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Bankruptcy

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Bankruptcy

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I. INTRODUCTION

This Article focuses on bankruptcy opinions issued in 2012 by the courts in the Eleventh Circuit.[1] The topics are varied, ranging from the constitutionality of bankruptcy-specific exemption schemes enacted by the states to the ever-growing body of law arising from the means test.

II. PROFESSIONALS

Chapter 7 presents an attorney fee dilemma. Potential Chapter 7 clients often do not have the money to pay fees in full before filing, and prepetition debts—including attorney fees—are discharged through the very proceedings the attorney advises. This conundrum forces bankruptcy attorneys to invent creative methods for collecting fees from Chapter 7 debtors.

In 2011, the United States Bankruptcy Court for the Middle District of Florida prohibited Clark & Washington's practice of taking postdated checks as a prepetition retainer for postpetition services[2] because

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1. For an analysis of bankruptcy law during the prior survey period, see James D. Walker, Jr. & Amber Nickell, *Bankruptcy, Eleventh Circuit Survey*, 63 MERCER L. REV. 1161 (2012).

2. *See* Walton v. Clark & Washington, P.C., 454 B.R. 537, 539 (Bankr. M.D. Fla. 2011) (Clark I).

depositing the checks either violates the automatic stay or the discharge injunction, depending on when the checks are deposited.[3] In response, Clark & Washington implemented a two-contract system whereby a client signs one contract prepetition agreeing to prepetition services and another contract postpetition agreeing to postpetition services.[4] The United States Trustee challenged this system in *Walton v. Clark & Washington, P.C.*,[5] decided in 2012.

At an initial hearing, the court expressed concerns over the adequacy of disclosures in the prepetition contract and how the transition from one contract to the other was a single continuous process; the client had no time to think about whether to choose Clark & Washington for postpetition services.[6] Clark & Washington modified its procedure to alleviate the court's concerns.[7]

The court ultimately approved a two-contract procedure, in which the prepetition contract explains the two-contract system in detail and describes the client's legal options postpetition—proceed pro se, retain Clark & Washington, or retain another firm.[8] Instead of being required to sign the postpetition contract immediately after the petition is filed, the client has a two-week "cooling off period" to decide among those three options.[9] The firm agrees to represent the client during this two-week "gap period" so the client is not left unrepresented.[10] Sua sponte, the court ordered certain modifications regarding the conspicuousness of the two-contract system in the prepetition agreement (including a separate disclosure the client must sign): the addition of provisions allowing the client to cancel the postpetition contract within fourteen days of signing it, and the inclusion of language in the Federal Rules of Bankruptcy Procedure Rule 2016[11] disclosure confirming that the firm will represent the debtor in any event until the court allows the firm to withdraw.[12]

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3. *Id.* at 545; *see also* Walton v. Clark & Washington, P.C., 469 B.R. 383, 385 (Bankr. M.D. Fla. 2012) (Clark II).
4. *Clark II*, 469 B.R. at 383-84.
5. 469 B.R. 383 (Bankr. M.D. Fla. 2012).
6. *Id.* at 385.
7. *Id.* at 385-86.
8. *Id.* at 386-88.
9. *Id.* at 386-87.
10. *Id.* at 387 (internal quotation marks omitted).
11. FED. R. BANKR. P. 2016.
12. *Clark II*, 469 B.R. at 387-88.

III. CLAIMS

A. *Claim Objections*

In the Southern District of Florida, scheduling a debt and then objecting to the related proof of claim may result in sanctions for the debtor's attorney, as seen in *In re Velez*.[13] The case involved challenges by the debtor to five proofs of claim on the ground that they violated Local Rule 3000-1(A)(3) because they did not include documentation showing the debtor owed the amount claimed, and they violated section 727.104 of the Florida Code[14] because they did not include evidence of assignment of the debt. The debtor requested that each claim be disallowed in full. Each proof of claim corresponded to a debt listed on the debtor's schedules. In each case, the amount of the debt, the account number, and the original creditor matched. However, each proof of claim also noted a change in the owner of the debt.[15]

Rather than disallowing the claims, the court issued an order for the debtor's attorney to show cause why he should not be sanctioned for violating Federal Rule of Bankruptcy Procedure 9011(b).[16] The court first pointed out that the laws cited in the claims objections were irrelevant to the claims allowance.[17] Local Rule 3000-1(A)(3) simply does not exist. Additionally, § 727.104 of the Florida Code only applies to a state court "assignment for the benefit of creditors" proceeding, which had not been commenced as to any of the claims.[18]

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13. 465 B.R. 912 (Bankr. S.D. Fla. 2012).

14. FLA. STAT. § 727.104 (2012), *available at* www.leg.state.fl.us.

15. *In re Velez*, 465 B.R. at 914-17. The claims were as follows: (1) claim two for $506.02 made by Chase Bank for Kohl's account number 5095, scheduled as $492 owed to Kohl's on account number 5095; (2) claim three for $17,268.74 made by FIA Card Services for Bank of America on account number 0084, scheduled as $17,268 owed to Bank of America on account number 0084; (3) claim five for $8,380.69 made by Candica, LLC for Barclay's Bank account number 4346, scheduled as $8,295 owed to Barclay's on account number 4346; (4) claim seven for $6,240.33 made by Evergreen for Chase account number 1273, scheduled as $6,240 owed to Chase on account number 1273; (5) claim eight for $23,103.96 made by Portfolio Recovery for Chase account number 0605, scheduled as $23,103 owed to Chase on account number 0605. *Id.*

16. *Id.* at 914; FED. R. BANKR. P. 9011(b).

17. *In re Velez*, 465 B.R. at 918; *see also* FLA. STAT. § 727.103 (2012 & Supp. 2013), *available at* www.leg.state.fl.us.

18. *In re Velez*, 465 B.R. at 918. In Florida, common law and statutory rights may be assigned unless such assignment is expressly prohibited by statute. *Id.* The court found no defect in the assignment because the debtor's counsel failed to cite "any statute or case law giving rise to a good faith argument that the assignments were statutorily prohibited or against public policy." *Id.* *But see* Pursley v. eCAST Settlement Corp. (*In re* Pursley),

Next, the court explained why sanctions were appropriate against debtor's counsel, noting that there was no basis for objecting to the claim.[19]

> If a debt is undisputed, no other creditor has filed a proof of claim for the debt, and the debtor doesn't present any evidence to dispute the debt or ownership of the debt, the objection to claim should be overruled based upon the preponderance of the evidence. To hold otherwise is to invite mischief[.][20]

It would encourage debtors to challenge otherwise undisputed claims by demanding documents that "claimants simply cannot produce timely or economically."[21] This would allow debtors to evade a debt on a technicality even though both the debtor and claimant acknowledged the debt under penalty of perjury—the debtor by listing the debt in his schedules, and the claimant by filing a proof of claim.[22]

Because the debtor's attorney was "unable to provide any evidence or even supply a meaningful explanation to justify filing of any of the offending claim objections," the court found he violated the duty imposed by Rule 9011 to make a reasonable investigation before signing and filing a document—in this case the specious claim objections.[23] As a consequence, the court suspended the attorney from practicing before it for thirty-one days.[24]

Not all courts take the same approach. In 2011, the court in *Pursley v. eCAST Settlement Corp. (In re Pursley)*[25] disallowed a claim when the debtor admitted the debt but denied any knowledge of the claimant, who was an assignee of the original creditor.[26] Although the claimant produced an affidavit from the transferor of the claim stating that its business records reflected the assignment, the court found insufficient

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451 B.R. 213, 234 (Bankr. M.D. Ga. 2011) (disallowing a claim when the debtor admitted the debt but denied any knowledge of the claimant and the claimant failed to produce documents showing assignment of the debt as necessary to enforce the debt under Georgia law).

19. *In re Velez*, 465 B.R. at 919-22.

20. *Id.* at 919 (internal citation omitted).

21. *Id.* (quoting *In re Habiballa*, 337 B.R. 911, 916 (Bankr. E.D. Wis. 2006)) (internal quotation marks omitted).

22. *Id.* at 921.

23. *Id.* at 920; FED. R. BANKR. P. 9011.

24. *In re Velez*, 465 B.R. at 921.

25. 451 B.R. 213 (Bankr. M.D. Ga. 2011).

26. *Id.* at 234.

evidence to enforce the debt under state law.[27] The court, therefore, sustained the claim objection.[28]

B. Tax Liability

Section 505(a)(1) of the Bankruptcy Code[29] authorizes bankruptcy judges to determine a tax liability, including one that has been previously assessed by taxing authorities.[30] However, under § 505(a)(2)(C), the court may not make such a determination as to an ad valorem tax on property of the bankruptcy estate "if the applicable period for contesting or redetermining that amount under [applicable nonbankruptcy] law has expired."[31] In *Dubov v. Read (In re Read)*,[32] the debtor owned twenty investment properties in Florida. Ad valorem property taxes were assessed as to the properties on October 12, 2009. Under Florida law, the debtor had sixty days to challenge the assessment. On day twenty-nine, she filed a bankruptcy petition. On day 191, she filed a challenge to the tax claim in the bankruptcy court seeking a redetermination of her tax liability under § 505.[33] The bankruptcy and district courts found the request for reassessment to be timely.[34] The United States Court of Appeals for the Eleventh Circuit disagreed and reversed.[35]

Typically, § 108 of the Bankruptcy Code[36] tolls nonbankruptcy statutes of limitations that are unexpired on the petition date.[37] The sixty-day Florida deadline for challenging tax assessments was a nonbankruptcy deadline that had not expired on the petition date. The debtor therefore argued § 108 served to toll the Florida deadline such that it remained unexpired at the time she filed her challenge to the tax claim in bankruptcy court.[38] As a result, the bankruptcy court had

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27. *Id.* at 217, 233-34.
28. *Id.* at 234.
29. 11 U.S.C. § 505(a)(1) (2006).
30. *Id.*
31. *Id.* § 505(a)(2)(C) (2006 & Supp. V 2012).
32. 692 F.3d 1185 (11th Cir. 2012).
33. *Id.* at 1188.
34. *Id.* at 1187.
35. *Id.*
36. 11 U.S.C. § 108 (2006).
37. *Id.* "If applicable nonbankruptcy law . . . fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of . . . two years after the order for relief." *Id.*
38. *In re Read*, 692 F.3d at 1188-89.

authority to reconsider the tax claim under § 505(a).[39] The circuit court was unpersuaded by the debtor's argument.[40]

The court found both the plain language of §§ 108 and 505 and public policy supported a finding that § 108 did not toll the Florida tax deadline.[41] First, the language of § 505(a)(2)(C) prohibits a redetermination of tax liability if the deadline for contesting a tax "under applicable *nonbankruptcy* law" has expired.[42] The applicable nonbankruptcy law in this case gave the debtor sixty days to challenge her tax assessment; she filed her challenge on the 191st day, well after expiration of the deadline.[43] "[B]ecause § 108(a) is *not* a nonbankruptcy law, its extension of the time period is irrelevant for purposes of § 505(a)(2)(C)."[44] Thus, the bankruptcy court was barred from redetermining the debtor's tax claim.[45]

From a policy perspective, § 505(a)(2)(C) was added to the Bankruptcy Code in 2005 as part of a package of amendments intended to protect creditors.[46] In the case of § 505(a)(2)(C), Congress's protection involves "prohibiting a debtor from contesting *ad valorem* tax claims after the time for filing an action challenging the assessment of such taxes has expired under state law."[47]

C. *Priority Claims*

Before *Kerr v. Meadors (In re Knott)*,[48] no court in the Eleventh Circuit had addressed whether overpayment of child support is a domestic support obligation (DSO) entitled to priority under § 507(a)(1)-(A).[49] The debtor filed a no-asset Chapter 7 case on November 20, 2009. Her ex-husband filed a proof of claim for a DSO in the amount of $41,581.79. He obtained a judgment in that amount from a Florida state court in April 2010 due to overpayment of child support. The ex-husband made his support payments through an automatic deduction order. The overpayments occurred when the debtor (1) unilaterally and

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39. *Id.*; *see also* 11 U.S.C. §§ 108, 505.
40. *In re Read*, 692 F.3d at 1187.
41. *Id.* at 1190; *see also* 11 U.S.C. §§ 108, 505.
42. *In re Read*, 692 F.3d at 1190.
43. *Id.*
44. *Id.*
45. *Id.* at 1192.
46. *Id.*; *see also* 11 U.S.C. § 505(a)(2)(C). Ironically, the Act effecting the amendments is titled the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Pub. L. No. 109-8, 119 Stat. 23 (2005).
47. *In re Read*, 692 F.3d at 1191.
48. 482 B.R. 852 (Bankr. N.D. Ga. 2012).
49. 11 U.S.C. § 507(a)(1)(A) (2006); *In re Knott*, 482 B.R. at 854.

improperly increased the amount of the deduction order and (2) refused to cooperate in terminating the order after she lost custody of the children. The debtor received a discharge on March 11, 2010, and the case was closed with no distributions to creditors. In August 2011, the Chapter 7 trustee reopened the debtor's bankruptcy case to administer a newly discovered prepetition asset. At that time, the trustee objected to the ex-husband's proof of claim and sought to reclassify it as a general unsecured claim. The ex-husband argued the claim was entitled to priority as a DSO, while the debtor argued she owed no money to her ex-husband.[50]

The court agreed with the ex-husband and held his claim was a priority DSO.[51] The court reviewed case law on the topic and noted that claims for overpayment of support were generally treated as DSOs if needed for the support of the creditor or children in his custody.[52] In *Knott*, the ex-husband had full custody of the children during part of the overpayment period and partial custody during the remainder of the overpayment period.[53] Based on these facts, the court concluded "the repayment obligation to [the former spouse] may properly be characterized as intended for and in the nature of support for the child."[54] It also noted that the obligation otherwise satisfied the definition of "domestic support obligation" under § 101(14A).[55] Therefore, the overpayment was entitled to priority as a DSO.[56]

IV. AVOIDANCE

A struggling business entering into a repayment plan with a creditor is a regular business occurrence. Struggling businesses often end up as bankruptcy debtors, and payments to creditors made within ninety days of filing for bankruptcy are avoidable as preference payments under § 547(b),[57] forcing the creditor to return the amounts to the bankruptcy trustee. One defense to a § 547(b) avoidance action is that the payments were made in the ordinary course of business pursuant to § 547(c)(2).[58] In *Bender Shipbuilding & Repair Co. v. Oil*

50. *In re Knott*, 482 B.R. at 853-54.
51. *Id.* at 856.
52. *Id.* at 854-56.
53. *Id.* at 856.
54. *Id.*
55. *Id.*; *see also* 11 U.S.C. § 101(14A) (2006).
56. *In re Knott*, 482 B.R. at 856.
57. 11 U.S.C. § 547(b) (2006).
58. *See* 11 U.S.C. § 547(c)(2) (2006).

Recovery (In re Bender Shipbuilding & Repair Co.),[59] the United States Bankruptcy Court for the Southern District of Alabama addressed whether payments made within the § 547(b) preference period pursuant to a repayment plan are subject to the ordinary-course-of-business defense under § 547(c)(2).[60]

The debtor had been a major customer of the creditor since 1988. In 2008, the debtor's payments became late so often that the creditor contacted the debtor about the late payments. The debt grew, and in January 2009 the debtor and the creditor agreed on a repayment plan, pursuant to which the debtor made payments until June 9, 2011. On June 9, four creditors filed an involuntary Chapter 7 petition against the debtor.[61]

It was undisputed that the creditor received $123,837.25 within the § 547(b) preference period.[62] The creditor argued, however, that it was entitled to keep that money under the § 547(c)(2) ordinary-course-of-business defense.[63] Section 547(c)(2) states that a preference cannot be avoided

> to the extent that the transfer was (1) in payment of a debt incurred by the debtor in the ordinary course of business of the debtor and the transferee and *either* (2) made in the ordinary course of business of the debtor and the transferee or (3) made according to ordinary business terms.[64]

The parties did not dispute that the debt was incurred in the ordinary course of business; they disputed whether the payments under the repayment plan were made in the ordinary course of business between the debtor and creditor.[65]

The creditor argued that despite its twenty-year business relationship with the debtor before the repayment plan, the January 2009 agreement established a "new normal" payment structure between the parties and that the preference payments were made pursuant to that ordinary course.[66] The creditor relied on *Marathon Oil Co. v. Flatau (In re Craig Oil)*,[67] an Eleventh Circuit opinion quoting legislative history for the proposition that "the general policy of the preference section [is] to

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59. 479 B.R. 899 (Bankr. S.D. Ala. 2012).
60. *Id.* at 904; *see also* 11 U.S.C. § 547.
61. *In re Bender Shipbuilding*, 479 B.R. at 901-02.
62. *Id.* at 902.
63. *Id.* at 903.
64. *Id.* at 903-04; *see also* 11 U.S.C. § 547(c)(2).
65. *In re Bender Shipbuilding*, 479 B.R. at 904.
66. *Id.*
67. 785 F.2d 1563 (11th Cir. 1986).

discourage unusual action by either the debtor or his creditor during the debtor's slide into bankruptcy."[68] The agreement was entered into before the debtor's slide into bankruptcy and was therefore ordinary course between the parties.[69] The debtor argued that "ordinary course" should be viewed in light of the entire twenty-year business relationship.[70] Thus, the January 2009 repayment plan was "unusual" compared to the ordinary relationship between the parties since 1988.[71]

The court agreed with the debtor.[72] In an Eleventh Circuit case cited by the creditor, the court stated that § 547(c)(2) "should protect those payments which do not result from 'unusual' debt collection or payment practices."[73] The payments the debtor made under the repayment plan were "from unusual debt collection or payment practices" because the creditor told the debtor that the creditor could no longer afford to do business with the debtor, which was "an unusual debt collection practice between the parties."[74] The parties introduced no evidence that they had ever, let alone ordinarily, entered into a repayment plan in the prior twenty years.[75] "Therefore, the payments made pursuant to that agreement that occurred during the preference period were incident to that unusual agreement and were not ordinary between the parties as contemplated by § 547(c)(2)."[76]

V. EXEMPTIONS

A state can opt out of the Bankruptcy Code's exemption statute[77] and restrict bankruptcy debtors to those exemptions set forth in the state's exemption law.[78] Some opt-out states, including Georgia, have enacted bankruptcy-specific exemptions separate from the state's debtor-creditor law exemptions.[79] During the survey period, three opinions from cases where debtors challenged Georgia's bankruptcy-only exemption statute

68. *Id.* at 1566 (quoting H.R. REP. NO. 95-595, at 373 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6329); *In re Bender Shipbuilding*, 479 B.R. at 904.
69. *In re Bender Shipbuilding*, 479 B.R. at 904.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* (quoting *In re Craig Oil*, 785 F.2d at 1566).
74. *Id.* at 905.
75. *Id.*
76. *Id.*
77. 11 U.S.C. § 522(d) (2006).
78. *See* 11 U.S.C. § 522(b) (2006).
79. *See* O.C.G.A. § 44-13-100 (2002 & Supp. 2012).

were rendered.[80] Because the facts of each case and the analysis of each opinion are similar, this Article will only examine one of these cases: *In re Joyner*.[81]

The Official Code of Georgia Annotated (O.C.G.A.) allows exemptions "for purposes of bankruptcy and intestate insolvent estates."[82] Section 44-13-100(a)(9)[83] allows a bankruptcy debtor to exempt up to $2000 of the cash surrender value of a whole life insurance contract.[84] O.C.G.A. § 33-25-11,[85] which is not part of Georgia's bankruptcy exemption code, protects the entire cash surrender value of a whole life insurance contract by making the contract's value unreachable to the insured's creditors.[86] The debtors in *In re Joyner* exempted $2000 of multiple policies' cash surrender value under O.C.G.A. § 44-13-100(a)(9) and attempted to exempt the remainder of the value under O.C.G.A. § 33-25-11. The United States Trustee objected to the latter exemption, arguing that § 33-25-11 did not apply to bankruptcy debtors. The debtors argued that Georgia's bankruptcy-specific exemption statute was unconstitutional under multiple clauses of the state and federal constitutions.[87]

The debtors argued that the statute violated the Equal Protection Clause of the Georgia constitution.[88] Because bankruptcy debtors are not a suspect class and because the statute did not restrict a fundamental right, the court reviewed the statute under the "rational relationship test,"[89] which permits a classification when it is based on rational distinctions and is directly related to the legislation's purpose.[90] Bankruptcy debtors seek to discharge their debts while nonbankruptcy debtors continue to pay their debts.[91] The tradeoff for bankruptcy's fresh start is to relinquish whatever property the Georgia legislature does not allow to be exempted.[92] The court found the distinction in treatment between what a bankruptcy debtor can exempt and what a

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80. *See In re* McFarland, 481 B.R. 242 (Bankr. S.D. Ga. 2012); *In re* Joyner, 489 B.R. 292 (Bankr. S.D. Ga. 2012); *In re* Dean, 470 B.R. 643 (Bankr. M.D. Ga. 2012).

81. 489 B.R. 292 (Bankr. S.D. Ga. 2012).

82. O.C.G.A. § 44-13-100.

83. *Id.* § 44-13-100(a)(9).

84. *Id.*

85. O.C.G.A. § 33-25-11 (2005 & Supp. 2012).

86. *See id.*

87. *In re Joyner*, 489 B.R. at 294.

88. GA. CONST. art. I, § 1, para. 2; *In re Joyner*, 489 B.R. at 294.

89. *In re Joyner*, 489 B.R. at 294 (citing Grissom v. Gleason, 262 Ga. 374, 377, 418 S.E.2d 27, 30 (1992)).

90. *Id.*

91. *Id.*

92. *Id.* at 294-95.

nonbankruptcy debtor can exempt to be rational.[93] Although the debtors did not challenge the statute under the federal Equal Protection Clause,[94] the court noted that even if they did, the argument would have failed "just as it did under the similar state provision."[95]

The debtors also challenged the statute as violating the United States Constitution's Bankruptcy Clause[96] and Supremacy Clause.[97] The Bankruptcy Clause states Congress can "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."[98] Relying on an older Supreme Court case, the debtors argued that Georgia's bankruptcy-only exemption statute violates the Bankruptcy Clause's Uniformity Provision because it breaches geographic uniformity.[99] The court dismissed this as a misinterpretation of case law and noted that the case the debtors relied on "recognized that states may have differing exemptions available to debtors in bankruptcy."[100] Moreover, the Uniformity Clause "is not a restriction upon the states."[101]

The court likewise found the Supremacy Clause challenge meritless; Georgia's exemption statute was intended to opt out of the federal exemption scheme in favor of its own exemptions.[102] Congress expressly permitted this in § 522(b) of the Bankruptcy Code, the court said, and thus the two exemption statutes do not conflict and the Supremacy Clause is not violated.[103]

VI. DISCHARGE

Question: When does a fraudulent transfer result in a willful and malicious injury to property of a creditor for purposes of § 523(a)(6)?[104] Answer: When the transfer is made to prevent a creditor from satisfying a judgment. The creditor in *Maxfield v. Jennings* (*In re Jennings*),[105] a young boy paralyzed in an accidental shooting, filed a personal injury lawsuit in California state court against Bruce Jennings, who owned a

93. *Id.*
94. U.S. CONST. amend. XIV, § 1.
95. *In re Joyner*, 489 B.R. at 297.
96. U.S. CONST. art. I, § 8, cl. 4.
97. U.S. CONST. art. VI, § 2; *In re Joyner*, 489 B.R. at 295-97.
98. U.S. CONST. art. I, § 8, cl. 4.
99. *In re Joyner*, 489 B.R. at 295 (citing Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 188 (1902)).
100. *Id.*
101. *Id.* at 296 (citing *In re* Cross, 255 B.R. 25, 31 (Bankr. N.D. Ind. 2000)).
102. *Id.* at 297.
103. *Id.*
104. 11 U.S.C. § 523(a)(6) (2006).
105. 670 F.3d 1329 (11th Cir. 2012).

gun distributor, and his two ex-wives—Janice and Anna (among others). While the lawsuit was pending, Janice, at Bruce's direction, transferred an unencumbered parcel of real property to Anna.[106] The creditor then filed a complaint in California against Janice for fraudulent transfer. Several months later, the California court found the gun distributor liable for the creditor's injuries but had not yet ruled on the liability of Bruce, Janice, and Anna. Bruce and Janice filed bankruptcy petitions, and the state law cases were transferred to the bankruptcy court. The bankruptcy court found Janice jointly and severally liable for the creditor's personal injury claim and liable for the fraudulent transfer claim. Shortly thereafter, the creditor filed a complaint to determine the dischargeability of the fraudulent transfer of debt under § 523(a)(6) for willful and malicious injury.[107] The bankruptcy court found in favor of Janice.[108] The district court reversed, and the the Eleventh Circuit affirmed.[109]

The circuit court considered three elements: (1) an injury to property of the creditor; (2) willfulness; and (3) malice.[110] With respect to the injury, Janice argued that because the *personal injury* judgment arose after the transfer, the transfer caused no injury.[111] The court, however, said the relevant fact was that the creditor obtained a *fraudulent transfer* judgment prior to asserting a § 523(a)(6) claim.[112] "[T]he bankruptcy court found that Janice Jennings knowingly conspired with Bruce to transfer [the property] with the intent to keep its value from [the creditor's] reach."[113] By preventing the creditor from "satisfying his personal injury claim," Janice injured his interest in that claim.[114]

The court further concluded Janice acted willfully because "[s]he knew that the purpose of the transfer was to keep [the property] out of the reach of creditors."[115] And, she acted maliciously—or without just cause—because "she knew Bruce had no legitimate reason to transfer"

106. *Id.* at 1330. The property was owned by a partnership created by Bruce and Janice. *Id.*
107. *Id.* at 1330-31.
108. *Id.* at 1331-32.
109. *Id.* at 1332, 1334.
110. *Id.* at 1333.
111. *Id.*
112. *Id.*
113. *Id.* at 1334.
114. *Id.*
115. *Id.*

the property to Anna.[116] Thus, the debt arising from the fraudulent transfer claim was nondischargeable under § 523(a)(6).[117]

In a second discharge case, the Eleventh Circuit considered § 523(a)(4),[118] which excepts from discharge those debts arising from the debtor's "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny."[119] "Defalcation" under this section does not have an exact definition,[120] and the circuits are split over what conduct constitutes defalcation.[121] The Eleventh Circuit, in *Bullock v. Bank-Champaign, N.A. (In re Bullock)*,[122] determined that defalcation under § 523(a)(4) requires "more than mere negligence" and "a known breach of a fiduciary duty, such that the conduct can be characterized as objectively reckless."[123]

The debtor in *Bullock* was the trustee of his father's trust. The life insurance policy was the trust's sole asset, and the trustee could only borrow from the trust to pay the premiums and to satisfy a beneficiary's withdrawal request. Violating those limiting provisions, the trustee used the life insurance policy as collateral for three loans. Trust beneficiaries discovered these loans and sued the debtor for breach of fiduciary duties.[124] The court awarded the plaintiffs $285,000, but in the order awarding damages the court stated that the debtor did "'not appear to have had a malicious motive in borrowing funds from the trust.'"[125] The property acquired through the self-dealing was put under a constructive trust to secure the judgment, as was the debtor's beneficial interest in his father's trust. BankChampaign (the Bank) replaced the debtor as trustee. The debtor tried to sell the property to satisfy the judgment, but the Bank's approval was required, and the Bank obstructed efforts to sell. The debtor filed for bankruptcy hoping to discharge the judgment debt. The bankruptcy court found the debt nondischargeable under § 523(a)(4). The district court affirmed, and while the court opined that the bank's actions were inappropriate, the bank's actions did not make the debt dischargeable.[126] On appeal to

116. *Id.*
117. *Id.*
118. 11 U.S.C. § 523(a)(4) (2006).
119. *Id.*
120. Quaif v. Johnson, 4 F.3d 950, 955 (11th Cir. 1993).
121. Bullock v. Bank Champaign, N.A. (*In re* Bullock), 670 F.3d 1160, 1165 (11th Cir. 2012).
122. 670 F.3d 1160 (11th Cir. 2012).
123. *Id.* at 1166.
124. *Id.* at 1162.
125. *Id.* (quoting uncited state court order).
126. *Id.* at 1162-63.

the Eleventh Circuit, the debtor argued that his breach of fiduciary duty did not rise to defalcation under § 523(a)(4), and the Bank's behavior gave him a defense to nondischargeability.[127]

The Eleventh Circuit reviewed the standards used by other circuit courts.[128] The United States Courts of Appeal for the Fourth, Eighth, and Ninth Circuits hold that a fiduciary's innocent act can result in defalcation.[129] The United States Courts of Appeal for the Fifth, Sixth, and Seventh Circuits require recklessness.[130] The United States Courts of Appeal for the First and Second Circuits require extreme recklessness.[131] In a previous Eleventh Circuit opinion, *Quaif v. Johnson*,[132] the court referred to an old Second Circuit case, *Central Hanover Bank & Trust Co. v. Herbst*,[133] as having "perhaps the best" description of defalcation under § 523(a)(4).[134] That opinion described defalcation as requiring a known breach of duty and not mere negligence.[135] Although *Quaif* was not binding, the court followed its "explicit alignment" with *Central Hanover* and held that defalcation under § 523(a)(4) requires a known breach of duty that rises to the level of objective recklessness.[136] Because the debtor at least should have known he was self-dealing, and he knowingly benefitted from the loans, his conduct could be characterized as objectively reckless; thus, the court held the conduct rose to the level of defalcation under § 523(a)(4).[137]

The debtor's contention that the Bank's behavior created a defense to nondischargeability also failed. Although bankruptcy courts are courts of equity and the bank asked for relief with arguably unclean hands, the

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127. *See id.* at 1163-64.

128. *Id.* at 1165-66.

129. *Id.* at 1165 (citing Republic of Rwanda v. Uwimana (*In re* Uwimana), 274 F.3d 806, 811 (4th Cir. 2001); Tudor Oaks Limited Partnership v. Cochrane (*In re* Cochrane), 124 F.3d 978, 984 (8th Cir. 1997); Sherman v. SEC (*In re* Sherman), 658 F.3d 1009, 1017 (9th Cir. 2011)).

130. *Id.* at 1165-66 (citing NFS, Ltd. v. Harwood (*In re* Harwood), 637 F.3d 615, 624 (5th Cir. 2011); Patel v. Shamrock Floorcovering Servs., Inc. (*In re* Patel), 565 F.3d 963, 970 (6th Cir. 2009); Follett Higher Educ. Grp., Inc. v. Berman (*In re* Berman), 629 F.3d 761, 766 (7th Cir. 2011)).

131. *Id.* at 1166 (citing Rutanen v. Baylis (*In re* Baylis), 313 F.3d 9, 20 (1st Cir. 2002); Denton v. Hyman (*In re* Hyman), 502 F.3d 61, 68 (2d Cir. 2007)).

132. 4 F.3d 950 (11th Cir. 1993).

133. 93 F.2d 510 (2d Cir. 1937).

134. *Quaif*, 4 F.3d at 955 (citing *Cent. Hanover Bank & Trust Co.*, 93 F.2d at 512); *see also In re Bullock*, 670 F.3d at 1164.

135. *In re Bullock*, 670 F.3d at 1166 (citing *Cent. Hanover Bank & Trust Co.*, 93 F.2d at 512).

136. *Id.*

137. *Id.*

debtor did not cite any cases holding a creditor's unclean hands renders an otherwise nondischargeable debt dischargeable.[138]

On May 13, 2013, the Supreme Court vacated the Eleventh Circuit's decision.[139] The Court held the state of mind required for defalcation is "knowledge of, or gross recklessness in respect to, the improper nature of the relevant fiduciary behavior."[140] Because the Eleventh Circuit had applied the less stringent "objective recklessness" standard, the case was remanded for further proceedings.[141]

VII. CONSUMER ISSUES

A. *Lienstripping*

Last year, this Article discussed the debtor's ability to void or "strip off" a wholly unsecured lien in the context of a Chapter 20 case (a Chapter 13 case filed soon after receiving a Chapter 7 discharge).[142] In such circumstances, the Chapter 13 debtor typically is not eligible for a discharge.[143] The bankruptcy courts in the Eleventh Circuit are split over whether a Chapter 13 debtor who is ineligible for a discharge may legally strip off a wholly unsecured lien.[144] The issue currently is the subject of a direct appeal request to the circuit court[145] and may soon be resolved.[146]

In the meantime, the Eleventh Circuit has decided *McNeal v. GMAC Mortgage, LLC (In re McNeal)*,[147] which, if it stands, may render the Chapter 20 lienstripping question moot. In *McNeal*, a Chapter 7 debtor sought to strip off a wholly unsecured second lien on her house under §§ 506(a) and (d).[148] Section 506(d) provides that "[t]o the extent that a lien secures a claim against the debtor that is not an *allowed secured*

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138. *Id.* at 1167.

139. Bullock v. BankChampaign, N.A., No. 11-1518, 2013 WL 1942393, at *7 (2013).

140. *Id.* at *3.

141. *Id.* at *7.

142. *See* Walker & Nickell, *supra* note 1, at 1180-82.

143. 11 U.S.C. § 1328(f)(1) (2006).

144. *See* Walker & Nickell, *supra* note 1, at 1180-82.

145. Typically bankruptcy cases are appealed first to the district court and then to the circuit court. 28 U.S.C. § 158(a) (2006). However, the circuit court may take a direct appeal in certain circumstances. *Id.* § 158(d).

146. The bankruptcy court held that "eligibility for a discharge is not a requirement to strip off of a wholly unsecured junior mortgage in a chapter 20 case." *In re* Scantling, 465 B.R. 671, 673 (Bankr. M.D. Fla. 2012).

147. 477 F. App'x 562 (11th Cir. 2012).

148. *Id.* at 563; 11 U.S.C. § 506(a), (d) (2006).

claim, such lien is void."[149] Under § 506(a) a claim is only a secured claim to the extent of the value of the collateral.[150] Thus, when a senior lien consumes all the value in a piece of collateral, the junior lienholder's claim will be an unsecured claim pursuant to § 506(a). The circuit court allowed the debtor to strip off the lien based on its 1989 decision, *Folendore v. United States Small Business Administration*,[151] in which the court had previously held that a Chapter 7 debtor could use § 506(d) to strip off a wholly unsecured lien.[152]

After *Folendore*, the Supreme Court decided *Dewsnup v. Timm*,[153] holding that a Chapter 7 debtor could not use § 506(d) to strip down a *partially* unsecured junior lien because the phrase "allowed secured claim" in § 506(d) means a claim that has been allowed and is secured by a lien.[154] It is not defined by reference to § 506(a).[155] The Eleventh Circuit held it could not rely on *Dewsnup* to depart from its prior precedent in *Folendore* because *Dewsnup* was not exactly on point, as it involved a partially secured lien rather than a wholly unsecured lien.[156] If *Folendore* and *McNeal* remain the law in the Eleventh Circuit, Chapter 20 debtors can deal with wholly unsecured liens in their Chapter 7 cases, so the liens never become an issue in the later Chapter 13 case.

The creditors in *McNeal* have filed an application for rehearing *en banc*.[157] However, that application is currently stalled due to a complication. The creditors (the mortgagee and the servicer) have filed bankruptcy cases and claim the appeal is subject to the automatic stay. However, because the creditors sold their interest in the mortgage, the debtor contends the automatic stay does not apply. There is also a question of whether or not the new mortgagee and servicer should be substituted as parties for the original creditors.

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149. 11 U.S.C. § 506(d).

150. *Id.* § 506(a).

151. 862 F.2d 1537 (11th Cir. 1989).

152. *In re McNeal*, 477 F. App'x at 564. In *Folendore*, the court allowed the debtor to strip off a wholly unsecured third lien on its real property because the creditor did not have an allowed secured claim. 862 F.2d at 1540-41.

153. 502 U.S. 410 (1992).

154. *Id.* at 417; *see also* 11 U.S.C. § 506(d).

155. *Dewsnup*, 502 U.S. at 417.

156. *In re McNeal*, 477 F. App'x at 564.

157. *In re* McNeal, 477 F. App'x 562 (11th Cir. 2012), *petition for rehearing en banc filed* (11th Cir. June 1, 2012) (No. 11-11352).

B. *Chapter 13 Plans*

In the right circumstances, above-median Chapter 13 debtors can buy their way out of Chapter 13 by paying off their plan early with a lump-sum payment, even if unsecured creditors will not be paid in full. In *In re Tibbs*,[158] the debtor's confirmed plan provided for total payments over sixty months of $14,850, with $11,726 going to general unsecured creditors (a 6.8% dividend). Less than a year after confirmation, the debtor wife lost her job. Without her income the debtors were unable to make the plan payments. They proposed to modify their plan to pay the remaining plan payments in one lump sum. The wife's parents agreed to gift the necessary funds to the debtors but only if the modification was approved.[159] The bankruptcy court allowed the modification over the trustee's objection.[160]

The court noted that Eleventh Circuit precedent requires an above-median income debtor to pay into a plan for sixty months (the applicable commitment period) unless unsecured creditors will be paid in full.[161] However, the circuit case arose in the context of plan confirmation, which requires conformance with §§ 1325(b)(4) and (b)(1)(B).[162] Subsection (b)(4) defines the applicable commitment period as sixty months for above—median income debtors,[163] while subsection (b)(1)(B) prevents the court from confirming a plan over objection unless the debtor devotes all disposable income to unsecured creditors over the applicable commitment period.[164] By contrast, the debtors in *Tibbs* sought modification under § 1329.[165] Section 1329 incorporates several other sections of Chapter 13, including § 1325(a).[166] However, it does not incorporate the applicable commitment period requirements set forth in § 1325(b).[167] Thus, the court allowed the modification because it was proposed in good faith and satisfied all the requirements of § 1329.[168]

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158. 478 B.R. 458 (Bankr. S.D. Fla. 2012).
159. *Id.* at 460.
160. *Id.* at 467.
161. *Id.* (citing Whaley v. Tennyson (*In re* Tennyson), 611 F.3d 873, 874 (11th Cir. 2010)).
162. *Id.* at 466; 11 U.S.C. § 1325(b)(4), (b)(1)(B) (2006).
163. 11 U.S.C. § 1325(b)(4).
164. *Id.* § 1325(b)(1)(B).
165. 478 B.R. at 467; 11 U.S.C. § 1329 (2006).
166. 11 U.S.C. § 1329(b)(1); *In re Tibbs*, 478 B.R. at 467.
167. 11 U.S.C. § 1329; *see also* 11 U.S.C. § 1325(b).
168. *In re Tibbs*, 478 B.R. at 467; *see also* 11 U.S.C. § 1329.

C. *Means Testing*

In 2011, the Supreme Court held that when using the means test to calculate a Chapter 13 debtor's disposable income, a debtor who does not make a car payment may not deduct a vehicle ownership expense from his current monthly income.[169] In *In re Rivers*,[170] the United States Bankruptcy Court for the Middle District of Florida considered the applicability of *Ransom* in the context of Chapter 7 means testing to determine whether the case is presumptively abusive.[171] The debtor in *Rivers* filed a statement of intent to surrender her former residence. However, when taking deductions on the means test she subtracted the monthly mortgage payment and 1/60th of the amount necessary to cure the arrearages on the mortgage.[172] With the deductions, the debtor's case was not presumptively abusive; without the deductions, the presumption of abuse did arise.[173]

Under § 707(b)(2)(A)(iii),[174] the debtor may deduct from her current monthly income "average monthly payments on account of secured debts," which are calculated as "the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date [of the filing] of the petition."[175] The *Ransom* decision involved § 707(b)(2)(A)(ii),[176] which allows the debtor to deduct from current monthly income "applicable monthly expense amounts specified under the [IRS's] National Standards and Local Standards."[177] The bankruptcy court in *Rivers* noted that the Supreme Court determined the means test was designed to ensure that debtors who could afford to repay their debts did so.[178] Thus, the means test should include expenses the debtor actually incurs.[179] However, the Supreme Court also "recognized that the purpose of the Means Test in Chapter 13 cases differs significantly from its purpose in Chapter 7

169. Ransom v. FIA Card Servs., 131 S. Ct. 716, 725 (2011).

170. 466 B.R. 558 (Bankr. M.D. Fla. 2012).

171. *Id.* at 561. Under 11 U.S.C. § 707(b)(1), the court may dismiss the case of an individual Chapter 7 debtor with primarily consumer debts if the case is abusive. Under § 707(b)(2), abuse is presumed if the debtor's income after deducting allowed expenses and payments exceeds a statutorily defined threshold. 11 U.S.C. § 707 (2006 & Supp. V 2012).

172. *In re Rivers*, 466 B.R. at 560.

173. *Id.* at 561.

174. 11 U.S.C. § 707(b)(2)(A)(iii).

175. *Id.*

176. *Id.* § 707(b)(2)(A)(ii).

177. *Id.*

178. 466 B.R. at 564 (citing *Ransom*, 131 S. Ct. at 721, 725).

179. *Id.*

cases."[180] The bankruptcy court elaborated on this distinction. In Chapter 13, "[t]he goal is to determine whether the debtor is submitting all of his 'projected disposable income' to his Chapter 13 plan."[181] By contrast, in Chapter 7 the goal "is to determine whether the granting of relief would be an abuse of the provisions of Chapter 7."[182] Thus, in Chapter 7 the means test functions "'as a screening mechanism,'"[183] which "should be applied as of the date that the Chapter 7 petition is filed, without consideration of whether the debtor's expenses may change after that date."[184] Thus, because the debtor owned her residence on the petition date, she could deduct mortgage payments on the means test, notwithstanding the intent to surrender the residence in the future.[185]

Even when the presumption of abuse does not arise, § 707(b)(3)(B)[186] provides an alternative test for determining whether a Chapter 7 filing is abusive. It states that the court shall consider "the totality of the circumstances" when determining whether granting relief would be an abuse of Chapter 7.[187] The issue for the Eleventh Circuit in *Witcher v. Early (In re Witcher)*[188] was whether a bankruptcy court can consider ability to pay debts under the totality-of-the-circumstances test of § 707(b)(3) after the court has already determined that a presumption of abuse under § 707(b)(2)—where ability to pay was already considered—did not arise.[189]

The debtors opted to keep certain luxury items and continue paying the debts secured by those items. The bankruptcy court found no presumption of abuse under the means test of § 707(b)(2), but the court found the debtors' ability to pay and unwillingness to surrender the luxury items—which would have provided a meaningful distribution to unsecured creditors—indicated that granting relief would be an abuse under the totality of the circumstances. The court gave the debtors

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180. *Id.* at 566.

181. *Id.* (citing Hamilton v. Lanning, 130 S. Ct. 2464, 2475 (2010)).

182. *Id.* (citing *Ransom*, 131 S. Ct. at 722 n.1).

183. *Id.* (quoting *Ransom*, 131 S. Ct. at 722 n.1).

184. *Id.* at 568.

185. *Id.*

186. 11 U.S.C. § 707(b)(3)(B).

187. *Id.* In *Rivers*, the court noted that the existence of this second basis for a finding abuse supported its conclusion that the means test should be administered in Chapter 7 based on the facts on the petition date. 466 B.R. at 567-68. Even if the debtor survives the means test based on the facts as of the petition date, the court may still dismiss the case as abusive based on the totality of the circumstances, including future events. *Id.* at 568.

188. 702 F.3d 619 (11th Cir. 2012).

189. *Id.* at 620.

fourteen days to convert to Chapter 13; the debtors did not convert, and the court dismissed the case.[190] The district court affirmed.[191] On appeal to the Eleventh Circuit, the debtors argued that once they pass the means test, which accounts for ability to pay, the court should not again look at ability to pay when viewing the totality of the circumstances. Reconsidering factors considered in the means test, they argued, would make the means test meaningless.[192]

The Eleventh Circuit disagreed, describing the debtors' reading of § 707 as "narrow" and stated that § 707(b)(3)(B) "broadly refers to 'the totality of the circumstances . . . of the debtor's financial situation,' phrasing which is surely intended to include the debtor's ability to pay his or her debts."[193] The court also found support in the "textual evolution" of § 707.[194] Prior to the 2005 amendments to the Bankruptcy Code, the phrase "totality of the circumstances" was absent from § 707.[195] Nevertheless, courts used the totality of the circumstances test prior to 2005, and in doing so, they "uniformly took the ability to pay into account."[196]

D. Conversion

The courts are split over whether equity accumulated during a Chapter 13 plan belongs to the debtor or to the estate after conversion to Chapter 7.[197] In *In re Robinson*,[198] the Bankruptcy Court for the Middle District of Florida held that the accumulated equity does not belong to the Chapter 7 estate.[199] Section 348(f)(1)(A)[200] of the Bankruptcy Code states that estate property in a converted case consists of whatever was estate property as of the original filing date that the debtor still has on the conversion date;[201] § 348(f)(2)[202] provides that if a Chapter 13 debtor converts to another chapter in bad faith, estate property in the converted case consists of estate property as of the

190. *Id.*
191. *Id.* at 621.
192. *Id.*
193. *Id.* at 622; *see also* 11 U.S.C. § 707(b)(3)(B).
194. *In re Witcher*, 702 F.3d at 622.
195. *Id.*
196. *Id.*
197. *In re* Robinson, 472 B.R. 854, 856 (Bankr. M.D. Fla. 2012).
198. 472 B.R. 854 (Bankr. M.D. Fla. 2012).
199. *Id.* at 857.
200. 11 U.S.C. § 348(f)(1)(A) (2006).
201. *Id.*
202. 11 U.S.C. § 348(f)(2).

conversion date.[203] The court found that § 348 was intended to incentivize repayment of debts under Chapter 13 rather than liquidations under Chapter 7—if accumulated equity belonged to the Chapter 7 estate, an honest Chapter 13 debtor who later had to convert would be penalized for attempting to repay debts.[204] Converting in bad faith, however, moves the date for determining estate property to the conversion date, and equity acquired as of the conversion date belongs to the estate.[205] The statutory scheme and legislative history showed that "Congress did not intend that a Chapter 13 debtor should lose the benefit of equity acquired in an asset due to his or her compliance with Chapter 13 payments."[206]

VIII. CHAPTER 12

Chapter 12 of the Bankruptcy Code allows individual farmers to adjust their debts through a plan of reorganization.[207] To be confirmed, a Chapter 12 plan must conform to the requirements of § 1222 of the Bankruptcy Code.[208] Section 1222(a)(2) requires that the plan provide for the full payment "of all claims entitled to priority under section 507."[209] In other words, no portion of priority claims can be discharged. Section 1222(a)(2)(A) downgrades the status of certain priority claims—claims of a governmental unit arising from the sale of farm assets that are entitled to priority under § 507.[210] Instead, these claims are treated as general unsecured claims and may be discharged to the extent they are not paid in full.[211] One such priority claim is a claim for "any tax . . . incurred by the estate."[212] Thus, § 1222(a)(2)(A) appears to strip taxes resulting from the sale of farm assets during a Chapter 12 case of their priority status.

In *Hall v. United States*,[213] the Chapter 12 debtor sold his farm postpetition, and his plan treated the resulting capital gains tax as a general unsecured debt that would receive only partial payment.[214] The issue for the Supreme Court was whether the taxes were "incurred

203. *Id.*
204. *In re Robinson*, 472 B.R. at 856.
205. *Id.* at 857.
206. *Id.*
207. *See* 11 U.S.C. ch. 12 (2006).
208. 11 U.S.C. § 1222 (2006 & Supp. V 2012).
209. *Id.* § 1222(a)(2).
210. *Id.* § 1222(a)(2)(A).
211. *Id.*
212. 11 U.S.C. § 503(b)(1)(B)(i) (2006).
213. 132 S. Ct. 1882 (2012).
214. *Id.* at 1886.

by the estate" and thus dischargeable to the extent not paid in full.[215] Resolving a circuit split,[216] the Court held that the tax liability was not incurred by the estate and thus the § 1222(a)(2)(A) exception did not apply to deprive the taxes of their priority status.[217] Instead, the taxes were neither collectible in Chapter 12 nor dischargeable.[218]

Examining several dictionary definitions of "incur," the Court concluded that a tax "'incurred by the estate'" has a plain meaning of "a tax for which the estate itself is liable."[219] The Internal Revenue Code (IRC) addresses tax liability in bankruptcy—§ 1398 of the IRC[220] states that Chapter 7 and Chapter 11 estates are liable for taxes,[221] and IRC § 1399[222] states that except as provided in § 1398, filing for bankruptcy does not create a separate taxable entity.[223] The Court concluded,

> In Chapter 12 and 13 cases, then, there is no separately taxable estate. The debtor . . . is generally liable for taxes and files the only tax return. . . . The postpetition federal income tax liability is not "incurred by the estate" and thus is neither collectible nor dischargeable in the Chapter 12 plan.[224]

The Court noted that these IRC sections sufficiently resolved the issue,[225] but the Court advanced several other arguments to support its holding, including a statutory structure argument.[226] Chapter 12 was modeled on Chapter 13, and courts interpreting sections of Chapter 12 often rely on opinions construing similar Chapter 13 sections as authority.[227] Section 1322(a)(2) of the Bankruptcy Code[228] is the Chapter 13 analog to § 1222(a)(2)—both sections require the payment of § 507 claims.[229] Bankruptcy courts, commentators, and the Internal Revenue Service have all treated postpetition taxes of a Chapter 13

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215. *Id.* at 1885; *see also* 11 U.S.C. § 503(b)(1)(B)(i).
216. *Hall*, 132 S. Ct. at 1886.
217. *Id.* at 1893.
218. *Id.*
219. *Id.* at 1887.
220. 26 U.S.C. § 1398 (2006).
221. *Id.* § 1398(a).
222. 26 U.S.C. § 1399 (2006).
223. *Hall*, 132 S. Ct. at 1887; *see also* 26 U.S.C. § 1399.
224. *Hall*, 132 S. Ct. at 1887.
225. *Id.*
226. *Id.* at 1889.
227. *Id.* (citing 8 COLLIER ON BANKRUPTCY ¶ 1200.01[5] at 1208-10 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2012)).
228. 11 U.S.C. § 1322(a)(2) (2006).
229. *Hall*, 132 S. Ct. at 1889.

debtor as a liability of the debtor, not the estate.[230] The Court saw "no reason to depart from those established understandings."[231]

Four justices dissented.[232] Armed with floor statements from Senator Charles Grassley, the chief sponsor of § 1222(a)(2)(A), the dissent argued that the exception's clear purpose was to protect postpetition asset sales from tax liability.[233] Many Chapter 12 debtors have to sell land or assets at a price that results in substantial capital gains taxes, the dissent noted, and if those taxes are treated as priority claims, many Chapter 12 plans would be underfunded and thus unconfirmable.[234] In response to the opinion in *Hall*, Senator Grassley, along with Senator Al Franken, introduced the Family Farmer Bankruptcy Tax Clarification Act of 2012,[235] which would effectively reverse the majority's decision.[236] Congress did not act on the bill prior to the end of the 112th Congress. As of this writing, it has not been reintroduced in the 113th Congress.

IX. CHAPTER 11

In an 8-0 decision, the Supreme Court held that a secured creditor must be allowed to credit bid when its collateral is being sold free of liens through a Chapter 11 cram down plan.[237] The debtors in *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*[238] borrowed $142 million from the lender, secured by the debtors' assets, to finance hotel construction and renovations. They ran out of money before completing the project and filed Chapter 11 cases. The debtors proposed a plan that provided for the sale of all their assets but barred the lender from credit bidding ("using the debt it is owed to offset the purchase price").[239] Because the debtors sought confirmation of the plan over the secured lender's objection (a cram down), they had to prove the plan was fair and equitable to the lender under § 1129(b)(2)(A) of the Bankruptcy Code. The bankruptcy court and the United States Court of Appeals for the

230. *Id.* at 1889-90.
231. *Id.* at 1890.
232. *Id.* at 1894 (Breyer, J., dissenting).
233. *Id.* at 1896.
234. *See id.* at 1894, 1897.
235. S. 3545, 112th Cong. (2012).
236. *See* Press Release, Senator Chuck Grassley, Senators Look to Reverse SCOTUS Ruling on Family Farmer Bankruptcies (Sept. 14, 2012), *available at* http://www.grassley.senate.gov/news/Article.cfm?custome_dataPageID_1502=42441.
237. RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 2065, 2073 (2012).
238. 132 S. Ct. 2065 (2012).
239. *Id.* at 2068-69.

Seventh Circuit found the plan unconfirmable and refused to approve bid procedures for the sale of assets.[240] The Supreme Court affirmed.[241]

To be considered "fair and equitable" to an objecting secured creditor, the plan must (1) allow the creditor to retain its lien and receive deferred cash payments; (2) give the creditor a lien on the proceeds of the sale of its collateral and allow the creditor to credit bid; or (3) provide the creditor with the indubitable equivalent of its claim.[242] Because the debtors proposed to sell the lender's collateral, but barred credit bidding, they could only cram down the plan under clause 3—by providing the lender with the indubitable equivalent of its claim.[243] However, relying on the canon of statutory interpretation that the specific governs the general, the Court concluded that the debtors could not use clause 3 to take an action expressly prohibited by clause 2.[244] Such a reading is supported by the structure of § 1129(b):

> (i) is the rule for plans under which the creditor's lien remains on the property, (ii) is the rule for plans under which the property is sold free and clear of the creditor's lien, and (iii) is a residual provision covering dispositions under all other plans—for example, one under which the creditor receives the property itself.[245]

Because the debtors' plan proposed to sell the lender's collateral free of liens, the plan could not be confirmed unless the lender were allowed to credit bid.[246]

X. CONCLUSION

It is difficult to find any common threads in this year's cases; 2012 is perhaps most notable for its diversity. It has also set in motion certain anticipated developments. Significantly, as described in Part VII.A., 2013 may be the year that multiple open questions on the issue of lienstripping in consumer cases are resolved. In addition, the Eleventh Circuit's interpretation of defalcation in *Bullock*, reported in Part VI., is set for review by the Supreme Court.[247]

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240. *Id.* at 2069.
241. *Id.* at 2073.
242. *Id.* at 2070 (summarizing 11 U.S.C. § 1129(b)(2)(A) (2006)).
243. *Id.*
244. *Id.* at 2070-71.
245. *Id.* at 2072.
246. *Id.*
247. *In re* Bullock, 670 F.3d 1160 (11th Cir. 2012), *cert. granted*, 133 S. Ct. 526 (2012).