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Bankruptcy

by W. Homer Drake, Jr.*
and
James W. Dilz**

I. INTRODUCTION

During 1991, the United States Court of Appeals for the Eleventh Circuit decided eighteen cases arising under or related to the Bankruptcy Code. These cases can be classified under the general headings of: Jurisdiction, preferences, claims against the estate, discharge and dischargeability, substantive consolidation, and attorney fees. This Article is a survey of each of the decisions rendered by the Eleventh Circuit in 1991.

II. JURISDICTION

A. Abstention Under Section 305

In *Parklane Hosiery Co. v. Parklane/Atlanta Joint Venture (In re Parklane/Atlanta Joint Venture)*, the Eleventh Circuit held that the bankruptcy court does not have jurisdiction to enter a nonreviewable order dismissing or suspending a case under section 305. On that basis, cause existed for the district court to grant a motion to withdraw the reference to rule on the section 305 motion.

James D. Silvers and Parklane Hosiery Company, Inc. ("Parklane") created a joint venture known as Parklane/Atlanta Joint Venture ("Joint Venture"). Under the joint venture agreement, Silvers operated five

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2. 927 F.2d 532 (11th Cir. 1991).
4. 927 F.2d at 538.
stores in Atlanta leased by Parklane. After the relationship deteriorated, Parklane filed suit against Silvers in the superior court, and an order was entered dissolving the Joint Venture and requiring Silver to relinquish possession of the stores within fifteen days. One day before the turnover date, Silvers filed a Chapter 11 petition on behalf of the Joint Venture.8

Parklane filed in the district court a motion to withdraw the reference simultaneously with filing a motion for abstention or, in the alternative, dismissal of the bankruptcy case under section 305.6 The district court granted the motion to withdraw the reference and requested briefs on the section 305 motion.7 Silvers moved for reconsideration of the order withdrawing the reference, which the district court denied.8 Silvers appealed from the order withdrawing the reference, and the Eleventh Circuit considered the appeal under the collateral order exception to the final judgment rule.9

On appeal, Silvers argued that withdrawal of the reference was inappropriate because the Joint Venture had a right to access the expertise of the bankruptcy court from the moment the Chapter 11 petition was filed.10 The Eleventh Circuit rejected that contention11 because Congress placed original jurisdiction over bankruptcy cases and proceedings in the district court under 28 U.S.C. § 1334.12 Pursuant to 28 U.S.C. § 157(d), the district court may withdraw the reference of a bankruptcy case or proceeding "for cause shown."13 The showing of "cause" for withdrawing the reference is "not an empty requirement."14

The Eleventh Circuit found that withdrawal of the reference by the district court was appropriate on the grounds that the bankruptcy court did not have jurisdiction to enter a nonreviewable order under section 305 dismissing a case or suspending all proceedings in a case.15 Citing the Supreme Court’s decisions in Northern Pipeline Construction Co. v. Marathion Pipe Line Co.16 and Granfinanciera, S.A. v. Nordberg,17 the court

5. Id. at 533-34.
6. Id. at 534.
7. Id.
8. Id.
9. Id.
10. Id. at 535.
11. Id.
13. Id. § 157(d). This section provides, in relevant part: "The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown." Id.
14. 927 F.2d at 536.
15. Id. at 538.
stated that the bankruptcy courts are not Article III courts and may not exercise the judicial power of the United States. Accordingly, it would have been an impermissible exercise of judicial power for the bankruptcy court to issue a nonreviewable order under section 305. The district court did not err in withdrawing the reference under the circumstances.

Another case involving the bankruptcy court's jurisdiction under section 305 is Goerg v. Parungao (In re Goerg). In Goerg "the bankruptcy court entered an order [under section 305] abstaining from or, alternatively, dismissing jurisdiction" of a petition for ancillary administration of a foreign decedent's estate. The administrator of the estate appealed to the district court, which "dismissed the appeal on the grounds that the abstention order was non-reviewable."

The Eleventh Circuit reversed, following its holding in Parklane that an Article I bankruptcy court may not issue a nonreviewable order under section 305. The Eleventh Circuit held that the bankruptcy court's section 305 order was reviewable under 28 U.S.C. § 158(a), which states that the bankruptcy court's legal determinations are subject to de novo review and the bankruptcy court's factual findings are subject to the "clearly erroneous" standard of review.

The significance of Parklane and Goerg has been diminished by the recent amendment to section 305(c) providing that only abstention orders from the district court are not reviewable. This amendment clarifies the bankruptcy court's jurisdiction to enter a section 305 order, subject to the district court's review.

B. Turnover of Property of the Estate

In Gallucci v. Grant (In re Gallucci), the Eleventh Circuit narrowed the bankruptcy court's jurisdiction to compel turnover of property. Michael Gallucci filed a Chapter 7 petition in the United States Bank-

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18. 927 F.2d at 538.
19. Id.
20. Id.
21. 930 F.2d 1563 (11th Cir. 1991).
22. Id. at 1565.
23. Id.
24. Id.
25. Id. at 1566; 28 U.S.C. § 158(a) (1988). This section provides, in relevant part: "The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of court, from interlocutory orders and decrees, of bankruptcy judges entered in the cases and proceedings referred to the bankruptcy judges under section 157 of this title." Id.
26. 930 F.2d at 1566.
28. 931 F.2d 738 (11th Cir. 1991).
ruptcy Court for the Middle District of Florida. The Chapter 7 trustee filed a turnover complaint against the debtor’s mother, Angelina Gallucci, who was an elderly, bedridden widow, demanding that she vacate her home in Warwick, Rhode Island, and turn possession of the property over to him. Mrs. Gallucci filed an action to quiet title to the property in a Rhode Island superior court.\(^9\) The quiet title action was removed by the trustee to the United States Bankruptcy Court for the District of Rhode Island and transferred to the Bankruptcy Court for the Middle District of Florida, where the quiet title and turnover proceedings were consolidated for trial.\(^{30}\)

Mrs. Gallucci was noticed for a deposition by the trustee as she was just beginning to recover from major exploratory surgery. The trustee traveled to Rhode Island, but Mrs. Gallucci failed to appear for the deposition. The bankruptcy court awarded sanctions against Mrs. Gallucci in the amount of $3,193.30 for attorney fees and expenses. When Mrs. Gallucci failed to pay the award after four extensions of time, the bankruptcy court struck her pleadings, dismissed her quiet title action with prejudice, and barred her from participating in the trial of the turnover action.\(^{31}\)

At the trial, the bankruptcy court nonetheless considered the claims to title to the Rhode Island property asserted by both the trustee and Mrs. Gallucci. The trustee’s claim of title was based on a quit claim deed to the trustee from a family friend of the debtor, Robert Gaudio, in January 1984 in settlement of the trustee’s suspicions that Gaudio was being used to conceal assets of the debtor. However, in January 1983, approximately a year before Gaudio executed the quit claim deed in favor of the trustee, he purportedly conveyed his interest in the property to a corporation owned by the debtor’s wife, which in turn conveyed the property to Mrs. Gallucci. Finding that Gaudio’s purported deed to the corporation in 1983 was forged, the bankruptcy court concluded that Gaudio conveyed good title to the trustee, and the bankruptcy court entered a judgment in favor of the trustee ordering Mrs. Gallucci to turn the property over to the bankruptcy estate.\(^{32}\) The district court affirmed the bankruptcy court’s judgment.\(^{33}\)

The Eleventh Circuit reversed, finding that the bankruptcy court lacked jurisdiction to compel turnover of property in which the estate’s interest was so tenuous.\(^{34}\) The court noted that “the instant case involves property that never belonged to the debtor but that a third party,
Gaudio, quitclaimed to the trustee to 'compromise' the trustee's conced-edly baseless claim against him." Under these circumstances, the Eleventh Circuit concluded that the residence in Rhode Island did not constitute after-acquired property under section 541(a)(7). The court stated that: "Although the after-acquired property provision, section 541(a)(7), could be read broadly to include any interest that the estate acquires after the commencement of the bankruptcy, regardless of the debtor's interest of it, we do not think that this was Congress' intent."

According to the Eleventh Circuit, the bankruptcy court should have inquired sua sponte into the facts surrounding the trustee's compromise with Gaudio to determine if it "resulted in the acquisition of property by the [bankruptcy] estate." The mere allegation by the trustee that property belonged to the estate was not a sufficient basis for the bankruptcy court to assert jurisdiction over the property. The Eleventh Circuit dismissed the trustee's action against Mrs. Gallucci for want of subject-matter jurisdiction. Most narrowly stated, the Eleventh Circuit's holding is that when property is transferred to the estate through a compromise, and the property was previously unrelated to the debtor and the bankruptcy estate, the bankruptcy court may lack jurisdiction to compel turnover of the property.

C. Exhaustion of Administrative Remedies

In Internal Revenue Service v. Brickell Investment Corp. (In re Brickell Investment Corp.), the Internal Revenue Service ("IRS") filed liens for past-due unemployment taxes against Dade Helicopter Jet Service, Inc. ("Dade"), Brickell Investment Corporation ("Brickell"), and Tropical Helicopter Airways, Inc. ("Tropical"). To collect the taxes, the IRS seized all the assets of Dade, Brickell, and Tropical. Chapter 11 bankruptcy petitions were promptly filed by the debtors, and complaints for turnover were initiated. The IRS returned possession of the assets to the debtors under an adequate protection agreement.
Thereafter, the IRS filed a proof of claim "against each debtor in the approximate amount of $52,000." The debtors objected to the proofs of claim, contending that each entity had its own separate tax liabilities. The bankruptcy court sustained the objection, concluding that the position of the IRS was "totally unjustified." The debtors filed a motion to recover costs and attorney fees under 26 U.S.C. § 7430, and the bankruptcy court entered an award in favor of the debtors in the amount of $12,343.75. The district court, however, reversed the award of attorney fees on the grounds that the debtors failed to exhaust administrative remedies under 26 U.S.C. § 7430.

The district court's order was reversed by the Eleventh Circuit. First, the court held that a corporate debtor-in-possession in a Chapter 11 reorganization is a proper party to request an award of attorney fees under 26 U.S.C. § 7430. The court distinguished a Chapter 11 debtor-in-possession from a Chapter 7 trustee, the latter of which was precluded from recovering attorney fees under the Equal Access to Justice Act in Gower v. Farmers Home Administration (In re Davis). Second, the court held that the bankruptcy court, as an Article I court, may only award attorney fees under section 7430 by submitting proposed findings of fact and conclusions of law to the district court or by express consent of the parties. Third, the court held that no administrative remedies were available to the debtors in objecting to a proof of claim in a Chapter 11 case, so the debtors were not required to submit a written claim for relief to the District Director of the IRS as a condition to recovering fees under section 7430.

Because the bankruptcy court did not submit proposed findings of fact and conclusions of law to the district court in entering the award against the IRS, the Eleventh Circuit remanded the case to the district with instructions for further proceedings.

44. Id.
45. Id.
46. Id. at 698-99.
48. 922 F.2d at 699.
49. Id. at 698.
50. Id. at 703.
51. Id. at 702-03.
53. 899 F.2d 1136, 1145 (11th Cir. 1990).
54. 922 F.2d at 701-02.
55. Id.
56. Id. at 704.
III. Preferences

A. Payment to a Secured Creditor

Grant v. Kaufman (In re Hagen)\textsuperscript{57} is a preference case involving $7,500 paid to a personal injury attorney in accordance with a contingent fee contract forty-seven days before the debtor’s bankruptcy filing.\textsuperscript{58} The question presented in the case was whether the personal injury attorney was a secured creditor at the time the payment was made by virtue of a charging lien that, under Florida law, related back to the commencement of the attorney’s representation.\textsuperscript{59}

The debtor, Susan Hagen, was struck by an automobile and injured on March 19, 1984. The next day, she called attorney Mark Jay Kaufman after seeing his television commercial. Kaufman went to Hagen’s house, where she signed a fifty-percent contingent fee contract for the attorney’s services. On May 14, 1985, the tort case was settled for the insurance policy limits, and $7,500 was paid to Kaufman. None of the settlement proceeds went to Hagen. Kaufman recommended that Hagen file bankruptcy to discharge her unpaid medical bills. Kaufman even selected Hagen’s bankruptcy counsel and advanced the bankruptcy filing fee from the settlement proceeds. The Chapter 7 petition was filed on July 1, 1985.\textsuperscript{60}

The Chapter 7 trustee filed a complaint against Kaufman to recover the $7,500 payment as a preference.\textsuperscript{61} The bankruptcy court ruled in favor of the trustee, reasoning that the transfer to Kaufman took place under section 547(e)(3)\textsuperscript{62} on May 14, 1985, when Hagen acquired rights to the settlement proceeds, despite the relation back of Kaufman’s charging lien.\textsuperscript{63} The bankruptcy court was affirmed by the district court, but the Eleventh Circuit reversed.\textsuperscript{64}

The Eleventh Circuit concluded that if Kaufman would have received the same amount under his charging lien through a Chapter 7 distribution as he received through the prepetition payment, his position was not improved.\textsuperscript{65} Therefore, it was erroneous for the bankruptcy court to focus on when the transfer took place instead of analyzing whether the transfer

\textsuperscript{57} 922 F.2d 742 (11th Cir. 1991).
\textsuperscript{58} Id. at 743.
\textsuperscript{59} Id. at 744.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} 11 U.S.C. § 547(e)(3) (1988). This section provides: “For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.” Id.
\textsuperscript{63} 922 F.2d at 745.
\textsuperscript{64} Id. at 746.
\textsuperscript{65} Id. at 745.
satisfied section 547(b)(5), one of the essential elements of a preference.\textsuperscript{66} The Eleventh Circuit stated the general proposition that a payment to a secured creditor in the amount of its lien "does not constitute an avoidable preference."\textsuperscript{66} After establishing that Kaufman was a secured creditor under state law prior to the ninety-day preference period, the court found that section 547(e)(3) was not germane to the analysis: "The language of Section 547(e)(3) pertains to when a transfer is made, not when the creditor attained secured status if the lien has a relation back element."\textsuperscript{66} The court distinguished this case from the situation in which a creditor acquires a lien during the preference period.\textsuperscript{70} Having concluded that Kaufman's lien arose more than ninety days prior to the bankruptcy filing, the trustee's action to recover the $7,500 payment as a preference was denied.\textsuperscript{71}

A dissenting opinion was written by Judge Johnson, who agreed that, but for section 547(e)(3), Kaufman's charging lien both arose and was perfected on the date the contingent fee contract was executed.\textsuperscript{72} However, under Florida law, Hagen did not acquire rights in the funds until she settled with the insurance company.\textsuperscript{73} According to Judge Johnson, section 547(e)(3) compels the conclusion that the transfer of the lien did not occur until the date of the settlement; therefore, the transfer was a preference subject to avoidance.\textsuperscript{74}

This case marks the second time that the Eleventh Circuit has given effect to a relation back provision under state law, to the apparent disregard of section 547(e)(3). In Askin Marine Co. v. Conner (In re Conner),\textsuperscript{75} a wage garnishment withstood a preference challenge on the grounds that the garnishing creditor had a lien that arose outside the preference period when the garnishment commenced, even though the debtor had no interest in the funds transferred to the creditor until the

\textsuperscript{66} 11 U.S.C. § 547(b)(5) (1988). In order for a transfer of an interest of the debtor in property to be a preference, the transfer must be one "that enables such creditor to receive more than such creditor would receive if—(A) the case were a case under chapter 7 of this title; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title." \textit{Id.}

\textsuperscript{67} 922 F.2d at 745.

\textsuperscript{68} \textit{Id.} at 746 (citing Deel Rent-A-Car, Inc. v. Levine, 721 F.2d 750, 756 (11th Cir. 1983)).

\textsuperscript{69} \textit{Id.}

\textsuperscript{70} \textit{Id.}

\textsuperscript{71} \textit{Id.}

\textsuperscript{72} \textit{Id.} at 747 (Johnson, J., dissenting).

\textsuperscript{73} \textit{Id.} (Johnson, J., dissenting).

\textsuperscript{74} \textit{Id.} (Johnson, J., dissenting).

\textsuperscript{75} 733 F.2d 1560 (11th Cir. 1984).
wages were actually earned. These two cases make it likely that the Eleventh Circuit will continue to literally enforce liens that relate back under state law, notwithstanding the plain language of section 547(e)(3) and the logic of the dissent in Hagen.

B. Replacement of Bad Check

The question presented in Reynolds v. Dixie Nissan (In re Car Renovators) was whether the trustee could avoid as a preference a payment made by the debtor to satisfy two previously dishonored checks. The payee argued that the debt for the dishonored checks would be nondischargeable as restitution under section 523(a)(7) and, therefore, that the payment to cover the checks should not be avoidable as a preference. Under the facts presented, the Eleventh Circuit rejected the payee’s argument.

The debtor, Car Renovators, Inc., issued two checks to Dixie Nissan totaling $2,674.63 for the purchase of auto parts and other supplies. The checks were returned for insufficient funds, and Dixie Nissan gave the debtor’s president ten days notice of the dishonor pursuant to Alabama’s Worthless Check Act. To avoid criminal prosecution under the Worthless Check Act, the debtor remitted a cashier’s check to Dixie Nissan to cover the bad checks. Within ninety days, the debtor filed its bankruptcy petition.

The trustee satisfied the prima facie elements of a preference. It is well settled that payment for goods by check is a cash transaction if the check is honored upon presentment. If, on the other hand, the check is dishonored, the sale becomes a credit transaction. Accordingly, the debtor’s payment to Dixie Nissan by cashier’s check to cover the two bad checks was made on account of an antecedent debt under section 547(b)(2). Dixie Nissan did not assert any exceptions to avoidance of

76. Id. at 1561-62.
77. 946 F.2d 780 (11th Cir. 1991).
78. 11 U.S.C. § 523(a)(7) (1988). This section excepts an individual debtor’s discharge of a debt “to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty.” Id.
79. 946 F.2d at 782.
80. Id. at 784.
81. Id. at 781.
82. Id. at 782.
83. Id.
84. Id.
85. Id.
Instead, Dixie Nissan argued that section 523(a)(7) should apply as an exception to preference avoidance.8

Dixie Nissan's argument emanated from the decision by the Supreme Court in *Kelly v. Robinson*88 holding "that restitution imposed as a condition of probation in a state criminal proceeding is nondischargeable under section 523(a)(7)."89 The reasoning of *Kelly* was extended in *In re Nelson*90 to except criminal restitution from preference avoidance.91 Without passing upon *Nelson*, the Eleventh Circuit rejected Dixie Nissan's argument on the grounds that the payment to Dixie Nissan was not made pursuant to a criminal sentence.92

The Eleventh Circuit observed that the federalism policy upon which *Kelly* is founded is irrelevant in a case when "there are no penal sanctions, criminal judgments, nor continuing prosecutions with which [the preference avoidance] could potentially interfere."93 Under these facts, Dixie Nissan failed to establish a defense to the preference action.94 The court deferred consideration of the avoidability of restitution resulting from a criminal sentence until such facts are presented.95

C. New Value Defense

In *Official Unsecured Creditors' Committee v. Airport Aviation Services, Inc. (In re Arrow Air, Inc.)*96, the Eleventh Circuit reiterated the specificity of the proof required for a transferee to sustain the contemporaneous exchange for new value defense to avoidance of a preference under section 547(c)(1).97

The debtor, Arrow Air, Inc. ("Arrow"), conducted daily flights between Miami and San Juan. Airport Aviation Services ("AAS") provided ground handling services for Arrow. Each Monday, AAS billed Arrow for services rendered the previous week. The invoice terms gave Arrow thirty days to

87. 946 F.2d at 782.
89. 946 F.2d at 782.
90. 91 B.R. 904 (N.D. Cal. 1988).
91. 946 F.2d at 782-83.
92. *Id.* at 783.
93. *Id.*
94. *Id.*
95. *Id.* at 783 n.7.
96. 940 F.2d 1463 (11th Cir. 1991).
97. *Id.* at 1464-65. The Code provides a defense to avoidance of a preference "to the extent that such transfer was (A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and (B) in fact a substantially contemporaneous exchange." 11 U.S.C. § 547(c)(1) (1988).
pay. A statement of account was issued once each month. Arrow did not routinely make the payments on time, and the payments were frequently less than the amount billed. During the ninety-day period prior to Arrow's bankruptcy filing, Arrow made nine separate payments to AAS totaling $192,358.13. Nevertheless, Arrow still owed AAS $193,033.67 as of the date of the bankruptcy filing.98

The unsecured creditors' committee for Arrow filed a complaint against AAS to recover the nine payments made during the preference period. AAS did not dispute the elements of a preference under section 547(b), but asserted alternatively that the payments were contemporaneous exchanges for new value under section 547(c)(1) or were made in the ordinary course of business under section 547(c)(2).99 The bankruptcy court and district court both upheld the section 547(c)(1) defense,100 but the Eleventh Circuit vacated the judgment in favor of AAS.101

The party seeking to establish an affirmative defense under section 547(c)(1) has the burden of establishing all required elements.102 The exception has three basic requirements: “(1) the transferee must have extended new value to the debtor in exchange for the payment or transfer, (2) the exchange of payment for new value must have been intended by the debtor and the transferee to be contemporaneous, and (3) the exchange must have been in fact substantially contemporaneous.”103 “New value” for purposes of this exception is defined in section 547(a)(2)104 to include new credit.105 The Eleventh Circuit stated that it was not impossible, as a matter of law, for extension of new credit by AAS to Arrow to have satisfied the section 547(c)(1) defense.106

98. 940 F.2d at 1465.
99. Id. The Code provides a defense to avoidance of a preference
     [T]o the extent that such transfer was—(A) in a payment of a debt incurred by
     the debtor in the ordinary course of business or financial affairs of the debtor and
     the transferee; (B) made in the ordinary course of business or financial affairs of
     the debtor and the transferee; and (C) made according to ordinary business terms.
100. 940 F.2d at 1465.
101. Id. at 1467.
102. Id. at 1465.
103. Id.
104. 11 U.S.C. § 547(a)(2) (1988). This section provides:
     “[N]ew value” means money or money's worth in goods, services, or new credit, or
     release by a transferee of property previously transferred to such transferee in a
     transaction that is neither void nor voidable by the debtor or the trustee under
     any applicable law, including proceeds of such property, but does not include an
     obligation substituted for an existing obligation.
     Id.
105. 940 F.2d at 1466.
106. Id.
However, the Eleventh Circuit concluded that the bankruptcy court’s findings were too generalized to sustain the affirmative defense.\textsuperscript{107} A party relying upon section 547(c)(1) “must prove with specificity the measure of new value given the debtor in the exchange transaction he seeks to protect—and the challenged payment is protected only to the extent of the specific measure of new value shown.”\textsuperscript{108} Instead of applying this stringent test, the bankruptcy court merely found that AAS, in most instances, extended credit to Arrow only after prior credit had been satisfied.\textsuperscript{109}

Considering this finding by the bankruptcy court and the fact that AAS’ claim against the bankruptcy estate was $193,033.67 as compared to the preferential payments totaling $192,385.13,\textsuperscript{110} it is likely that AAS had a valid “new value” defense under either section 547(c)(1) or section 547(c)(4)\textsuperscript{111} to most or all of the preferential transfers. The error in the lower courts was that the findings of fact did not contain a sufficiently detailed comparison of the timing and amounts of the payments AAS received in relation to the timing and amounts of the new value it extended to Arrow. The \textit{Arrow} case makes clear that no shortcut around this analysis exists.

IV. \textsc{Claims Against the Estate}

A. \textit{Untimely Proof of Claim}

The question presented in \textit{ITT Commercial Finance Corp. v. Dilkes (In re Analytical Systems, Inc.)}\textsuperscript{112} was whether the wife of the debtor’s president and sole shareholder, who relied upon statements by her husband that filing a proof of claim was unnecessary, showed excusable neglect to allow the filing of a late proof of claim.\textsuperscript{113} The Eleventh Circuit ruled that the breach of a confidential marital relationship between hus-

\begin{itemize}
\item \textsuperscript{107} Id.
\item \textsuperscript{108} Id.
\item \textsuperscript{109} Id.
\item \textsuperscript{110} Id. at 1465.
\item \textsuperscript{111} 11 U.S.C. § 547(c)(4) (1988). This section provides a defense to the avoidance of a preference
\begin{quote}
[T]o the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—(A) not secured by an otherwise unavoidable security interest; and (B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor.
\end{quote}
\item \textsuperscript{112} 933 F.2d 939 (11th Cir. 1991).
\item \textsuperscript{113} Id. at 940-41.
\end{itemize}
band and wife does not constitute excusable neglect, and the claim was
time barred.\textsuperscript{114} 

Analytical Systems, Inc. filed a voluntary petition for relief under
Chapter 11 on January 30, 1986. James Dunning was the chief executive
officer, president, and sole shareholder of the debtor. At that time, Dun-
nning was married to the claimant, Virginia Dilkes. A bar date of July 10,
1986, was established for filing claims. Although Dilkes contended that
she was owed $378,872, her claim was shown on the bankruptcy schedules
at $51,456. After Dilkes received the bar order, she questioned Dunning,
who told her that it was unnecessary for her to file a proof of claim be-
cause her claim was scheduled.\textsuperscript{115}

Following her divorce from Dunning, Dilkes discovered that her claim
was not scheduled at the full amount. Fourteen months after the bar
date, Dilkes filed a proof of claim in the amount of $378,872 with a mo-
tion to allow her untimely claim.\textsuperscript{116}

The bankruptcy court initially denied Dilkes' motion, finding that
"[t]he most that can be said is that Mr. Dunning did not affirmatively
state the amount of Mrs. Dilkes' claim."\textsuperscript{117} The bankruptcy court found
that no misleading information had been given by Dunning. Dilkes filed a
motion for reconsideration, and the bankruptcy court this time allowed
the claim because of the "breach of the confidential marital relationship
that exists under Georgia law between a husband and wife."\textsuperscript{118} The dis-
trict court affirmed, concluding that the spousal duty applies to the busi-
ness relationship between a husband and wife as debtor and creditor, and
that breach of the confidential marital relationship constituted construc-
tive fraud.\textsuperscript{119}

The Eleventh Circuit reversed on the grounds of Bankruptcy Rule
9006(b),\textsuperscript{120} which requires a showing of "excusable neglect" to obtain an
extension of time after the expiration of a bar date.\textsuperscript{121} Under the "excusable
neglect" standard, the claimant must establish that "the failure to
timely perform a duty was due to circumstances which were beyond the
reasonable control of the person whose duty it was to perform."\textsuperscript{122} Dilkes
received, read, and understood the bar order. Accordingly, "[i]t was her

\textsuperscript{114} Id. at 943.
\textsuperscript{115} Id. at 940.
\textsuperscript{116} Id.
\textsuperscript{117} Id. at 941 (quoting ITT Commercial Fin. Corp. v. Dilkes \textit{(In re Analytical Sys.)}, No.
86-00688-SWC, slip op. at 3 (Bankr. N.D. Ga. Aug. 31, 1988)).
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} \textsc{Fed. R. Bankr. P.} 9006(b).
\textsuperscript{121} 933 F.2d at 942.
\textsuperscript{122} \textit{Id.} (quoting Biscayne 21 Condominium Ass'n, Inc. v. South Atlantic Fin. Corp. \textit{(In
re South Atlantic Fin. Corp.)}, 767 F.2d 814, 817 (11th Cir. 1985)).
duty as a creditor to determine the accuracy of her claim as listed in the bankruptcy schedules. The Eleventh Circuit stated that general principles of equity may not be used to bypass the "beyond the reasonable control" element. The Eleventh Circuit concluded that the confidential marital relationship did not excuse Dilkes from taking steps within her reasonable control, and her reliance on Dunning's statements about the need to file a proof of claim did not constitute excusable neglect.

B. Standing to Object to Secured Claim

The Eleventh Circuit held in International Yacht & Tennis, Inc. v. Wasserman (In re International Yacht & Tennis, Inc.) that a Chapter 11 debtor-in-possession has standing to move for reconsideration of an allowed, secured claim, even though there would be no equity in the collateral for the benefit of the debtor after satisfaction of secured claims and distribution to unsecured creditors.

The bankruptcy court entered an order allowing certain secured claims against real property constituting the primary asset of the debtor, International Yacht and Tennis, Inc. Four months later, the attorney for the debtor filed a motion for reconsideration with respect to the allowance of the mortgage held by Nathan Wasserman. The debtor contended that Wasserman was granted a mortgage as an accommodation for a loan to the debtor's former president, in his individual capacity, and an unrelated corporation. The bankruptcy court denied the motion for reconsideration. After a motion for a rehearing was also denied, the debtor appealed to the district court, which held that the bankruptcy court did not abuse its discretion in denying reconsideration of Wasserman's secured claim. On remand, the bankruptcy court imposed sanctions against the debtor's attorney and its current president based solely on the fact that the debtor would have had no interest in the real property after payment of secured and unsecured claims.

The Eleventh Circuit reversed and remanded the case with instructions for an appropriate hearing to be held on the validity of Wasserman's mortgage. The Eleventh Circuit did not pass upon the merits of the

123. Id.
124. Id.
125. Id. at 943.
126. 922 F.2d 659 (11th Cir. 1991).
127. Id. at 663.
128. Id. at 660.
129. Id. at 661.
130. Id. at 663.
motion for reconsideration, merely holding instead that the motion was legally sufficient.\textsuperscript{131}

Section 502(j)\textsuperscript{132} and Bankruptcy Rule 3008\textsuperscript{133} allow the bankruptcy court to reconsider for cause the allowance of claims. The provisions of section 502(j) and Bankruptcy Rule 3008, rather than Bankruptcy Rule 8002,\textsuperscript{134} apply to reconsideration of allowed claims.\textsuperscript{135} Since a debtor-in-possession has virtually the same rights and duties as a trustee pursuant to section 1107(a),\textsuperscript{136} and the trustee has a duty to object to the allowance of any improper claim, sections 1106(a)(1)\textsuperscript{137} and 704(5)\textsuperscript{138} vest the debtor-in-possession with a duty to object to improper claims.\textsuperscript{139} The Eleventh Circuit concluded in this case that the debtor was fulfilling its section 1107(a) duty in attempting to preserve as much of the estate as possible for the benefit of unsecured creditors.\textsuperscript{140} For that reason, the bankruptcy court was incorrect as a matter of law in imposing Rule 11 sanctions against the debtor on the grounds that the debtor was not a proper party in interest to challenge Wasserman's secured claim.\textsuperscript{141}

\textsuperscript{131} Id.
\textsuperscript{132} 11 U.S.C. § 502(j) (1988). This section provides, in relevant part: “A claim that has been allowed or disallowed may be reconsidered for cause.” Id.
\textsuperscript{133} Fed. R. Bankr. P. 3008. This rule provides: “A party in interest may move for reconsideration of an order allowing or disallowing a claim against the estate. The court after a hearing on notice shall enter an appropriate order.” Id.
\textsuperscript{134} Fed. R. Bankr. P. 8002. This rule, inter alia, establishes the ten-day period for filing a notice of appeal following the date of the entry of the judgment, order, or decree appealed from. Id.
\textsuperscript{135} 922 F.2d at 662.
\textsuperscript{136} 11 U.S.C. § 1107(a) (1988). This section provides:

Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the right, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

Id.
\textsuperscript{137} Id. § 1106(a)(1). This section provides: “A trustee shall—(1) perform the duties of a trustee specified in sections 704(2), 704(5), 704(7), 704(8), and 704(9) of this title.” Id.
\textsuperscript{138} Id. § 704(5). This section provides: “The trustee shall... (5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper.” Id.
\textsuperscript{139} 922 F.2d at 663.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
C. Determination of Claims Under Non-Bankruptcy Law

In *Dayton Securities Associés v. Morgan Guaranty Trust Co. (In re Securities Group)*, the limited partners of three debtor limited partnerships objected to the claims asserted by Morgan Guaranty Trust Company of New York ("Morgan Guaranty"). The claims by Morgan Guaranty arose from the debtors' guaranty of loans to an affiliated corporation. The objecting limited partners contended that the debtors did not have authority to act as guarantors for the affiliated corporation. The bankruptcy court dismissed the objections and the district court affirmed.

Applying New York law, the Eleventh Circuit upheld the dismissal of the objections to Morgan Guaranty's claims. The guarantees were valid under New York law so long as the guarantees were within the apparent business of the debtors. Furthermore, New York law provides that “[a] partnership may ratify its partners' actions, even though those actions were beyond the scope permitted by the partnership agreement.” The bankruptcy court found that the debtors benefited from the loans made by Morgan Guaranty to the affiliated corporation and intended to adopt the terms of the guarantees. These findings were not clearly erroneous. Finally, the guarantees were not void as having been given for past consideration, even though there was a three day delay in executing the guarantees in connection with one of the promissory notes.

The issue before the Eleventh Circuit in *Woodrum v. Ford Motor Credit Co. (In re Dillard Ford, Inc.)* was whether Ford Motor Credit had a perfected security interest in a dealer proceeds withheld ("DPW") account. The debtor, Dillard Ford, had a financing agreement with Ford Motor Credit involving Dillard Ford's purchase of inventory and consumer retail financing of vehicles sold by Dillard Ford. Under the financing agreement, the DPW account was established to cover any losses by Ford Motor Credit in financing a consumer's purchase of a car. At the time of Dillard Ford's Chapter 7 filing, the DPW account contained $36,283. Although Ford Motor Credit was owed $54,943 as of the petition

142. 926 F.2d 1051 (11th Cir. 1991).
143. Id. at 1052-53.
144. Id. at 1053.
145. Id. at 1052.
146. Id. at 1054.
147. Id. (citations omitted).
148. Id. at 1055.
149. Id. at 1056.
150. 940 F.2d 1507 (11th Cir. 1991).
151. Id. at 1510.
152. Id. at 1509.
date, the Chapter 7 Trustee filed a complaint against Ford Motor Credit
to recover the funds in the DPW account.153

Applying Georgia law, the Eleventh Circuit concluded that Ford Motor Credit had a valid and perfected security interest in the DPW account.154 The UCC financing statement described Ford Motor Credit's collateral as including "general intangibles."155 The Eleventh Circuit concluded that this description of the DPW account by category sufficiently described the collateral as required by UCC § 9-402(1).156

In Savers Federal Savings & Loan Ass'n v. Amberley Huntsville, Ltd.,157 the Eleventh Circuit held that the D'Oench Duhme158 doctrine, as codified in 12 U.S.C. § 1823(e),159 prohibited the obligors on two promissory notes from asserting, as a defense to their obligations, that a partnership had been created with the lender based on collateral agreements that were not part of the initial loan transaction and that did not appear in the lender's records with respect to the two notes.160 Furthermore, the facts presented were insufficient to create a partnership under Alabama law through the "additional interest" provisions in the two promissory notes.161 Finally, the lender owed no duty of good faith to the obligors, under Alabama law, in exercising its rights to accelerate the two notes.162

V. DISCHARGE AND DISCHARGEABILITY

A. Collateral Estoppel

The Supreme Court in Grogan v. Garner163 held that "the standard of proof for the dischargeability exceptions in 11 U.S.C. § 523(a) is the ordinary preponderance-of-the-evidence standard."164 The Eleventh Circuit relied upon Grogan to conclude, in Hoskins v. Yanks (In re Yanks),165 that a state court judgment against the debtor, for the tort of defamation,

153. Id. at 1510.
154. Id. at 1511-12.
155. Id. at 1512.
156. Id.
157. 934 F.2d 1201 (11th Cir. 1991).
160. 934 F.2d at 1207.
161. Id. at 1208.
162. Id. at 1208-09.
164. Id. at 661.
165. 931 F.2d 42 (11th Cir. 1991).
collaterally estopped the debtor from denying the nondischargeability of the judgment.\textsuperscript{166}

In 1975 Hoskins filed a suit against Yanks, the debtor, in a Florida court for the tort of defamation. The suit asserted that the debtor had maliciously published a defamatory statement alleging that Hoskins was involved in criminal activity. The jury awarded a verdict in favor of Hoskins for zero dollars in compensatory damages and $20,000 in punitive damages.\textsuperscript{167}

After the debtor filed for Chapter 7 bankruptcy relief, Hoskins filed a complaint objecting to the dischargeability of his debt under section 523(a)(6), which applies to the "willful and malicious injury by the debtor to another entity."\textsuperscript{168} The issue before the Eleventh Circuit was the collateral estoppel effect of the Florida judgment in the nondischargeability action.\textsuperscript{169}

The Eleventh Circuit has previously described the requirements for collateral estoppel as follows:

\begin{itemize}
\item (1) [T]hat the issue at stake be identical to the one involved in the prior litigation;
\item (2) that the issue have been actually litigated in the prior litigation;
\item and (3) that the determination of the issue in the prior litigation have been a critical and necessary part of the judgment in that earlier action.\textsuperscript{170}
\end{itemize}

Of these three requirements, only the first requirement was in dispute in \textit{Yanks}. The Eleventh Circuit ruled that there was an identity of issues because the Florida judgment was premised on two alternative theories of liability; either "malicious publication, or malice implied by law because the publication alleged criminal activity."\textsuperscript{171} Under the authority of \textit{Chrysler Credit Corp. v. Rebhan},\textsuperscript{172} "malice for purposes of section 523(a)(6) can be established by a finding of implied or constructive malice."\textsuperscript{173}

The Eleventh Circuit in \textit{Yanks} adopted a fourth requirement for collateral estoppel involving the respective burdens of persuasion in the first and subsequent actions.\textsuperscript{174} As applied to the facts at hand, the Florida judgment would not collaterally estop the debtor from denying the nondischargeability of his debts to Hoskins if Hoskins had a significantly

\textsuperscript{166} Id. at 43.
\textsuperscript{167} Id. at 42.
\textsuperscript{168} Id. (quoting 11 U.S.C. § 523(a)(6) (1988)).
\textsuperscript{169} Id.
\textsuperscript{170} Id. at 43 n.1 (quoting \textit{In re Held}, 734 F.2d 628, 629 (11th Cir. 1984)).
\textsuperscript{171} Id. at 43.
\textsuperscript{172} 842 F.2d 1257 (11th Cir. 1988).
\textsuperscript{173} 931 F.2d at 43 (quoting Rebhan, 842 F.2d at 1263).
\textsuperscript{174} Id. at 43 n.1.
heavier burden of persuasion under section 523(a)(6) than he had in the
tort action. In light of Grogan, the burden of persuasion in the tort case
was identical to the burden under section 523(a)(6). Accordingly, the
court held that Hoskins was “entitled to invoke the doctrine of collateral
estoppel.”

B. Reasonable Reliance on False Financial Statement

In Collins v. Palm Beach Savings & Loan (In re Collins), the Elev-
enth Circuit held that a loan fraudulently obtained by the use of false
financial statements may be nondischargeable under section
523(a)(2)(B), even though the creditor could have prevented its own
injury by perfecting a security interest in the debtor's collateral.

The debtor, C. Wendell Collins (“Collins”), borrowed $150,000 from
Palm Beach Savings & Loan (“Palm Beach”). Prior to approval of the
loan, Palm Beach required the debtor to deliver a financial statement and
a signed affidavit stating that the collateral pledged by Collins had not
been assigned, sold, or transferred. In fact, the collateral had been as-
signed twice previously, but the two prior secured creditors also failed to
perfect their security interests. After Collins defaulted on his note to
Palm Beach, he filed for bankruptcy relief. Palm Beach was unable to
foreclose on its collateral because it had not filed a UCC financing state-
ment to perfect its security interest.

Palm Beach filed a complaint to object to the dischargeability of its
debt under section 523(a)(2)(B) based on the debtor's false financial
statements. The bankruptcy court and district court both held the debt
to be nondischargeable. The Eleventh Circuit affirmed.

175. Id. at 43.
176. Id.
177. 946 F.2d at 815 (11th Cir. 1991).
178. 11 U.S.C. § 523(a)(2)(B) (1988). This section provides:
   A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not
   discharge an individual debtor from any debt . . . (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . (b) use of a statement in writing— (i) that is materially false; (ii) respecting the debtor's or an insider's financial condition; (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and (iv) that the debtor caused to be made or published with intent to deceive.
   Id.
179. 946 F.2d at 816.
180. Id.
181. Id. at 815.
182. Id. at 815.
183. Id. at 815-16.
The debtor's first argument on appeal was that his false financial statement was not the proximate cause of Palm Beach's harm. The Eleventh Circuit agreed with the debtor that there is a causation requirement implied in section 523(a)(2)(B). However, the bankruptcy court found that the false financial statements were the proximate cause of Palm Beach's harm, and the Eleventh Circuit said that factual finding was not clearly erroneous.

The debtor's second argument on appeal was that Palm Beach did not reasonably rely upon the false financial statement. The bankruptcy court found reasonable reliance, and, once again, the Eleventh Circuit did not deem the finding to be clearly erroneous. Although Palm Beach's approval process made the loan subject to the filing of a UCC-1 form, the court did not view this language as a condition precedent imposed by Palm Beach upon itself. Nor was the failure to file the UCC financing statement sufficient by itself to negate Palm Beach's reasonable reliance on the false financial statement. Following a Seventh Circuit decision, the court stated as follows: "The reasonableness of [a creditor's] conduct after turning over his money is ... irrelevant to the reasonableness of his reliance on the representation which induced the loan in the first place."

The express message of Collins is that bankruptcy is intended to protect the honest debtor, and the exceptions to dischargeability are designed to discourage abuse in order to prevent dishonest debtors from benefiting from their wrongdoing.

C. Recovery of Attorney Fees

In TranSouth Financial Corp. v. Johnson, the Eleventh Circuit held that a creditor whose debt is determined to be nondischargeable may recover attorney fees if provided for by the contract between the parties.

184. Id. at 816.
185. Id. at 816-17.
186. Id. at 816.
187. Id. at 817.
188. Id.
189. Id.
190. Id. (quoting Carini v. Matera, 592 F.2d 378, 381 (7th Cir. 1979)).
191. Id. at 816-17.
192. 931 F.2d 1505 (11th Cir. 1991).
193. Id. at 1509.
The debtors, Ralph and Vera Johnson, obtained a revolving line of credit from TranSouth Financial Corporation of America ("TranSouth") by executing a promissory note. The note contained a provision requiring the debtors to be liable up to a stated amount for TranSouth's attorney fees in collecting the balance due in the event of a default.

At the time of the Chapter 7 filing, the note was in default and the balance owed on the line of credit was $2,660.31. TranSouth initiated an adversary proceeding to object to the dischargeability of the debt under section 523(a)(2). The parties entered into a "Stipulation For Settlement." The stipulation stated that the debt was nondischargeable under section 523(a)(2) and called for entry of a judgment against the debtors in the principal amount of $2,000 plus post-judgment interest costs of $150.25 as well as attorney fees in the amount of $300.

The bankruptcy court entered a judgment in favor of TranSouth pursuant to the "Stipulation For Settlement," but the judgment did not award the $300 in attorney fees. The bankruptcy court found no authority to support the award of attorney fees, notwithstanding the terms of the stipulation. Citing the legislative history of section 523, the district court affirmed the denial of TranSouth's attorney fees. The Eleventh Circuit, however, reversed the lower courts.

The Eleventh Circuit began its analysis with the actual language of section 523, stating that the statute should be interpreted in a manner "consistent with the plain meaning of the statutory language." Section 523 excepts from discharge any debt of an individual debtor that meets the requirements of section 523. "If a creditor is able to establish the requisite elements of section 523, the creditor is entitled to collect 'the whole of any debt' he is owed by the debtor . . . ." To determine the meaning of the word "debt," the Eleventh Circuit turned to the definition of "debt" in section 101, which states that a "debt" is a "liability on a claim." The Eleventh Circuit then examined the definition of "claim" in section 101. Since "debt" is to be given a broad and expansive read-

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194. Id. at 1505.
195. Id. at 1505-06.
196. Id. at 1510 (Clark, J., dissenting).
197. Id. (Clark, J., dissenting).
198. Id. at 1511 (Clark, J., dissenting).
199. Id. at 1509.
200. Id. at 1507.
202. 931 F.2d at 1507 (quoting Martin v. Bank of Germantown (In re Martin), 761 F.2d 1163, 1168 (6th Cir. 1985)).
204. 931 F.2d at 1507.
ing under the Code, the "debt" excepted from discharge "would appear to include a debtor's contractual obligation to pay a creditor's attorney's fees."

Instead of ending its analysis with this interpretation of the "plain meaning" of the statute, the Eleventh Circuit sought further support for its conclusion. First, the Eleventh Circuit stated that its interpretation of the statute in allowing attorney fees for the successful creditor "is reinforced by the principal that attorney's fees are properly awarded to a creditor prevailing in a bankruptcy claim if there exists a statute or valid contract providing therefor." Construction of the contract between the parties is a question of local law. Florida law upholds such contractual provisions for reasonable attorney fees.

Second, the Eleventh Circuit rejected the contention that an award of attorney fees to the successful creditor would violate section 523(d). Section 523(d) enables a debtor who prevails in a dischargeability proceeding to recover attorney fees in certain instances. The court reasoned that the absence of a statutory entitlement to attorney fees for the creditor in this case did not preclude a contractual award.

Third, awarding attorney fees to the creditor would not violate the protective policy of section 523(d). The court's ruling does not expose an honest debtor who prevails in the dischargeability action to liability for payment of the creditor's attorney fees; the creditor must meet a substantial burden in order to prove an exception to dischargeability, and the reaffirmation procedure of sections 524(c) and (d) makes any settlement to pay a debt subject to "strict scrutiny" under the "exhaustive, court-monitored procedure" contained therein.

A sharp dissent was written by Judge Clark, who had two primary objections to the majority opinion. First, Judge Clark questioned whether there was a justiciable dispute between the parties, since the principal indebtedness outstanding at the time of the bankruptcy filing exceeded the nondischargeable debt provided for in the "Stipulation For Settle-

205. Id. (quoting Nordberg v. Arab Banking Corp. (In re Chase & Sanborn Corp.), 904 F.2d 588, 595 (11th Cir. 1990)).
206. Id.
207. Id. (citations omitted).
208. Id. (citing Security Mortgage Co. v. Powers, 278 U.S. 149, 154 (1928)).
209. Id. at 1508 (citations omitted).
210. Id. at 1509.
212. 931 F.2d at 1507 n.3.
213. Id.
214. 11 U.S.C. § 524(c) and (d) (1988).
215. 931 F.2d at 1509.
ment,” even with the $300 charge for attorney fees included. Judge Clark suggested that the proceedings were manipulated so that the attorney fee issue would come before the Eleventh Circuit unopposed by the debtor. Second, Judge Clark felt that allowing the creditor to recover attorney fees would unfairly increase the creditor's leverage in inducing a debtor to succumb to an objection to dischargeability, contrary to the policy behind section 523(d) as expressed in the legislative history.

The court could have avoided Judge Clark's concern over the existence of a justiciable dispute by limiting its holding to the facts of the case, wherein the debtor agreed to pay nominal attorney fees to the creditor as part of a settlement stipulation. Since the court's analysis was not limited to these facts, the creditor's right to recover attorney fees when provided for in its contract appears to be firmly established by TranSouth once the debt is excepted from the debtor's discharge under section 523(a).

D. Omission of Assets from Schedules

The Eleventh Circuit in Swicegood v. Ginn affirmed the denial of a debtor's discharge based on the debtor's deliberate and material omission of assets from the bankruptcy schedules. Swicegood should disabuse any debtor's attorney of the notion that the preparation of bankruptcy schedules can be taken lightly, or that an amendment can remedy any omission of assets that becomes known during the course of the bankruptcy case.

The debtor, William S. Swicegood, filed a Chapter 7 petition listing debts of $861,778.19 and assets of $12,700. A creditor, William T. Ginn, who was owed $179,418, filed a complaint objecting to the debtor's discharge on various grounds. After Ginn learned from the debtor's ex-wife that the debtor had omitted from his bankruptcy schedules "a Rolex watch, a set of silver flatware, two shares of AT&T stock, golf clubs, and two demitasse sterling silver cups," Ginn amended his complaint to add section 727(a)(4)(A) as a ground for denying the debtor's discharge.

216. Id. at 1510-11 (Clark, J., dissenting).
217. Id. at 1511 (Clark, J., dissenting).
218. Id. at 1515-16 (Clark, J., dissenting).
219. 924 F.2d 230 (11th Cir. 1991).
220. Id. at 232.
221. Id. at 231.
222. Id.
223. 11 U.S.C. § 727(a)(4)(A) (1988). This section provides: "The court shall grant the debtor a discharge, unless . . . (4) the debtor knowingly and fraudulently, in or in connection with the case—(A) made a false oath or account.” Id.
224. 924 F.2d at 231.
After the debtor learned that his ex-wife had reviewed the bankruptcy schedules with Ginn's counsel, the debtor amended his schedules to include these items. In his amendment, the debtor valued the Rolex watch at $1,000 and the silver flatware at $400, purportedly based on the highest purchase offers the debtor received at two different stores. Despite the amendment, the bankruptcy court found that the debtor's initial omission of the assets constituted a false oath relating to a material matter. The debtor's discharge was denied. The district court affirmed, stating that the bankruptcy court's finding of fraudulent intent was not clearly erroneous.

On appeal to the Eleventh Circuit, the debtor argued that the omissions were not deliberate. The Eleventh Circuit refused to disturb the bankruptcy court's findings, which were supported by evidence that the debtor amended his schedules to include the omitted assets only after he became aware that his ex-wife had revealed the omissions to Ginn's counsel, the amendment significantly undervalued the assets, and the debtor routinely wore the Rolex watch. The Eleventh Circuit has previously held that deliberate omissions by a debtor may result in the denial of a discharge.

The debtor's second argument on appeal was that the omissions were not material. The debtor valued the Rolex watch and the silver at an aggregate of $1,400. Without placing a specific value on the omitted items, the bankruptcy court concluded that the $1,400 figure used by the debtor was a significant undervaluation. The Eleventh Circuit's decision does not provide any clear guidelines for determining materiality, although it is noteworthy that the court refrained from making any comparison of the value of the omitted items as a percentage of the scheduled indebtedness. The Eleventh Circuit deferred to the bankruptcy court's factual finding that "the omitted assets were not of trivial value and were material" and the district court's finding of no clear error.

As a result of Swicegood, debtor's counsel should be vigilant in making sure that all items of personal property are listed in the bankruptcy schedules, particularly something as conspicuous as a Rolex watch. If the debtor waits until the omission is caught, Swicegood casts doubt on the debtor's ability to rectify the omission.

225. Id.
226. Id. at 232.
227. Id.
228. Id. (quoting Chalik v. Moorefield (In re Chalik), 748 F.2d 616, 618 (11th Cir. 1984)).
229. Id.
230. Id.
VI. SUBSTANTIVE CONSOLIDATION

In *Eastgroup Properties v. Southern Motel Ass'n*, the Eleventh Circuit reviewed the substantive consolidation of two related entities, Gainesville P-H Properties ("GPH") and Southern Motel Association ("SMA"). The bankruptcy court ordered substantive consolidation, finding that, absent consolidation, the majority of creditors of GPH would only receive a small part of their claims, while equity interest holders of SMA would be entitled to receive a substantial distribution. The district court and Eleventh Circuit affirmed, with the Eleventh Circuit issuing a comprehensive decision on the requirements for substantive consolidation.

Substantive consolidation arises from the bankruptcy court's general equitable power. The objective of substantive consolidation is "to insure the equitable treatment of all creditors." Nevertheless, substantive consolidation should be used only sparingly because consolidation redistributes wealth among the creditors of the consolidated entities.

Substantive consolidation requires a showing that "(1) there is a substantial identity between the entities to be consolidated; and (2) consolidation is necessary to avoid some harm or to realize some benefit." When the proponent makes this showing, a rebuttable presumption arises that creditors have not relied solely on the credit of one of the entities, and the burden shifts to an objecting creditor to show both that "(1) it has relied on the separate credit of one of the entities to be consolidated; and (2) it will be prejudiced by substantive consolidation." If an objecting creditor makes its showing, then the bankruptcy court may order consolidation only if the benefits of consolidation outweigh the harm.

A non-exclusive list of factors which may be relevant to substantive consolidation include the following:

(1) The presence or absence of consolidated financial statements;
(2) the unity of interests and ownership between various corporate entities;
(3) the existence of parent and intercorporate guarantees on loans;
(4) the degree of difficulty in segregating and ascertaining indi-

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231. 935 F.2d 245 (11th Cir. 1991).
232. *Id.* at 246.
233. *Id.* at 248.
234. *Id.*
235. *Id.* at 246.
236. *Id.* at 248 (citations omitted).
237. *Id.* (quoting *In re Murray Indus., Inc.*, 119 B.R. 820, 830 (Bankr. M.D. Fla. 1990)).
238. *Id.* (citations omitted).
239. *Id.* at 249 (citations omitted).
240. *Id.* (citations omitted).
241. *Id.* (citations omitted).
vidual assets and liabilities; (5) the existence of transfers of assets without formal observance of corporate formalities; (6) the commingling of assets and business functions; . . . (7) the profitability of consolidation at a single physical location; (8) the parent owning the majority of the subsidiary's stock; (9) the entities having common officers or directors; (10) the subsidiary being grossly undercapitalized; (11) the subsidiary transacting business solely with the parent; (12) both entities disregarding the legal requirement of the subsidiary as a separate organization.

VII. ATTORNEY FEES

In Port Royal Land & Timber Co. v. Berkowitz, Lefkovits, Isom & Kushner, the Eleventh Circuit vacated the district court's order, reducing an attorney fee award by 373.2 hours attributable to an unsuccessful fraudulent conveyance action. The Eleventh Circuit instructed the district court to conduct further proceedings in light of the decision in Grant v. George Schumann Tire & Battery Co.

The background facts are set forth in the published opinion by the bankruptcy court. The debtor, Port Royal Land & Timber Company, engaged Berkowitz, Lefkovits, Isom & Kushner as its counsel after an involuntary bankruptcy filing. Although the bankruptcy case was a success from the standpoint that a Chapter 11 liquidation plan was confirmed, the debtor's counsel was unsuccessful in setting aside a prepetition foreclosure sale as a fraudulent conveyance. Upon the application for compensation by Berkowitz, Lefkovits, Isom & Kushner, the bankruptcy court found that all hours billed were reasonably expended in the representation of the debtor. Nevertheless, the bankruptcy court felt bound by Norman v. Housing Authority of City of Montgomery to deduct hours spent on unsuccessful claims. Therefore, while acknowledging problems in applying Norman to bankruptcy cases, the bankruptcy court excluded from compensation the 373.2 hours spent by debtor's counsel on the fraudulent conveyance action.

242. Id. at 249-50 (citations omitted).
243. 924 F.2d 208 (11th Cir. 1991).
244. Id. at 209.
246. 924 F.2d at 209. See Grant v. George Schumann Tire & Battery Co., 908 F.2d 874 (11th Cir. 1990).
248. Id. at 73.
249. Id. at 74.
250. 836 F.2d 1292 (11th Cir. 1988).
251. In re Port Royal Land & Timber Co., 105 B.R. at 77-78.
252. Id. at 78.
The order of the bankruptcy court was affirmed by the district court without the benefit of the Eleventh Circuit's 1990 decision in Grant.253 In Grant, the Eleventh Circuit acknowledged that section 330 is not a typical fee-shifting statute.254 "The language of section 330 does not authorize the court to award attorney's [sic] fees to the prevailing party. Rather, the statute authorizes the court to award "reasonable compensation for actual, necessary services rendered."”255

Port Royal and Grant combine to remove the apparent mandate of Norman to adjust fee awards downward for lack of results when attorneys reasonably perform services and pursue litigation, in their fiduciary capacity as representatives of the estate, that they might not pursue under other circumstances.256

253. 924 F.2d at 209.
254. Id. (quoting Grant v. George Schumann Tire & Battery Co., 908 F.2d 874, 882 (11th Cir. 1991).
255. Id. (quoting Grant, 908 F.2d at 882 (quoting 11 U.S.C. § 330(a)(1) (1988)).
256. See In re Port Royal Land & Timber Co., 105 B.R. at 77.