Bankruptcy

**by James D. Walker, Jr.*
and Amber Nickell****

I. INTRODUCTION

This Article offers a review of recent bankruptcy law developments[1] in the United States Court of Appeals for the Eleventh Circuit.[2] Two notable areas of activity in the past year included: (1) bankruptcy court jurisdiction, which was ruled on by the United States Supreme Court; and (2) mortgages in Chapter 13 cases, which were the subject of both case law and a new bankruptcy rule.

II. JURISDICTION: *STERN V. MARSHALL*

In its only bankruptcy decision of 2011, *Stern v. Marshall*,[3] the United States Supreme Court partially defined the constitutional limits on bankruptcy court jurisdiction. The players in the case were as follows: (1) the decedent–an elderly and wealthy Texan; (2) the debtor–the decedent's widow; and (3) the creditor–the decedent's son from a prior marriage and the debtor's stepson.[4]

When the debtor found herself cut out of the decedent's estate plan, her lawyers publicly accused the creditor of fraud, forgery, and other

---

* U.S. Bankruptcy Judge, Middle District of Georgia. Augusta State University (B.A., 1970); University of South Carolina (J.D., 1974). Member, State Bar of Georgia.

** Law Clerk to the Honorable James D. Walker, Jr., Chapman University (B.A., 1993); Mercer University, Walter F. George School of Law (J.D., 2001). Member, State Bar of Georgia.

1. Unless specified otherwise, all statutory references in this Article are to the Bankruptcy Code, 11 U.S.C. §§ 101-1501 (2006 & Supp. IV 2010).

2. For analysis of Eleventh Circuit bankruptcy law during the prior survey period, see Hon. James D. Walker, Jr. & Amber Nickell, *Bankruptcy, Eleventh Circuit Survey*, 62 MERCER L. REV. 1085 (2011).

3. 131 S. Ct. 2594 (2011).

4. *See id.* at 2600. The widow in this case was Vickie Lynn Marshall, better known as deceased celebrity Anna Nicole Smith. *Id.* at 2601.

misdeeds. The debtor later filed for bankruptcy in California. The creditor filed a proof of claim in the bankruptcy case based on defamation, and he filed an adversary proceeding to determine the dischargeability of the debt. The debtor raised truth as a defense and filed a counterclaim for tortious interference with an expectancy. The bankruptcy court found in favor of the debtor and awarded her damages in excess of $449 million. The creditor appealed to the district court.[5]

Meanwhile, a probate court in Texas was considering whether the decedent's estate plan was valid.[6] The debtor had filed claims challenging the validity of the plan and alleging tortious interference by the creditor. However, she withdrew her claims in the probate court after succeeding on her tortious interference counterclaim in the bankruptcy court. The probate court subsequently declared the estate plan to be valid, which created a conflict with the bankruptcy court's order. Sometime after the probate court entered its order, the district court, in reviewing the bankruptcy court order, entered a decision in favor of the debtor.[7]

At issue in the Supreme Court was whether the bankruptcy court decision or the probate court decision controlled. The bankruptcy court decision could only control if the bankruptcy court had authority to enter a final order on the debtor's tortious interference counterclaim.[8] The Supreme Court held that it could not.[9] Instead, the bankruptcy court order did not become final until affirmed by the district court.[10] Because the probate court order preceded the district court order, the probate court order had preclusive effect.[11]

To reach its decision, the Supreme Court first addressed the bankruptcy court's statutory authority to decide the debtor's counterclaim.[12] Pursuant to 28 U.S.C. § 157(b)(1),[13] bankruptcy judges may enter final orders in "core proceedings arising under [T]itle 11, or arising in a case under [T]itle 11."[14] By contrast, only the district court can enter final

---

5. *Id.* at 2601-02.
6. Marshall v. Marshall, 547 U.S. 293 (2006). *Marshall* involved the same case as *Stern*, but a different issue. The Court provided a more detailed explanation of the background facts in *Marshall* than in *Stern*.
7. *Id.* at 300-02.
8. *See Stern*, 131 S. Ct. at 2600.
9. *Id.* at 2601.
10. *See id.* at 2608.
11. *See id.* at 2602-03.
12. *Id.* at 2600.
13. 28 U.S.C. § 157(b)(1) (2006).
14. *Id.*

orders in matters "related to" a bankruptcy case.[15] Congress provided a nonexclusive list of core proceedings, including "counterclaims by the estate against persons filing claims against the estate."[16] Thus, the bankruptcy court had statutory authority to enter a final judgment on the debtor's counterclaim.[17] However, the bankruptcy court did not have "the constitutional authority to do so."[18]

Pursuant to the United States Constitution, and to effectuate the principle of separation of powers, only Article III judges[19] may exercise the judicial power of the United States.[20] The judicial power, which may not be withdrawn by Congress, is exercised "[w]hen a suit is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789.'"[21] However, the Supreme Court has previously recognized that cases involving "public rights" may fall outside the constitutional scope of judicial power and, thus, may be the subject of final orders by non-Article III tribunals.[22]

While the Supreme Court has never provided a comprehensive definition of public rights, they may include: (1) those that "can be pursued only by grace of the other branches . . . or one that 'historically could have been determined exclusively by' those branches";[23] (2) "those arising 'between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments'" rather than matters involving the "'liability of one individual to another'";[24] (3) those in which the claimed right to relief "flow[s] from a federal statutory scheme" and is "'completely dependent upon' adjudication of a claim created by federal law";[25] and (4) those in which the claim is "limited to a 'particularized area of the law' . . . in which Congress devised an 'expert and inexpensive method for dealing with a class of questions of fact which are

---

15. *Id.* § 157(c)(1) (2006).
16. *Id.* § 157(b)(2)(C) (2006).
17. *Stern*, 131 S. Ct. at 2601.
18. *Id.*
19. Article III judges are those who are appointed for life and whose compensation may not be diminished. *Id.* at 2609; *see also* U.S. CONST. art. III, § 1. Bankruptcy judges are appointed to fourteen-year terms. 28 U.S.C. § 152(a)(1) (2006).
20. U.S. CONST. art. III, § 1.
21. *Stern*, 131 S. Ct. at 2609 (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring)).
22. *Id.* at 2610 (internal quotation marks omitted).
23. *Id.* at 2614 (quoting *N. Pipeline*, 458 U.S. at 68).
24. *Id.* at 2612 (quoting Crowell v. Benson, 285 U.S. 22, 50-51 (1932)).
25. *Id.* at 2614 (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856 (1986)).

particularly suited to examination and determination by an administrative agency specially assigned to that task.'"[26]

In summary, "what makes a right 'public' rather than private is that the right is integrally related to [a] particular federal government action."[27] In the bankruptcy context, the Supreme Court has previously said, "[i]f a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court."[28]

The debtor's counterclaim does not fit within the framework of a public right because it is not one that is within the domain of the executive or legislative branches.[29] In addition, it neither "flow[s] from a federal regulatory scheme," nor is it a "claim created by federal law."[30] Finally, it does not involve a particularized area of law.[31] Instead, the debtor's counterclaim–an ordinary tort claim arising under state law–fits squarely within the scope of private rights that must be adjudicated by an Article III court.[32] The fact that the creditor had filed a proof of claim does not change the result.[33] The creditor's defamation claim did not transform the nature of the debtor's counterclaim, nor did resolution of the creditor's claim fully resolve the debtor's counterclaim.[34] Although there was some overlap between the two claims–namely whether or not the creditor had engaged in acts rising to the level of tortious interference–the debtor's counterclaim required additional inquiries by the Court.[35] For example, a tortious interference claim typically requires proof that the plaintiff expected to receive a bequest and proof that the expectation was reasonable.[36] "There thus was never reason to believe that the process of ruling on [the creditor's] proof of claim would necessarily result in the resolution of [the debtor's] counterclaim."[37] Consequently, the Supreme Court held, in ruling on

26. *Id.* (quoting *N. Pipeline*, 458 U.S. at 85; *Crowell*, 285 U.S. at 46).
27. *Id.* at 2613.
28. *Id.* at 2614 (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 54-55 (1989)).
29. *See id.*
30. *Id.*
31. *Id.* at 2615.
32. *Id.*
33. *See id.* at 2615-16.
34. *Id.* at 2617.
35. *Id.*
36. *Id.*
37. *Id.* at 2617-18.

the counterclaim, the bankruptcy court impermissibly exercised the judicial power.[38]

The Supreme Court rejected the argument that its decision would give rise to practical problems, limiting efficiency.[39] It noted that with noncore "related to" matters, bankruptcy courts generally hear the case and submit proposed findings of fact and conclusions of law to the district court for de novo review.[40] Nothing in the opinion prevents similar procedures from being used for matters that are statutorily defined as core but actually require the exercise of Article III judicial power.[41]

Furthermore, the Supreme Court stated its ruling addresses a "narrow" issue and only upsets the authority of bankruptcy courts to enter final orders "in one isolated respect."[42] As the United States Bankruptcy Court for the Middle District of Florida in *In re Safety Harbor Resort & Spa*[43] pointed out, "nothing in the Supreme Court's opinion actually limits a bankruptcy court's authority to adjudicate the other 'core proceedings' identified in section 157(b)(2)."[44] *Stern* does not even apply to all counterclaims asserted in response to a proof of claim; its limitation only affects those counterclaims that are neither native to the bankruptcy process nor capable of full resolution in the claims allowance process.[45]

III. CLAIMS

In 2011, the Eleventh Circuit decided two cases involving the effect of plan confirmation on claims. One case involved a Chapter 11 plan and postconfirmation amendment of claims.[46] The other case involved a Chapter 13 plan and the appropriate post-confirmation rate of interest for oversecured claims.[47]

In *IRT Partners, L.P. v. Winn-Dixie Stores, Inc. (In re Winn-Dixie Stores, Inc.)*,[48] the Chapter 11 debtor rejected the creditors' leases and

---

38. *Id.* at 2620.
39. *See id.* at 2619.
40. *Id.* at 2620.
41. *See id.*
42. *Id.*
43. 456 B.R. 703 (Bankr. M.D. Fla. 2011).
44. *Id.* at 715.
45. *See id.*
46. *See* IRT Partners, L.P. v. Winn-Dixie Stores, Inc. (*In re* Winn-Dixie Stores, Inc.), 639 F.3d 1053 (11th Cir. 2011).
47. *See* First United Sec. Bank v. Garner (*In re* Garner), 663 F.3d 1218 (11th Cir. 2011).
48. 639 F.3d 1053 (11th Cir. 2011).

objected to their subsequently filed claims. The creditors did not respond to the objection, and the bankruptcy court allowed the claims in reduced amounts. Then, pursuant to the debtor's confirmed plan, the creditors received shares of the debtor's common stock in full satisfaction of their claims. After this distribution, the creditors filed amended claims to add rejection damages. The bankruptcy court disallowed the rejection damages.[49] The district court and the Eleventh Circuit affirmed.[50]

The Eleventh Circuit first considered the proper framing of the issue on appeal.[51] The creditors argued that the question was whether they had satisfied a five-part test for determining when a claim may be amended.[52] The Eleventh Circuit disagreed.[53] Instead, the question was whether plan confirmation has a res judicata effect on claims, precluding their amendment.[54]

The Eleventh Circuit held that a confirmation order should be given res judicata effect as to claims, absent compelling circumstances justifying amendment of claims.[55] The court noted that postconfirmation amendment to claims "can render a plan infeasible or alter the distribution to other creditors" and is, thus, disfavored.[56]

In this case, the confirmed plan expressly provided for the full satisfaction of the creditors' prepetition claims–including rejection damages–through distribution of common stock.[57] Thus, "the plan undertook to extinguish all claims, substituting for them a new contractual relationship between [the debtor] and its creditors, defined by the terms of the plan itself."[58] Because of the res judicata effect of plan confirmation and the absence of compelling circumstances, the creditors could not amend their claims postconfirmation.[59]

Turning to Chapter 13, the Eleventh Circuit again found that confirmation limited the creditor's rights. In *First Security Bank v. Garner (In re Garner)*,[60] the debtor borrowed more than $30,000 at an annual rate of 10.5% and gave the creditor a security interest in an

---

49. *Id.* at 1055.
50. *Id.* at 1057.
51. *Id.* at 1055.
52. *Id.*
53. *Id.* at 1056.
54. *Id.*
55. *Id.* at 1056-57.
56. *Id.*
57. *Id.* at 1056.
58. *Id.*
59. *Id.* at 1056-57.
60. 663 F.3d 1218 (11th Cir. 2011).

assortment of vehicles.[61] The debtor filed for Chapter 13, and proposed to repay the creditor–who was oversecured–at the prime-plus rate[62] of 4.25% annually.[63] The creditor objected to confirmation, arguing it was entitled to the contract rate.[64]

The bankruptcy court ruled that the creditor was only entitled to the contract rate until confirmation; thereafter it was entitled to prime-plus interest.[65] The district court and the Eleventh Circuit affirmed.[66] The Eleventh Circuit first noted that oversecured creditors are entitled to postpetition interest pursuant to 11 U.S.C. § 506(b)[67] and that they are entitled to the contract rate of interest between the petition date and the confirmation date.[68] Next, the court considered the appropriate rate following confirmation.[69] It noted that under both Supreme Court precedent and Eleventh Circuit dicta, § 506(b) applies only during the preconfirmation period to set the amount of the allowed secured claim.[70] Upon confirmation, the debtor may rely on 11 U.S.C. § 1325(a)(5)(B)[71] to modify the creditor's rights, "including the rate of interest."[72] Thus, the reduction of the creditor's interest rate to prime-plus in this case was consistent with the provisions of the Bankruptcy Code.[73]

IV. PROFESSIONALS

Attorneys cannot evade court review of their fees by agreeing to accept a prepetition retainer in full satisfaction of their services, according to the United States Bankruptcy Court for the Middle District of Florida in *In re Ford*.[74] The court examined all Chapter 11 cases that were

---

61. *Id.* at 1219.
62. In *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004), the Supreme Court considered the appropriate rate of interest for secured creditors whose claims were subject to cram down–in which the present value of secured portion of the claim is paid in full and unsecured portion is paid pro rata. *Id.* at 469. A plurality held that creditors are entitled to the prime rate plus a risk factor ("prime-plus" or "formula" rate). *Id.* at 479-80. This formulation is commonly referred to as *Till* interest.
63. *In re Garner*, 663 F.3d at 1219.
64. *Id.*
65. *Id.*
66. *Id.*
67. 11 U.S.C. § 506(b) (2006).
68. *In re Garner*, 663 F.3d at 1220.
69. *Id.*
70. *Id.*
71. 11 U.S.C. § 1325(a)(5)(B) (2006 & Supp. IV 2010).
72. *In re Garner*, 663 F.3d at 1220-21.
73. *See id.* at 1221.
74. 446 B.R. 550 (Bankr. M.D. Fla. 2011).

pending during a particular twenty-one-month period.[75] In doing so, it found a certain attorney had failed to file fee applications in ninety cases.[76] In each of the ninety cases, the attorney filed a disclosure of compensation indicating his receipt of a retainer and stating his understanding that the retainer was subject to review by the court for reasonableness. Nevertheless, the attorney contended no fee application was necessary in the cases at issue because he agreed to accept the retainer in full satisfaction of his services, even though fees incurred exceeded the amount of the retainer. Thus, no harm resulted from failure to file a fee application.[77] Furthermore, his actions were "consistent with an informal local practice that has evolved among the local bankruptcy bar."[78]

The court rejected the attorney's arguments and concluded that his practices were improper because they did not comply with the statutory scheme for approval of fees.[79] Under Federal Rule of Bankruptcy Procedure 2016, anyone seeking compensation in a bankruptcy case must file an application that includes a statement of services provided and the amount requested.[80] No fee application means no notice and hearing as required by Federal Rule of Bankruptcy Procedure 2002(a)(6), no review by the U.S. Trustee as required by 28 U.S.C. § 586(a)(3)(A),[81] and no court review for reasonableness as required by 11 U.S.C. § 330.[82] Following the appropriate procedures is necessary both to "preserve[] the public perception of the integrity of the bankruptcy system" and to establish "that compensation for the professional is reasonable and based on actual and necessary services."[83] Therefore, even those professionals who seek payment only from a prepetition retainer must file a fee application and obtain court approval for their compensation.[84]

In *In re Dorn*,[85] the United States Bankruptcy Court for the Middle District of Florida had an opportunity to evaluate the reasonableness of unusually high fees requested by a debtor's attorney in two Chapter 7 cases. Most attorneys in the locality (Orlando) with a high-volume case

---

75. *Id.* at 552.
76. *Id.*
77. *Id.* at 553.
78. *Id.* at 554.
79. *Id.*
80. *Id.* at 551.
81. 28 U.S.C. § 586(a)(3)(A) (2006 & Supp. IV 2010).
82. 11 U.S.C. § 330 (2006); *In re Ford*, 446 B.R. at 554.
83. *In re Ford*, 446 B.R. at 555.
84. *Id.*
85. 443 B.R. 555 (Bankr. M.D. Fla. 2011).

load typically charged a flat fee of $1,250 to $2,500 for a Chapter 7 case. Such attorneys and their paralegals generally spent a combined time of five to ten hours per case.[86]

By contrast, the attorney at issue charged $3,450 in one no-asset case and $3,369 in another slightly more complicated case. The attorney spent ten to eleven hours per case, and her paralegal spent about seven hours per case. The attorney's hourly rate was $295, and her paralegal's hourly rate was $105. Furthermore, the attorney's practice differed from that of high-volume filers in several ways. First, she only filed about ten cases per year. Second, she marketed herself as providing a premium or luxury service by which she personally guided the debtor through the bankruptcy process and handled many services that are typically handed off to paralegals. Third, she offered to refer debtors to less expensive attorneys.[87]

The court held that, based on the attorney's hourly rate, which was reasonable given her experience, the amount of hours she typically spent on a case, and the highly personalized services she provided, her fees were reasonable.[88] The court noted that the debtors were apparently satisfied with the attorney's services and did not object to the fees.[89]

The court further refused to set a cap on fees in Chapter 7 cases, noting that the market is a better arbiter of rates and that not all debtors "have the same preferences when it comes to attorneys."[90] The court's only concern was reasonableness of fees.[91] Although the attorney's fees were higher than average for Orlando, they were reasonable "for *what she provide[d]*."[92]

V. BANKRUPTCY ESTATE

Facing an unusual set of facts and somewhat puzzling legal arguments, the United States Bankruptcy Court for the Northern District of Alabama in *Shields v. Adams* (*In re Adams*)[93] concluded that a § 542 (a)[94] action to recover undisclosed income, filed by the Chapter 13 trustee against a Chapter 13 debtor, does not become property of the

86. *Id.* at 555-57.
87. *Id.* at 555-58.
88. *Id.* at 559.
89. *Id.* at 558. The U.S. Trustee, not the debtors, objected to the attorney's fee applications. *Id.*
90. *Id.* at 559.
91. *See*, *e.g.*, *id.* at 557.
92. *Id.* at 559 (alteration in original).
93. 453 B.R. 774 (Bankr. N.D. Ala. 2011).
94. 11 U.S.C. § 542(a) (2006).

Chapter 7 estate when the case is converted.[95] While the debtor's bankruptcy case was pending, he received and spent $55,000 in undisclosed income and received an undisclosed income tax refund. The debtor conceded the money was property of the Chapter 13 estate. The Chapter 13 trustee filed an adversary proceeding for turnover of the funds under § 542(a). The debtor voluntarily converted his case to a Chapter 7.[96] While conceding that the undisclosed funds did not become property of the Chapter 7 estate, the Chapter 7 trustee contended the turnover proceeding did become property of the Chapter 7 estate and could be prosecuted by the Chapter 7 trustee.[97]

The court first noted that it was unclear that the Chapter 13 trustee had standing to initiate a § 542(a) suit and, thus, it was unclear whether there was a valid suit to pass into the Chapter 7 estate.[98] In a § 542(a) turnover proceeding, the trustee can only recover property that he has the right to "use, sell, or lease under section 363."[99] However, § 1303[100] grants such rights to the debtor, "exclusive of the trustee."[101] Without deciding the standing issue, the court pointed to another problem that had not been addressed by the parties: whether the trustee could recover funds from the debtor if the debtor no longer had them.[102] The court noted a split of authority on the question and again declined to decide the issue.[103]

Finally, the court considered whether a § 542(a) action initiated by a Chapter 13 trustee becomes property of the Chapter 13 estate that can pass to the Chapter 7 estate upon conversion.[104] The court looked to 11 U.S.C. § 541[105] and 11 U.S.C. § 1306[106] after finding no relevant case law.[107] Section 541(a) defines property of the estate, in general, as a broad range of the debtor's interests in property on the petition date.[108] Section 1306(a) provides that postpetition earnings and after-acquired property of the kind specified in § 541(a) become property of the

95. *In re Adams*, 453 B.R. at 780.
96. *Id.* The conversion was found to be in bad faith and the debtor consented to denial of a Chapter 7 discharge. *Id.*
97. *Id.* at 775-76.
98. *Id.* at 777.
99. *Id.*; 11 U.S.C. § 542(a).
100. 11 U.S.C. § 1303 (2006).
101. *In re Adams*, 453 B.R. at 777; 11 U.S.C. § 1303.
102. *In re Adams*, 453 B.R. at 777.
103. *Id.* at 777-78.
104. *Id.* at 778.
105. 11 U.S.C. § 541 (2006 & Supp. IV 2010).
106. 11 U.S.C. § 1306 (2006).
107. *In re Adams*, 453 B.R. at 778-79.
108. *See*, *e.g.*, *id.*

estate.[109] Thus, if the turnover action was the type of property listed in § 541(a), it would have become property of the estate under § 1306-(a).[110] Section 541(a) primarily applies to property owned by the *debtor*.[111] However, § 541(a)(7) provides that the estate includes "[a]ny interest in property that *the estate* acquires after the commencement of the case."[112] Nevertheless, the court determined this provision did not apply to the § 542 action, noting that "the power to seek turnover pursuant to § 542 is a 'statutorily created power to recover property,' not an interest in property itself."[113] Thus, the § 542 action never became property of the Chapter 13 estate and could not become property of the Chapter 7 estate.[114] Consequently, the Chapter 7 trustee could not pursue a § 542 cause of action.[115]

VI. DISCHARGE

Student loans are notoriously difficult to discharge, absent some catastrophic disability that leaves a debtor permanently unable to work. In *Wieckiewicz v. Education Credit Management Corp.*,[116] the Eleventh Circuit approved additional hurdles–of an administrative nature–for those seeking discharge of student loan debt.[117]

The debtor filed an adversary proceeding to determine the dischargeability of his student loans.[118] Student loans may be discharged only if they impose an undue hardship on the debtor.[119] The Eleventh Circuit applied the three-part *Brunner*[120] standard to test for undue hardship.[121] The debtor must demonstrate: (1) that he "cannot maintain . . . a minimal standard of living"; (2) "additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the [student loan] repayment period"; and (3) he "has made good faith efforts to repay the loans."[122]

---

109. *Id.* at 778.
110. *See id.* at 779.
111. *Id.* at 780.
112. *Id.* at 779; 11 U.S.C. § 541(a)(7) (emphasis added).
113. *In re Adams*, 453 B.R. at 779-80 (quoting Moyer v. ABN AMRO Mortg. Grp., Inc. (*In re* Feringa), 376 B.R. 614, 624 (Bankr. W.D. Mich. 2007)).
114. *Id.*
115. *Id.*
116. 443 F. App'x 449 (11th Cir. 2011).
117. *See id.* at 450, 452.
118. *See id.* at 450.
119. *Id.* at 451; 11 U.S.C. § 523(a)(8) (2006 & Supp. IV 2010).
120. Brunner v. New York State Higher Educ. Serv. Corp., 831 F.2d 395 (2d Cir. 1987).
121. *Wieckiewicz*, 443 F. App'x at 451.
122. *Id.* (citing *Brunner*, 831 F.2d at 396) (internal quotation marks omitted).

While the debtor's dischargeability case was pending, the bankruptcy court ordered the debtor to apply for loan consolidation through the William D. Ford Federal Direct Loan Program, which could have reduced his loan payments to $0. If the debtor qualified for the program he probably would not be able to establish undue hardship; but if he did not qualify, he likely could prove undue hardship. When the debtor refused to apply for the program, the court dismissed the adversary proceeding.[123]

The Eleventh Circuit affirmed the dismissal.[124] First, the court noted that the bankruptcy court has inherent authority "to dismiss actions for failure to . . . obey court orders"[125] but only when "*necessary* to protect its ability to function . . . [or] to facilitate activity authorized by statute or rule."[126] Second, the court noted that the bankruptcy judge extended considerable patience and consideration toward the debtor after ordering him to apply for consolidation.[127] The judge convened a hearing to consider the debtor's eligibility for the Ford program, granted the debtor an extension of the time to apply, and offered to protect him from any negative effects of the program.[128] Despite the bankruptcy judge's efforts, the debtor refused to comply with the court's order to apply for consolidation.[129]

The Eleventh Circuit concluded that, under the circumstances, the bankruptcy court did not abuse its discretion in dismissing the adversary proceeding.[130] The debtor's eligibility for the loan program could have a determinative effect on the adversary; therefore, the bankruptcy court had a nonfrivolous reason to order the debtor to apply.[131] Despite significant accommodations offered by the judge, the debtor refused to

---

123. *Id.* at 450-51.

124. *Id.* at 452.

125. *Id.* at 450.

126. *Id.* at 451 (quoting *In re* Novak, 932 F.2d 1397, 1406 (11th Cir. 1991)) (alteration in original).

127. *Id.*

128. *Id.* at 451-52. The mention of negative effects is likely a reference to the potential income tax implications of the Ford program. The Ford program offers an income contingent repayment option in which payments are based on ability to pay and may be as low as $0. *See* Educ. Credit Mgmt. Corp. v. Stanley, 300 B.R. 813, 818 n.8 (N.D. Fla. 2003) (dismissing concerns about income tax liability as speculative). After the debtor completes twenty-five years of payments, any balance remaining on the loan is forgiven. *Id.* The amount forgiven may become part of the debtor's taxable income. *Id.*

129. *Wieckiewicz*, 443 F. App'x at 451.

130. *Id.* at 452.

131. *Id.*

comply with the order.[132] Thus, dismissal of the adversary proceeding was appropriate.[133]

VII. AVOIDANCE

According to the United States District Court for the Middle District of Georgia in *Hope v. Acorn Financial, Inc.* (*In re Fluellen*),[134] if a bankruptcy trustee is aware of potential preference actions prior to plan confirmation but does not act on them, the entry of the confirmation order may prevent her from pursing them postconfirmation.[135] The debtor gave the creditor a security interest in his vehicle. However, the creditor did not perfect the security interest until after the debtor filed a Chapter 13 petition. The trustee learned of these events approximately thirty days prior to the date set for the confirmation hearing. The confirmation hearing proceeded as scheduled and the debtor's plan, which treated the creditor as secured, was confirmed. Two weeks after confirmation, the trustee initiated an adversary proceeding to avoid the creditor's security interest and to treat the creditor as unsecured.[136] The bankruptcy court granted summary judgment to the creditor, and the district court affirmed.[137]

At issue in *In re Fluellen* was whether the trustee was bound by the confirmation order.[138] Pursuant to 11 U.S.C. § 1327(a),[139] "[t]he provisions of a confirmed plan bind the debtor and each creditor."[140] The parties agreed that by this language, "confirmation of a Chapter 13 plan may satisfy the requirements for claim preclusion and therefore prevent relitigation of matters that either were raised or could have been raised prior to confirmation."[141] However, the statute says nothing about binding the trustee. The trustee argued that under principles of statutory interpretation, the omission should be considered intentional.[142] The district court disagreed.[143]

The district court first noted that the Eleventh Circuit has held that any objections to classification of a claim must be raised prior to

---

132. *Id.*
133. *Id.*
134. No. 5:11-CV-276, 2012 WL 74874 (M.D. Ga. Jan. 10, 2012).
135. *See id.* at *5-6.
136. *Id.* at *1.
137. *Id.* at *2, *6.
138. *Id.* at *2.
139. 11 U.S.C. § 1327(a) (2006).
140. *In re Fluellen*, 2012 WL 74874, at *2; 11 U.S.C. § 1327(a).
141. *In re Fluellen*, 2012 WL 74874, at *2.
142. *Id.*
143. *Id.* at *3.

confirmation.[144] Here, the trustee's avoidance action would effectively reclassify the claim from secured to unsecured after the plan had been confirmed.[145] In addition, multiple courts have held that the res judicata effect of plan confirmation applies to all parties to confirmation, including the trustee–at least to the extent that "the facts supporting the trustee's post-confirmation challenge were discoverable pre-confirmation."[146] For these reasons, the court held that "under the specific facts of this case, the binding effect of confirmation applied to the Trustees."[147]

VIII. AUTOMATIC STAY/DISCHARGE INJUNCTION

In 2011, the Eleventh Circuit ruled on the limits of both the automatic stay and the discharge injunction. In *Jacks v. Wells Fargo Bank* (*In re Jacks*),[148] the court held that internal bookkeeping entries by a creditor do not violate the automatic stay.[149] And, in *Florida Department of Revenue v. Diaz* (*In re Diaz*),[150] the court held that a child support collection agency does not violate the discharge injunction when it attempts to collect unpaid prepetition interest on past due child support that had been disallowed as part of the creditor's claim.[151]

In *In re Jacks*, the mortgage creditor had incurred attorney fees of $310 for preparing a proof of claim and reviewing the debtors' Chapter 13 plan. The amount was charged to the debtors' account on the creditor's internal books. However, the creditor did not include the amount on the statements mailed to the debtors and did not otherwise seek payment of the fees. The debtors claimed the notation violated the automatic stay by attempting to collect property of the estate, attempting to enforce a lien against the estate, and attempting to collect a prepetition claim.[152] The Eleventh Circuit disagreed.[153] The notation had no effect on the debtors' account balance, the creditor never made any communications that could be interpreted as a request to pay the fees, and the creditor made no effort to extend its lien to include the fees.[154] The Eleventh Circuit held:

---

144. *Id.*
145. *See id.*
146. *Id.* at *4.
147. *Id.* at *6.
148. 642 F.3d 1323 (11th Cir. 2011).
149. *Id.* at 1329.
150. 647 F.3d 1073 (11th Cir. 2011).
151. *Id.* at 1092.
152. 642 F.3d at 1327-28.
153. *Id.* at 1330.
154. *Id*. at 1329-30.

> Neither possession nor control of the property was affected by [the creditor's] entry of the fees on its internal records. Absent some other overt attempt . . . to recover these fees from the estate or to gain advantage over other creditors, the entries . . . do not constitute a violation of the automatic stay.[155]

In *In re Diaz*, the creditor had filed a proof of claim for past due child support[156] plus interest.[157] The debtor objected to the interest portion of the claim. The creditor did not respond to the objection, and the bankruptcy court disallowed the interest. The debtor's plan provided for full payment of the principal. The debtor completed all his plan payments and received a discharge. Sometime thereafter, the domestic support obligation (DSO) creditor attempted to collect the unpaid interest.[158] The bankruptcy court found that in doing so, the creditor violated the discharge injunction.[159] The district court affirmed.[160] The Eleventh Circuit reversed.[161]

First, the Eleventh Circuit noted that DSOs are nondischargeable in bankruptcy.[162] Because the discharge injunction does not apply to such debts, it cannot be violated by attempts to collect such debts.[163] Furthermore, disallowance of a portion of the DSO claim has "no bearing on whether any portion of the debt is discharged."[164]

Second, the court held that the bankruptcy court did not adjudicate the amount of the debtor's liability for the DSO when it disallowed a

---

155. *Id.* at 1329.

156. Child support is a domestic support obligation (DSO) as defined in 11 U.S.C. § 101(14A) (2006). DSOs are nondischargeable pursuant to 11 U.S.C. § 523(a)(5) (2006 & Supp. IV 2010).

157. *In re Diaz*, 647 F.3d at 1080.

158. *Id.* at 1080-81.

159. *Id.* at 1082. The bankruptcy court also found violations of the automatic stay. *Id.* However, the Eleventh Circuit held that sovereign immunity barred the automatic stay claims. *Id.* at 1086. Generally, a governmental unit cannot raise sovereign immunity when accused of violating the automatic stay because the stay is necessary for the court to exercise its in rem jurisdiction over property of the estate. *Id.* States are deemed to have consented to such exercise of jurisdiction by their ratification of the Constitution. *Id.* at 1083-84. However, the debtor in this case did not raise the automatic stay claims until after the discharge had been entered and property of the estate had been fully distributed. *Id.* at 1086. Thus, the stay "was no longer necessary or even operative to assist the bankruptcy court in exercising its in rem jurisdiction." *Id.* (emphasis omitted).

160. *Id.* at 1082.

161. *Id.* at 1093.

162. *Id.* at 1089.

163. *Id.* at 1090. In the course of its analysis, the court held, as a matter of first impression, that postpetition interest on a DSO is nondischargeable. *Id.* at 1090 n.14.

164. *Id.* at 1090.

portion of the claim.[165] Instead, "the only issue before the bankruptcy court at the time of the claim objection was the amount of the child-support debt that would be paid by the bankruptcy estate through [the debtor's] Chapter 13 plan, not the total amount of the child-support debt."[166] Thus, principles of preclusion did not apply to prevent the creditor from effectively relitigating the amount of the liability by attempting to collect the unpaid interest.[167] Of course, the creditor cannot attempt to collect amounts already paid in the bankruptcy case.[168] If it does so, the debtor's proper recourse lies in state court.[169]

IX. DISCRIMINATION

Section 525[170] protects debtors from certain types of discrimination solely based on their bankruptcy history, including employment discrimination.[171] In *Myers v. TooJay's Management Corp.*,[172] the Eleventh Circuit held that the protections of § 525 do not extend to hiring by private employers.[173]

In *Myers*, the debtor underwent a lengthy application process for a managerial position at a restaurant. The application included a background check that revealed the debtor's prior bankruptcy. The restaurant refused to hire the debtor due to the bankruptcy.[174] The debtor argued that the refusal to hire violated § 525(b), which provides that a private employer may not "terminate the employment of, or discriminate with respect to employment against" a bankruptcy debtor.[175] The Eleventh Circuit disagreed.[176]

The court compared the language of § 525(b), relating to private employers, to § 525(a), relating to government employers.[177] Under § 525(a), government employers may not "*deny employment to*, terminate the employment of, or discriminate with respect to employment against"

165. *Id.* at 1091.
166. *Id.* (emphasis omitted).
167. *Id.* In addition, preclusion does not apply to nondischargeable debts. *Id.* at 1092.
168. *Id.* at 1093.
169. *Id.*
170. 11 U.S.C. § 525 (2006).
171. *Id.*
172. 640 F.3d 1278 (11th Cir. 2011).
173. *See id.* at 1284-87.
174. *Id.* at 1280-82.
175. *Id*. at 1282; 11 U.S.C. § 525(b).
176. *Myers*, 640 F.3d at 1284.
177. *Id*. at 1283-84.

a bankruptcy debtor.[178] Applying well-established principles of statutory construction, the Eleventh Circuit concluded that the inclusion of a bar on denial of employment in one section of the statute and its omission from another section of the statute were intentional by Congress.[179] The court explained that "[h]ad Congress wanted to cover a private employer's hiring policies and practices in § 525(b), it could have done so the same way it covered a governmental unit's hiring policies and practices in § 525(a)."[180] Furthermore, because the section applying to the government regulates both hiring and discrimination in employment (while private employers are only barred from discrimination), the discrimination language must refer to something other than hiring, such as discrimination "in promotions, demotions, hours, pay, and so forth."[181] Finally, the court reasoned that interpreting the statute in favor of the debtor would support the purpose of bankruptcy to provide debtors with a fresh start.[182] However, when the plain language of the statute conflicts with the purpose of bankruptcy law, the plain language prevails.[183]

X. CONSUMER ISSUES

A. *Chapter 13 Residential Mortgages*

An authorization in 11 U.S.C. § 1322(b)(5)[184] allows Chapter 13 debtors to cure their mortgage arrearages through the Chapter 13 plan, while maintaining their regular postpetition mortgage payments outside the plan.[185] As a result, upon the completion of all plan payments, the debtor's mortgage should be fully cured and current.[186] Instead, debtors sometimes find themselves in default upon completion of the plan due to improper accounting practices and other problems within the creditor's organization and are often unable to get any response from the creditor to deal with the problem.[187] Last year, two bankruptcy courts rejected the efforts of debtors to include special provisions in their plans

178. *Id*. at 1283; 11 U.S.C. § 525(a) (emphasis added).
179. *Myers*, 640 F.3d at 1284.
180. *Id.* at 1285.
181. *Id.* at 1285-86.
182. *Id.* at 1286.
183. *Id.*
184. 11 U.S.C. § 1322(b)(5) (2006).
185. *In re* Jackson, 446 B.R. 608, 609 (Bankr. N.D. Ga. 2011); 11 U.S.C. § 1322(b)(5).
186. *In re Jackson*, 446 B.R. at 609.
187. *Id*. at 610.

for the purpose of avoiding such a result.[188] However, on December 1, 2011, a new bankruptcy rule went into effect that is aimed at accomplishing the same goal, but in a uniform manner nationwide.[189] Federal Rule of Bankruptcy Procedure 3002.1, which only applies to mortgage claims on a Chapter 13 debtor's principal residence that are subject to § 1322(b)(5) treatment, requires the creditor to provide the debtor, the debtor's attorney, and the trustee with (1) notice of any change in payment amount at least twenty-one days before the new amount is due; and (2) notice of postpetition fees recoverable against the debtor within 180 days after the fees were incurred.[190] The debtor and trustee will then have one year to file a motion disputing that the fees are required to cure a default or to maintain payments.[191]

Once the debtor has completed all plan payments, the trustee has thirty days to provide notice to the creditor, the debtor, and the debtor's counsel that the default has been fully cured.[192] After receiving the notice, the creditor has twenty-one days to file a supplement to its proof of claim, stating whether or not it agrees that the default has been cured and whether the debtor is current on payments.[193] The supplement must also itemize any amounts the creditor contends are unpaid.[194] The debtor or trustee then has twenty-one days after the creditor files its supplement to file a motion to "determine whether the debtor has cured the default."[195] If the creditor fails to comply with its require-

188. *Id*. at 611-12; *In re* Duke, 447 B.R. 365, 372 (Bankr. M.D. Ga. 2011). The debtors in these cases proposed a nearly identical set of special provisions. *See In re Jackson*, 446 B.R. at 609-10; *In re Duke*, 447 B.R. at 372-73. The courts rejected some of the provisions as duplicative of current laws and rejected others because they violated current law. *In re Jackson*, 446 B.R. at 611; *In re Duke*, 447 B.R. at 368-71. The courts determined that allowing such special provisions would result in increased costs and administrative inefficiencies throughout the Chapter 13 system due to the extra analysis the plans would require. *In re Jackson*, 446 B.R. at 611; *In re Duke*, 447 B.R. at 371.

189. *See In re Jackson*, 446 B.R. at 610; *In re Duke*, 447 B.R. at 372.

190. FED. R. BANKR. P. 3002.1(a)-(c). The notice of payment change and the notice of expenses must be filed as supplements to the proof of claim; two new official forms–Supplement 1 and Supplement 2 to Form 10–have been created for this purpose. U.S. BANK. COURT, NOTICE OF MORTGAGE PAYMENT CHANGE, B 10S1 SUPPLEMENT 1 (2011), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK%20Forms%20Pending%201211/B_010S1.pdf; U.S. BANK. COURT, NOTICE OF POSTPETITION MORTGAGE FEES, EXPENSES, AND CHARGES, B 10S2 SUPPLEMENT 2 (2011), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK%20Forms%20Pending%201211/B_010S2.pdf.

191. FED. R. BANKR. P. 3002.1(c) advisory committee's note.

192. FED. R. BANKR. P. 3002.1(f).

193. FED. R. BANKR. P. 3002.1(g).

194. *Id.*

195. FED. R. BANKR. P. 3002.1(h).

ments under Rule 3002.1, the court may exclude the "omitted information . . . as evidence in any contested matter or adversary proceeding" or may award other appropriate relief.[196]

B. Chapter 13 Nonresidential Mortgages

While a debtor's options for dealing with a residential mortgages are limited, the debtor has more options when it comes to debt on investment real estate. If the maturity date of the debt extends beyond the length of the plan, the debtor may use 11 U.S.C. § 1322(b)(5), which allows for defaults to be cured under the plan and for "maintenance of payments" by the debtor.[197] Or, under 11 U.S.C. § 1322(b)(2),[198] the debtor may modify the rights of the creditor by dividing the claim into secured and unsecured portions under 11 U.S.C. § 506(a),[199] paying the secured portion in full and paying a pro rata share of the unsecured portion.[200]

What happens if a debtor proposes to do both, as the debtors did in *In re Elibo*[201] and *In re Agustin*?[202] These cases shared a common fact pattern as follows: The debtor owned investment real estate that was substantially underwater, with the mortgage maturing after completion of the Chapter 13 plan.[203] The debtor proposed to bifurcate the debt and to pay the secured portion according to the mortgage's original maturity schedule with a reduced interest rate, resulting in a significantly lower monthly payment.[204] In both cases, the United States Bankruptcy Court for the Southern District of Florida rejected the debtor's proposal.[205]

Debtors with long-term debt may bifurcate the creditor's claim pursuant to § 506(a) and § 1322(b)(2) while paying the debt beyond the term of the plan under § 1322(b)(5).[206] However, they may only do so if they satisfy the requirement in § 1322(b)(5) to maintain payments.[207]

---

196. FED. R. BANKR. P. 3002.1(i).
197. *In re* Elibo, 447 B.R. 359, 362 (Bankr. S.D. Fla. 2011); 11 U.S.C. § 1322(b)(5).
198. 11 U.S.C. § 1322(b)(2) (2006).
199. 11 U.S.C. § 506(a) (2006).
200. *See* 11 U.S.C. § 1322(b)(2).
201. 447 B.R. at 362.
202. 451 B.R. 617 (Bankr. S.D. Fla. 2011).
203. *In re Elibo*, 447 B.R. at 361; *In re Agustin*, 451 B.R. at 618.
204. *In re Elibo*, 447 B.R. at 361; *In re Agustin*, 451 B.R. at 618.
205. *In re Elibo*, 447 B.R. at 364; *In re Agustin*, 451 B.R. at 620-21.
206. If the debtor does not invoke § 1322(b)(5), then all payments must be made within the applicable three- or five-year period, in accordance with § 1322(d). *See In re Elibo*, 447 B.R. at 362.
207. *Id*. at 363; *In re Agustin*, 451 B.R. at 620.

As the court in *In re Elibo* noted, "maintenance of payments in § 1322(b)(5) means that the debtor must respect the interest rate and the monthly payment in the mortgage contract during the plan and after completion of [plan] payments . . . ."[208] Thus, if the debtors want to alter their contractual payments (by reducing the interest rate), they must pay the secured claim in full during the applicable plan term (rather than over the term of the loan).[209]

C. Chapter 20 Lienstripping

Lienstripping involves reducing a lien to the value of the underlying collateral (strip down) or avoiding the lien in its entirety when there is no value in the collateral due to the existence of senior liens (strip off).[210] In Chapter 7, both types of lienstripping are generally impermissible.[211] By contrast, Chapter 13 permits modification of the rights of most secured claim holders.[212] An exception applies to mortgages on the debtor's primary residence.[213] Such mortgages cannot be stripped down if they are partially secured; however, if the mortgages attach to no equity in the collateral due to the existence of senior liens, they may be entirely stripped off.[214]

Now, certain consumer debtors are raising a related issue, one that has split bankruptcy courts throughout the country,[215] and has now divided bankruptcy courts within the Eleventh Circuit.[216] The question is whether a Chapter 20 debtor can strip off a junior lien held by a creditor whose claim is wholly unsupported by value in the collateral.

A Chapter 20 debtor is a debtor who files a Chapter 13 case shortly after receiving a Chapter 7 discharge.[217] As mentioned above, Chapter 13 debtors can usually strip off wholly unsecured junior liens.[218] However, according to some courts, the existence of a prior Chapter 7 discharge adds a wrinkle.[219] Under 11 U.S.C. § 1328(f),[220] a debtor

---

208. 447 B.R. at 363 (quoting KEITH M. LUNDIN & WILLIAM H. BROWN, CHAPTER 13 BANKRUPTCY § 128.2, at ¶¶ 12-14 (4th ed.)).

209. *Id.* at 364-65; *In re Agustin*, 451 B.R. at 620.

210. *In re* Gerardin, 447 B.R. 342, 345 (Bankr. S.D. Fla. 2011).

211. *Id.*

212. *See* 11 U.S.C. § 1322(b)(2).

213. *In re Gerardin*, 447 B.R. at 345.

214. *Id.*

215. *See In re* Jennings, 454 B.R. 252, 256 (Bankr. N.D. Ga. 2011) (collecting cases).

216. *See In re* Quiros Amy, 456 B.R. 140, 145 (Bankr. S.D. Fla. 2011).

217. *See*, *e.g.*, *In re Jennings*, 454 B.R. at 253-54.

218. *In re Quiros Amy*, 456 B.R. at 144.

219. *See, e.g.*, *In re Gerardin*, 447 B.R. at 346; *In re Quiros Amy*, 456 B.R. at 143. *In re Gerardin* was a joint opinion by three judges–Judges Mark, Isicoff, and Cristol–in seven

is not entitled to a Chapter 13 discharge if he received a Chapter 7 discharge in the four years prior to filing his Chapter 13 case.[221] The availability of a discharge comes into play under 11 U.S.C. § 1325,[222] which governs the treatment of an "allowed secured claim" in a Chapter 13 plan.[223] The wholly unsecured junior creditor holds an allowed secured claim because its debt is secured by a lien enforceable against the debtor's property[224] and its claim has not been disallowed.[225] Assuming the debtor intends to retain the collateral and the creditor does not accept the plan, the plan must provide that the creditor will retain its lien until the debt, as determined by nonbankruptcy law, is paid in full or until the debtor receives a discharge.[226] Because the Chapter 20 debtor is ineligible for a Chapter 13 discharge, the debtor cannot remove the lien prior to fully satisfying the underlying debt.[227] Thus, the lien cannot be stripped.[228]

However, one bankruptcy court, the United States Bankruptcy Court for the Northern District of Georgia, has concluded that § 1325(a)(5) does not apply to the claim of a wholly unsecured junior lienholder in a Chapter 20 case.[229] On the contrary, the court held that "nothing in the Bankruptcy Code prevents [C]hapter 20 lien stripping."[230] It reasoned that the creditor holds an allowed *unsecured* claim pursuant to § 506(a), which classifies claims as secured only to the extent the creditor has an interest in the value of the collateral.[231] Because the creditor's junior lien cannot attach to any equity, its claim is classified as unsecured.[232] Consequently, its treatment under the plan must

---

bankruptcy cases. *In re Gerardin*, 447 B.R. at 343. Like *In re Gerardin*, *In re Quiros Amy* arose in the Southern District of Florida, but was written by Judge Olsen, who was not one of the three judges involved in the *In re Gerardin* opinion. *In re Quiros Amy*, 456 B.R. at 141.

220. 11 U.S.C. § 1328(f) (2006).

221. *Id.* § 1328(f)(1).

222. 11 U.S.C. § 1325 (2006 & Supp. IV 2010).

223. *Id.* § 1325(a)(5).

224. *In re Gerardin*, 447 B.R. at 346. Although the debtor's personal liability on the debt was discharged by the Chapter 7 case, the creditor still holds a claim that can be treated under a Chapter 13 plan. *Id*.

225. *See*, *e.g.*, *id.* at 346-47; *In re Quiros Amy*, 456 B.R. at 146.

226. 11 U.S.C. § 1325(a)(5)(B).

227. *In re Gerardin*, 447 B.R. at 352.

228. *Id.*

229. *In re Jennings*, 454 B.R. at 256-58.

230. *Id.* at 258.

231. *Id.* at 258-59.

232. *Id.* at 254.

satisfy the best interests test of § 1325(a)(4) but need not satisfy § 1325(a)(5).[233] Once the plan is completed, the lien will be void.[234]

This issue likely is rendered moot by the Eleventh Circuit's recent unpublished opinion in *McNeal v. GMAC Mortgage LLC* (*In re McNeal*).[235] In *McNeal*, the court held that the Chapter 7 debtor could strip off a wholly unsecured second lien on her home.[236] In doing so, the court ruled that its 1989 decision in *Folendore v. United States Small Business Administration*[237] was unaffected by the Supreme Court's 1992 decision in *Dewsnup v. Timm*.[238] If wholly unsecured junior liens can be stripped off in Chapter 7, they will not be an issue if the debtor later files a Chapter 13 case.

XI. CONCLUSION: LOOKING AHEAD

Bankruptcy developments in 2011 were largely driven by changes in consumer bankruptcy law. By contrast, in 2012, we can expect Supreme Court rulings addressing Chapter 12 and Chapter 11 issues. In *Hall v. United States*,[239] which was argued in November 2011, the Court will decide whether capital gains tax incurred by the postpetition sale of the debtor's farm may be paid under the Chapter 12 plan as an administrative expense.[240] In *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*,[241] the Court will consider whether a Chapter 11 debtor who sells assets free of liens may bar credit bidding by instead offering the creditor the indubitible equivalent of its claim.[242]

---

233. *Id.* at 259.
234. *Id.* at 255.
235. No. 11-11352 (11th Cir. May 11, 2012).
236. *Id.* at 3.
237. 862 F.2d 1537 (11th Cir. 1989).
238. *Id.* at 3-4 (citing Dewsnup v. Timm, 502 U.S. 410 (1992)).
239. 617 F.3d 1161 (9th Cir. 2010), *cert. granted* (U.S. June 13, 2011) (No. 10-875). The Court decided Hall after this Article was written. It held that the tax at issue was not incurred by the estate and, therefore, it cannot be discharged upon completion of the Chapter 12 plan. 2010 WL 5535748 at *5.
240. Petition for Writ of Certiorari, Hall v. United States, 131 S. Ct. 2989 (2010) (No. 10-875), 2010 WL 5535748 at *2-5.
241. 651 F.3d 642 (7th Cir. 2011), *cert. granted* (U.S. Dec. 12, 2011) (No. 11-166).
242. Petition for Writ of Certiorari, RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 845 (2011) (No. 11-166), 2011 WL 3511028 at *3.