

In this case, eight days passed between the closing of the loan and the perfection of the new security deed.¹²⁴ The creditor claimed that the transfer fell within the “contemporaneous exchange for new value” defense to a preference action under § 547(c)(1).¹²⁵

The court noted that other circuit courts have split on this issue.¹²⁶ The United States Courts of Appeals for the First and Sixth Circuits have relied on § 547(e)(2)¹²⁷ to inform their decisions.¹²⁸ Under that subsection, the date a transfer of real property is deemed “made” is dependant on when it is perfected.¹²⁹ If it has been perfected within

116. 291 F.3d at 1286.

117. 321 F.3d 1289, 1291 (11th Cir. 2003).

118. 453 F.3d 1339, 1344 (11th Cir. 2006); *See In re Waldron*, 536 F.3d at 1244-45.

119. *In re Waldron*, 536 F.3d at 1245.

120. *Id.* at 1246.

121. *Id.*

122. 524 F.3d 1175 (11th Cir. 2008), *modified by* 529 F.3d 1026 (11th Cir. 2008).

123. *In re Hedrick*, 524 F.3d at 1179; *see* 11 U.S.C. § 547 (2006).

124. *In re Hedrick*, 524 F.3d at 1185.

125. *Id.*; 11 U.S.C. § 547(c)(1).

126. *In re Hedrick*, 524 F.3d at 1185-86.

127. 11 U.S.C. § 547(e)(2).

128. *In re Hedrick*, 524 F.3d at 1185-86 (citing *Collins v. Greater Atlanta Mortgage Corp. (In re Lazarus)*, 478 F.3d 12, 19 (1st Cir. 2007); *Ray v. Sec. Mut. Fin. Corp. (In re Arnett)*, 731 F.2d 358, 363 (6th Cir. 1984)).

129. *Id.* at 1180.

ten days¹³⁰ of the transfer, the transfer is “made” on the date of the transfer.¹³¹ Otherwise, it is “made” on the date of perfection.¹³² The First and Sixth Circuits concluded that if perfection occurs within the grace period, the transfer is a substantially contemporaneous exchange.¹³³

The court rejected that approach because it writes language into § 547(c)(1) that does not exist: “Congress chose, for whatever reason, not to make ten days the time measure for § 547(c)(1)(B); it chose instead to make ‘substantially contemporaneous’ the standard.”¹³⁴ In fact, the presence of a specific time period in one section shows that Congress knows how to make bright-line rules when it chooses to do so.¹³⁵ Instead, courts should apply a fact-intensive inquiry into the totality of the circumstances.¹³⁶ “[C]ourts should take into account the objective reasonableness of the time taken to perfect the interest, the cause of any delay, and the motivations for it. The length of the delay between the transfer and perfection is one factor, although it is not necessarily dispositive.”¹³⁷

In this case, the court held that all of the activity surrounding the transfer was within “the normal course of affairs for this kind of transaction.”¹³⁸ Thus, the transfer was a contemporaneous exchange for new value and, therefore, unavoidable.¹³⁹

VII. DISCHARGEABILITY

In *FIA Card Services, N.A. v. Flowers (In re Flowers)*,¹⁴⁰ the United States District Court for the Middle District of Alabama considered whether cash advances on a credit card are nondischargeable.¹⁴¹ The debtor obtained a cash advance of \$4000 and then filed for bankruptcy

130. Section 547(e)(2)(A) was amended to change the grace period from ten to thirty days. See Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8 § 403, 119 Stat. 23, 104 (2005).

131. *In re Hedrick*, 524 F.3d at 1180 (citing 11 U.S.C. § 547(e)(2)(A)).

132. *Id.* at 1181 (citing 11 U.S.C. § 547(e)(2)(B)).

133. *Id.* at 1186 (citing *In re Lazarus*, 478 F.3d at 19; *In re Arnett*, 731 F.2d at 363).

134. *Id.*

135. *Id.* at 1187.

136. *Id.* at 1190 (citing *Lindquist v. Dorholt (In re Dorholt, Inc.)*, 224 F.3d 871, 874 (8th Cir. 2000); *Dye v. Rivera (In re Marino)* 193 B.R. 907, 915 (B.A.P. 9th Cir. 1996), *aff'd* 117 F.3d 1425 (9th Cir. 1997)).

137. *Id.*

138. *Id.* at 1191.

139. *Id.*

140. 391 B.R. 178 (M.D. Ala. 2008).

141. See *id.* at 179.

ninety-nine days later, having made no payments toward the debt. The creditor alleged that the debt was fraudulent and nondischargeable under § 523(a)(2)¹⁴² because the debtor had no intention of repaying the cash advance when he incurred it. The bankruptcy court disagreed, granted summary judgment for the debtor, and awarded attorney fees to the debtor.¹⁴³ The district court affirmed.¹⁴⁴

Fraud requires a false statement, which can be implied in a credit card case if the debtor “uses the card with no present intent to pay the debt in the future.”¹⁴⁵ Generally, courts look to the totality of the circumstances to determine fraudulent intent.¹⁴⁶ However, inability to pay or failure to pay, by itself, is insufficient to prove fraud.¹⁴⁷ In this case, the debtor submitted an affidavit stating he intended to repay the debt at the time he took the cash advance. The creditor offered no evidence to the contrary.¹⁴⁸ It merely presented a “stunningly inadequate affidavit” authenticating a copy of the debtor’s account statement.¹⁴⁹

In ruling for the debtor, the court explained that the creditor’s position was not “substantially justified” and that the debtor was entitled to attorney fees pursuant to § 523(d).¹⁵⁰ Although the creditor claimed it intended to challenge the continuing viability of *First National Bank of Mobile v. Roddenberry*¹⁵¹—a circuit court opinion regarding dischargeability of credit card debt decided under a prior version of the law¹⁵²—the court held that there was no basis for the suit even if *Roddenberry* did not apply.¹⁵³ In granting the debtor a decisive victory, the court stated, “To have been substantially justified in bringing this suit, [the creditor] would have had to conduct some kind of pre-filing investigation to determine whether there was evidence to support fraud by [the debtor].”¹⁵⁴ The creditor made no such investiga-

142. 11 U.S.C. § 523(a)(2) (2006).

143. *In re Flowers*, 391 B.R. at 180.

144. *Id.* at 183.

145. *Id.* at 181.

146. *Id.*

147. *Id.* at 182.

148. *Id.*

149. *Id.*

150. *Id.* at 183; 11 U.S.C. § 523(d) (2006).

151. 701 F.2d 927 (11th Cir. 1983).

152. *See id.* at 927-28.

153. *In re Flowers*, 391 B.R. at 183.

154. *Id.*

tion nor did the case present circumstances justifying the suit notwithstanding the lack of investigation.¹⁵⁵

VIII. CONSUMER ISSUES

A. *Calculating the Means Test*

Under § 707(b)(2)¹⁵⁶—the means test—a Chapter 7 debtor’s petition is presumed abusive if the debtor’s current monthly income¹⁵⁷ less certain deductions—including “amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition”¹⁵⁸—falls within certain parameters.¹⁵⁹ In *In re Parada*,¹⁶⁰ the debtors included in their calculations deductions for payments on a condominium and automobile, both of which they surrendered to the secured creditors. The trustee objected to the deductions.¹⁶¹

To determine whether the deductions were appropriate, the United States Bankruptcy Court for the Southern District of Florida began with the language of the statute, noting that judges have interpreted it in two different ways.¹⁶² Courts adopting the “snapshot” approach find the statute requires the court to look at the debtor’s finances as they exist on the petition date.¹⁶³ Under this view, “the means test is a mechanical test, based only superficially on a debtor’s reality, the purpose of which is to create a bright line presumptive test of eligibility.”¹⁶⁴ Courts following the second approach find that the amounts “scheduled as contractually due” language applies only to “those expenses that the debtor reasonably expects to be paid during the next sixty months.”¹⁶⁵

The court rejected the second approach as inconsistent with both the United States Supreme Court’s and the Eleventh Circuit’s admonition “against judges ‘improving’ plain statutory language in order to better carry out what they perceive to be the legislative purposes.”¹⁶⁶ In-

155. *Id.*

156. 11 U.S.C. § 707(b)(2) (2006).

157. “Current monthly income” is defined at 11 U.S.C. § 101(10A) (2006).

158. 11 U.S.C. § 707(b)(2)(A)(iii)(I).

159. *See id.* § 707(b)(2)(A)(i), (iii).

160. 391 B.R. 492 (Bankr. S.D. Fla. 2008).

161. *Id.* at 495.

162. *Id.* at 497.

163. *Id.*

164. *Id.*

165. *Id.* at 498.

166. *Id.* (quoting *In re Bracewell*, 454 F.3d 1234, 1240 (11th Cir. 2006) (citing *Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004))).

stead, the court concluded that the plain language of the means test allows debtors to deduct secured payments for property they intend to surrender.¹⁶⁷

While such deductions may be appropriate in Chapter 7, courts have reached a different result when applying the means test in Chapter 13 to determine a debtor's disposable income. Under § 1325(b),¹⁶⁸ "disposable income" is defined as current monthly income less reasonable expenses for the debtor's support and maintenance.¹⁶⁹ Reasonable expenses, in turn, are determined by reference to the means test in §§ 707(b)(2)(A) and (B), which includes the deduction for "amounts scheduled as contractually due to secured creditors."¹⁷⁰

In *In re Vernon*,¹⁷¹ the debtors sought to deduct payments on their residence, which they surrendered.¹⁷² Similarly, in *In re Holmes*,¹⁷³ the debtor sought to deduct payments on a mortgage that had been stripped off the collateral.¹⁷⁴ Although many Chapter 7 cases allow the deduction when collateral is surrendered, these cases are unhelpful because "[t]he policy aim of Chapter 7 is completely different from the policy aim of Chapter 13; therefore the allowance of a deduction under Chapter 7 has no relevance under a Chapter 13 plan."¹⁷⁵ While the purpose of the means test in Chapter 7 is to identify abuse by those who have some ability to repay debts, its purpose in Chapter 13 is to "determine the maximum a debtor could pay under a Chapter 13 plan."¹⁷⁶ Allowing a debtor to deduct a nonexistent expense would be contrary to the goals of Chapter 13.¹⁷⁷ Therefore, the courts refused to allow the debtors to deduct payments for surrendered collateral from their projected disposable income calculation.¹⁷⁸

167. *Id.* The court ultimately dismissed the case for abuse under 11 U.S.C. § 707(b)(3) (2006) primarily because the debtors had the "ability to pay 100% of their unsecured debt in less than five years." *In re Parada*, 391 B.R. at 503.

168. 11 U.S.C. § 1325(b) (2006).

169. *Id.* § 1325(b)(2).

170. *Id.* § 707(b)(2)(A)(iii)(I).

171. 385 B.R. 342 (Bankr. M.D. Fla. 2008).

172. *Id.* at 343.

173. 395 B.R. 149 (Bankr. M.D. Fla. 2008).

174. *Id.* at 150-51.

175. *In re Vernon*, 385 B.R. at 346.

176. *Id.* at 346-47 (citing Eugene R. Wedoff, *Means Testing in the New § 707(B)*, 79 AM. BANKR. L.J. 231, 272 (2005)).

177. *In re Holmes*, 395 B.R. at 153.

178. *See id.*; *In re Vernon*, 385 B.R. at 347.

B. Hanging Paragraph

The hanging paragraph appears at the end of § 1325(a)(9)¹⁷⁹ and provides for treatment of certain secured claims, commonly referred to as “910 claims,” when the creditor has a purchase money security interest in either (1) a “motor vehicle . . . acquired for the personal use of the debtor” within 910 days prior to the bankruptcy filing or (2) “any other thing of value” acquired within one year before the petition date.¹⁸⁰ Generally, such a claim must be treated as fully secured and cannot be bifurcated into secured and unsecured claims pursuant to § 506.¹⁸¹ In a trio of cases, the Eleventh Circuit addressed three issues related to the hanging paragraph: (1) the scope of a purchase money security interest, (2) the effect of a surrender of collateral, and (3) the availability of interest on a 910 claim.¹⁸²

First, in *Graupner v. Nuvel Credit Corp. (In re Graupner)*,¹⁸³ the debtor financed the purchase of a truck. The amount financed included the negative equity on his trade-in vehicle. When the debtor later filed a bankruptcy petition, he proposed to bifurcate the claim on the ground that it was not subject to a purchase money security interest, although he conceded it met the other requirements for a 910 claim.¹⁸⁴ The Eleventh Circuit rejected the debtor’s position.¹⁸⁵

The court noted that it had previously defined a “purchase money security interest” as follows: “A security interest in collateral is “purchase money” to the extent that the item secures a debt for the money required to make the purchase. If an item of collateral secures some other type of debt, e.g., antecedent debt, it is not purchase money.”¹⁸⁶ The court then examined state law to determine whether the negative equity was debt required to make the purchase or some other type of debt.¹⁸⁷ Under Georgia’s version of the Uniform Commercial Code, a purchase money obligation is one “incurred as all or part of the price of the collateral.”¹⁸⁸ Furthermore, in the context of a motor

179. 11 U.S.C. § 1325(a)(9) (2006).

180. *Id.* (hanging paragraph).

181. *Id.*; 11 U.S.C. § 506 (2006).

182. *See* DaimlerChrysler Fin. Servs. v. Barrett (*In re Barrett*), 543 F.3d 1239 (11th Cir. 2008); Nuvel Fin. Servs. Corp. v. Dean (*In re Dean*), 537 F.3d 1315 (11th Cir. 2008); Graupner v. Nuvel Credit Corp. (*In re Graupner*), 537 F.3d 1295 (11th Cir. 2008).

183. 537 F.3d 1295 (11th Cir. 2008).

184. *Id.* at 1298.

185. *Id.* at 1303.

186. *Id.* at 1300-01 (quoting *In re Freeman*, 956 F.2d 252, 254-55 (11th Cir. 1992)).

187. *See id.*

188. *Id.* at 1298-99 (quoting O.C.G.A. § 11-9-103(a)(2) (2002)).

vehicle sale, state law defines “cash sale price” to include the cost of satisfying a lien on a trade-in vehicle.¹⁸⁹ Relying on these definitions, the court concluded that a purchase money security interest includes negative equity.¹⁹⁰

In *DaimlerChrysler Financial Services v. Barrett (In re Barrett)*,¹⁹¹ the Eleventh Circuit considered whether the antibifurcation requirement applies when the debtor surrenders the collateral.¹⁹² In other words, can a debtor surrender collateral in full satisfaction of a 910 claim when the debt exceeds the value of the collateral? The short answer is no.¹⁹³ Under the hanging paragraph, § 506 is inapplicable to a 910 claim.¹⁹⁴ This situation “leaves the parties to their contractual entitlements.”¹⁹⁵ The contracts are controlled by state law, which generally allows the creditors to pursue a deficiency claim.¹⁹⁶ Any other conclusion would be at odds with the congressional intent to help car creditors as evidenced by the title of the legislation enacting the hanging paragraph—“Restoring the Foundation for Secured Credit.”¹⁹⁷ By holding that 910 claimants are entitled to pursue a deficiency claim upon surrender of the collateral, the court joined the position taken by the United States Courts of Appeals for the Fourth, Sixth, Seventh, Eighth, and Tenth Circuits.¹⁹⁸

Finally, in *Nuvell Financial Services Corp. v. Dean (In re Dean)*,¹⁹⁹ the court addressed the treatment of 910 claims in a Chapter 13 plan.²⁰⁰ Under 11 U.S.C. § 1325(a)(5)(B), the holder of an allowed secured claim is entitled to the present value of his or her claim.²⁰¹ The United States Bankruptcy Court for the Middle District of Georgia concluded that a 910 claim is not an allowed secured claim because it does not pass through § 506 and is therefore not entitled to postpetition

189. *Id.* at 1299 (citing O.C.G.A. § 10-1-31(a)(1) (2000)).

190. *Id.* at 1301.

191. 543 F.3d 1239 (11th Cir. 2008).

192. *See id.* at 1241.

193. *See id.* at 1247.

194. *Id.* at 1246.

195. *Id.* (quoting *In re Wright*, 492 F.3d 829, 832 (7th Cir. 2007)).

196. *Id.* (citing *Butner v. United States*, 440 U.S. 48 (1979)).

197. *Id.*; see Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8, § 306(b), 119 Stat. 23, 80 (2005).

198. *In re Barrett*, 543 F.3d at 1246; see *Tidewater Fin. Co. v. Kenney*, 531 F.3d 312 (4th Cir. 2008); *In re Ballard*, 526 F.3d 634 (10th Cir. 2008); *In re Long*, 519 F.3d 288 (6th Cir. 2008); *Capital One Auto Fin. v. Osborn*, 515 F.3d 817 (8th Cir. 2008); *In re Wright*, 492 F.3d 829.

199. 537 F.3d 1315 (11th Cir. 2008).

200. *See id.* at 1317.

201. 11 U.S.C. § 1325(a)(5)(B)(ii).

interest under § 1325(a)(5)(B).²⁰² The Eleventh Circuit disagreed.²⁰³ The court reasoned that § 506 does not define secured claims.²⁰⁴ Instead, the type of claim entitled to interest under § 1325(a)(5)(B) is one that is both allowed by the Bankruptcy Code and secured by a lien under nonbankruptcy law.²⁰⁵ Because a 910 claim meets those requirements and because the Code requires it to be treated as fully secured, the court held that the creditor is entitled to interest on the full value of its claim.²⁰⁶ The court made no determination regarding the appropriate rate of interest to apply to 910 claims.²⁰⁷

IX. CHAPTER 11: *PICCADILLY* REDUX

In 2007, the Eleventh Circuit held that a preconfirmation transfer is exempt from a stamp tax under § 1146²⁰⁸ if the transfer is “necessary to the consummation of a confirmed plan of reorganization.”²⁰⁹ In *Florida Department of Revenue v. Piccadilly Cafeterias, Inc.*,²¹⁰ the United States Supreme Court reviewed and reversed the Eleventh Circuit’s decision.²¹¹

In this case, prior to filing a Chapter 11 plan, the debtor auctioned all of its assets and obtained bankruptcy court approval of the sale. When it approved the sale, the court also made the ruling at issue in this case—that the preconfirmation sale was exempt from stamp taxes.²¹²

Pursuant to § 1146(a), “[a] transfer under a plan confirmed . . . may not be taxed under any law imposing a stamp tax or similar tax.”²¹³ The Supreme Court stated two possible meanings for the phrase “under a plan confirmed”—either the sale is authorized by the plan or the sale is made in accordance with the plan.²¹⁴ However, when read in

202. *In re Dean*, 537 F.3d at 1319.

203. *See id.* at 1320.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* n.5.

208. 11 U.S.C. § 1146 (2006).

209. *Fla. Dep’t of Rev. v. Piccadilly Cafeterias, Inc. (In re Piccadilly Cafeterias, Inc.)*, 484 F.3d 1299, 1304 (11th Cir. 2007), *rev’d*, 128 S. Ct. 2326, *remanded to* 548 F.3d 960 (11th Cir. 2008).

210. 128 S. Ct. 2326 (2008).

211. *Id.* at 2330.

212. *Id.* at 2330-31.

213. 11 U.S.C. § 1146(a).

214. *In re Piccadilly Cafeterias*, 128 S. Ct. at 2332-33.

context, one meaning emerges as the more plausible and more natural—the transfer must occur postconfirmation.²¹⁵

Notably, the provision at issue falls under the subchapter “Postconfirmation Matters,” which suggests the context for reading it.²¹⁶ In addition, courts must read the exemption narrowly so as not to “recogniz[e] an exemption from state taxation that Congress has not clearly expressed.”²¹⁷ In fact, there is no basis for reading the provision liberally “to serve its ostensibly ‘remedial’ purpose” as the Eleventh Circuit did because to do so would “stretch the disallowance well beyond what the statutory text can naturally bear.”²¹⁸ The Court had previously established that the Bankruptcy Code generally leaves the determination of property rights to the states, which “accommodates the interests of the States in regulating property transfers.”²¹⁹ For that reason, the Court was not persuaded that it should deviate from the natural reading of the statute’s text.²²⁰ Thus, it concluded that the transfer at issue was not exempt from the stamp tax because the transfer took place prior to plan confirmation and, thus, could not have been under a plan confirmed.²²¹

X. CONCLUSION

Looking forward to 2009, it is hard to guess the future path of bankruptcy law. As mentioned in Part I, there certainly is a possibility Congress may enact legislation to allow mortgage cram-downs in bankruptcy, although it looks increasingly unlikely. In addition, the United States Supreme Court has granted certiorari in two bankruptcy cases. The first deals with the issue of the scope of postconfirmation settlement agreements and whether they apply to disputes between two nonparties to the agreement.²²² The second will probably affect far more cases as it involves the scope of exemptions. If a debtor values property in the same dollar amount it claims as exempt, is the property

215. *Id.* at 2333, 2336.

216. *Id.* at 2336.

217. *Id.* at 2338 (emphasis omitted) (quoting *Cal. State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 851-52 (1989)).

218. *Id.*

219. *Id.* at 2339.

220. *See id.*

221. *See id.* at 2329, 2339.

222. *See Traveler’s Indem. Co. v. Pearlie Bailie*, United States Supreme Court, 2008 Granted Certiorari, No. 08-295, (Dec. 12, 2008), available at <http://origin.www.supremecourtus.gov/docket/08-295.htm>.

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fully exempt—in the absence of objection—regardless of its true value?²²³

223. Schwab v. Reilly, 129 S. Ct. 2049 (U.S. Apr. 27, 2009) (No. 08-538).