Mercer Law Review

Volume 66
Number 4 *Eleven Circuit Survey* Article 2

7-2015

Bankruptcy

John T. Laney III

Daniel Taylor

Bankruptcy

by Hon. John T. Laney, III*
and Daniel Taylor**

I. INTRODUCTION

This Article offers a review of recent bankruptcy-related opinions issued in 2014 by the United States Supreme Court and courts within the Eleventh Circuit.[1] The topics are varied, ranging from the jurisdiction of the bankruptcy courts to the ever-developing law arising from "lien stripping."

II. BANKRUPTCY JURISDICTION

In *Executive Benefits Insurance Agency v. Arkison*,[2] the United States Supreme Court clarified an issue that arose in the aftermath of its decision in *Stern v. Marshall*[3]-how a bankruptcy court should proceed when a "*Stern* claim" is identified.[4] The Court concluded that when faced with deciding a *Stern* claim the bankruptcy court may issue

* United States Bankruptcy Judge for the Middle District of Georgia. Mercer University (A.B., 1964); Mercer University, Walter F. George School of Law (J.D., magna cum laude, 1966). Member, Mercer Law Review (1964-1966); Co-Editor in Chief (1965-1966). Member, State Bar of Georgia.

** Law Clerk, The Honorable John R. Laney, III. Auburn University (B.S., 2007); Mercer University, Walter F. George School of Law (J.D., cum laude, 2013). Member, State Bar of Georgia.

1. For an analysis of bankruptcy law during the prior survey period, see Hon. John T. Laney, III & Daniel Taylor, *Bankruptcy, Eleventh Circuit Survey*, 65 MERCER L. REV. 869 (2014).
2. 134 S. Ct. 2165 (2014).
3. 131 S. Ct. 2594 (2011).
4. *Arkison*, 134 S. Ct. at 2173. A "*Stern* claim" is a "core claim" on which the Constitution does not permit a bankruptcy court to enter final judgment. *Id.* at 2172-73.

proposed findings of fact and conclusions of law for de novo review by the district court.[5]

The Court's decision in *Arkison* expanded on its decision in *Stern*. Under 28 U.S.C. § 157[6] a bankruptcy court may enter final judgment on a claim in two circumstances–in "core" proceedings,[7] and in "non-core"[8] proceedings "with the consent of all the parties."[9] In *Stern*, the Court held that even though a bankruptcy court was statutorily permitted to enter final judgment on core claims, Article III of the Constitution[10] prohibits bankruptcy judges from entering final orders on certain claims that qualify as core.[11] At issue in *Stern* was whether a bankruptcy court could issue a final order on a common law counterclaim brought by the bankruptcy estate against a person filing a claim against the estate.[12] The Court held that even though 28 U.S.C. § 157(b)(2) designated such counter claims as core proceedings within the bankruptcy court's power to adjudicate, such claims were actually non-core claims required to be adjudicated by an Article III judge.[13] Simply put, *Stern* made clear that some claims labeled as core by Congress may not be adjudicated by a bankruptcy court even though expressly authorized in 28 U.S.C. § 157(b)(2).[14]

However, the Court in *Stern* did not decide how a bankruptcy or district court should proceed when faced with a *Stern* claim.[15] That was precisely the issue before the Court in *Arkison*. In *Arkison*, the Chapter 7 trustee brought a fraudulent transfer action against Executive Benefits, which had purchased certain assets from the debtor prior to the bankruptcy filing. The bankruptcy court entered summary judgment in favor of the trustee. On appeal, the United States District Court for the Western District of Washington conducted a de novo review and affirmed the bankruptcy court decision. While *Arkison* was on appeal to the United States Court of Appeals for the Ninth Circuit, the Supreme Court issued its *Stern* opinion. Executive Benefits argued that in light of the *Stern* decision, the bankruptcy court lacked authority to enter summary

5. *Id.* at 2173.
6. 28 U.S.C. § 157 (2012).
7. *Id.* § 157(b).
8. Non-core claims are those claims which are "not . . . core" but that otherwise relate to the bankruptcy case. *Id.* § 157(c).
9. 28 U.S.C. § 157(c)(2).
10. U.S. CONST. art. III, § 2, cl. 1.
11. *Stern*, 131 S. Ct at 2620.
12. *Id.* at 2600, 2601.
13. *Arkison*, 134 S. Ct. at 2172.
14. *Id.*
15. *Id.*

judgment.[16] The Ninth Circuit held that under *Stern*, a bankruptcy court was not permitted "to enter final judgment on a fraudulent conveyance claim against a noncreditor unless the parties consent."[17] The Ninth Circuit went on to find that Executive Benefits had impliedly consented to the bankruptcy court's jurisdiction, and therefore affirmed the decision of the district court.[18]

The Supreme Court affirmed the Ninth Circuit, but did so without addressing the issue of whether parties may consent to bankruptcy court jurisdiction to determine *Stern* claims.[19] Instead, the Supreme Court relied on the severability provision of the Bankruptcy Amendments and Federal Judgeship Act of 1984[20] to close the so called "statutory gap"[21] in § 157 created by the *Stern* decision.[22] Section 157(b)(1) authorizes bankruptcy judges to "enter appropriate orders and judgments" on core claims.[23] However, § 157(c)(1) provides that a bankruptcy court determining non-core claims is to "'hear [the] proceeding,' and then submit proposed findings of fact and conclusions of law to the district court.'"[24] This supposedly created a "statutory gap" in § 157, whereby *Stern* claims fell under neither § 157(b)(1) nor § 157(c)(1).[25] The Court concluded that *Stern* claims are subject to § 157(c)(1), and therefore, a bankruptcy court may hear *Stern* claims and submit proposed findings of fact and conclusions of law to the district court for a de novo review.[26]

---

16. *Id.* at 2169.
17. *Id.*
18. *Id.*
19. *See id.* at 2175.
20. Pub. L. No. 79-353, 98 Stat. 333 (1984). The severability provision provides in pertinent part, "If any provision of this Act or the application thereof . . . is held invalid, the remainder of this Act, or the application of that provision to persons or circumstances other than those as to which it is held invalid, is not affected thereby." *Id.* at 344.
21. In *Arkison*, the petitioners argued that because § 157(b) does not explicitly authorize bankruptcy judges to submit proposed findings of fact and conclusions of law in "core" proceedings, *Stern* created a "gap" in the bankruptcy statute whereby bankruptcy courts had no authority to hear *Stern* claims, thus requiring all *Stern* claims to be heard in district court. *Arkison*, 134 S. Ct. at 2172-73. Prior to the Supreme Court's decision in *Arkison*, this argument had some traction among lower courts, including the Ninth Circuit. *See* Exec. Benefits Ins. Agency v. Arkison (*In re* Bellingham Ins. Agency, Inc.), 702 F.3d 553, 565-66 (2012) (describing the "statutory gap" created by *Stern*), *aff'd*, 134 S. Ct. 2165 (2014).
22. *Arkison*, 134 S. Ct. at 2173.
23. 28 U.S.C. § 157(b)(1).
24. *Arkison*, 134 S. Ct. at 2172 (alteration in original) (quoting 28 U.S.C. § 157(c)(1)).
25. *See id.* at 2173.
26. *Id.* at 2174.

In *Arkison,* the bankruptcy court entered judgment in favor of the trustee without specifying whether it was acting pursuant to the core or non-core provisions of § 157. On appeal, the district court did not address whether there was a *Stern* problem, but it did conduct a de novo review of the bankruptcy court decision and issued an opinion affirming the bankruptcy court. The district court then separately entered judgment in favor of the trustee.[27] Thus, according to the Supreme Court, although the case did not proceed exactly in the fashion outlined in § 157(c)(1), Executive Benefits received the same treatment it would have if the case had proceeded in accordance with § 157(c)(1)–a de novo review by an Article III court.[28]

III. EXEMPTIONS

A. *Retirement Funds*

The Bankruptcy Code[29] allows an individual debtor to exempt certain assets from the bankruptcy estate.[30] One such asset is "retirement funds."[31] In *Clark v. Rameker*,[32] the Supreme Court was presented with the issue of whether funds in an inherited individual retirement account (IRA) qualify within the meaning of 11 U.S.C. § 522(b)(3)(C)[33] as "retirement funds."[34] The Court unanimously held that funds held in an inherited IRA are not retirement funds within the meaning of the federal exemption statute.[35]

In *Clark*, the petitioner, Heidi Heffron-Clark, inherited her mother's traditional IRA. At that point the traditional IRA was reclassified as an inherited IRA. Heffron-Clark chose to receive monthly distributions rather than withdraw the entire balance of the account. In October 2010, Heffron-Clark and her husband filed a Chapter 7 bankruptcy petition and listed the inherited IRA, then having a value of approximately $300,000, on the schedules and claimed its value as exempt under 11 U.S.C. § 522(b)(3)(C). The trustee objected to the claimed

27. *Id.*
28. *Id.* at 2175.
29. U.S.C. tit. 11 (2012).
30. 11 U.S.C. § 522(b)(1)-(3) (2012).
31. *Id.* § 522(b)(3)(C).
32. 134 S. Ct. 2242 (2014).
33. 11 U.S.C. § 522(b)(3)(c) (2012).
34. *Id.* at 2244; *see also* 11 U.S.C. § 522(b)(3)(c).
35. 134 S. Ct. at 2244.

exemption, arguing that the funds in the inherited IRA were not retirement funds within the meaning of the statute.[36]

The bankruptcy court agreed with the trustee and denied the exemption.[37] On appeal, the United States District Court for the Western District of Wisconsin reversed, reasoning that the exemption only covers an account containing funds that were "originally accumulated for retirement purposes."[38] The Seventh Circuit reversed, finding that an inherited IRA was not within the class of retirement funds covered by the exemption because it is a fund that is available for immediate consumption, rather than one designed solely for retirement purposes.[39] The Supreme Court, seeking to resolve a split of authority between the Seventh Circuit's holding in *Clark* and the United States Court of Appeals for the Fifth Circuit's holding in *Chilton v. Moser (In re Chilton)*,[40] granted certiorari.[41]

The Supreme Court based its holding on the difference between the Internal Revenue Code's[42] treatment of an inherited IRA and its treatment of a traditional or Roth IRA.[43] Both traditional and Roth IRAs offer tax advantages to encourage individuals to save for retirement.[44] However, both types of accounts are subject to a penalty if withdrawals are made before an accountholder reaches the age of fifty-nine and one half.[45] On the other hand, funds within an inherited IRA may be withdrawn at any time, without penalty, regardless of the account holder's age.[46] Moreover, an inheritor is prohibited from making contributions to an inherited IRA and "must either withdraw the entire balance in the account within five years . . . or take minimum distributions on an annual basis."[47]

The Court held that § 522(b)(3)(C) requires that funds satisfy two conditions in order to be exempt: (1) the funds must be retirement funds; and (2) the funds must be held in an account that is exempt from

---

36. *Id.* at 2245.

37. *Id.* at 2246.

38. *Id.* (quoting Clark v. Rameke (*In re Clark*), 466 B.R. 135, 139 (W.D. Wisc. 2012)) (internal quotation marks omitted).

39. *Id.*

40. 674 F.3d 486, 487 (5th Cir. 2012).

41. *Clark*, 134 S. Ct. at 2246.

42. U.S.C. tit. 26 (2012).

43. *Clark*, 134 S. Ct. at 2244-45.

44. *Id.* at 2245.

45. *Id.*

46. *Id.* If the inheritor is the spouse of the original owner, the spouse will have the option to "roll over" the IRA funds into the spouse's own IRA, or the spouse may keep the IRA as an inherited IRA subject to the rules that apply to non-spouse inheritors. *Id.*

47. *Id.*

taxation under one of the listed Internal Revenue Code sections.[48] Since the funds at issue in *Clark* were not retirement funds, they failed to satisfy the first element, and therefore, were not exempt under § 522(b)(3)(C).[49] It is also worth noting that *Clark* was a case decided under the federal exemption statute.[50] Thus, even though inherited IRAs are not exempt under the federal exemption statute, they may be exempt under specific state exemption statutes.[51]

B. Surcharging Exemptions

Under 11 U.S.C. § 105(a)[52] a bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]."[53] In the case of *Law v. Siegel*,[54] the Supreme Court was faced with the issue of whether § 105(a) gives a bankruptcy court the authority to surcharge a debtor's exemptions to cover administrative expenses incurred as a result of the debtor's misconduct.[55] In *Siegel*, the trustee sought to surcharge the debtor's exemption in his home to cover attorney fees incurred by the trustee for litigation that was the result of the debtor's fraudulent conduct.[56] The Court unanimously held that such a surcharge was not permitted under the Bankruptcy Code.[57] In its holding, the Court concluded that even though § 105(a) grants a bankruptcy court statutory authority to issue "'any order . . . appropriate to carry out the provisions"[58] of the Bankruptcy Code, such an order "may not contravene express provisions of the Bankruptcy Code."[59]

The debtor's misdeeds in *Siegel* were extraordinary. In 2004 the debtor, Stephen Law, filed a Chapter 7 bankruptcy petition, and Alfred Siegel was appointed trustee. On his schedules the debtor listed the

---

48. *Id.* at 2248.
49. *Id.* at 2247-48.
50. *See id.* at 2244-45.
51. Georgia has chosen to opt out of the federal exemption scheme but there are Georgia statute sections that cover retirement funds. *See* O.C.G.A. § 44-13-100(a)(2)(f), (2.1)(D) (2002 & Supp. 2014). The Georgia statute does not specifically address inherited individual IRAs, but some states have chosen to specifically list them. *See* FLA. STAT. ANN. § 222.21(2)(a) (West 1998 & Supp. 2015) (specifically allowing an exemption for inherited IRAs).
52. 11 U.S.C. § 105(a) (2012).
53. *Id.*
54. 134 S. Ct. 1188 (2014).
55. *Id.* at 1192.
56. *Id.* at 1193.
57. *Id.* at 1192, 1194-95.
58. *Id.* at 1198 (quoting Fed. R. Bankr. P. 9011(c)(2)).
59. *Id.*

value of his home as $363,348 and claimed $75,000 as exempt under California's homestead exemption. He listed the home as being encumbered by two liens: (1) a note and deed of trust for $147,156.52 in favor of Washington Mutual Bank; and (2) a second note and deed of trust for $156,929.04 in favor of "Lin's Mortgage & Associates." Thus, according to the debtor's schedules there was no equity in the house because the value of the two liens exceeded the non-exempt value of the house. Therefore, if the schedules were accurate the debtor would have presumably been able to keep his house because there would not be a reason for the trustee to pursue a sale since there would be nothing to distribute to his other creditors. However, the debtor's schedules were not accurate.[60]

A few months after the petition was filed, the trustee brought an adversary proceeding alleging that the lien in favor of Lin's Mortgage & Associates was fraudulent. The deed supporting the lien listed a debt to someone named "Lili Lin." Eventually, two people claiming to be Lili Lin responded to the trustee's complaint. One, Lili Lin of Artesia, California, admitted she was a former acquaintance of the debtor, but denied that she had ever loaned the debtor any money. The second Lili Lin–a supposed resident of China who spoke no English–came forward and managed to engage in extensive litigation over the next five years contesting the avoidance of the lien and subsequent sale of the house.[61]

Eventually, in 2009, the bankruptcy court found that no person named Lili Lin had ever loaned the debtor money in exchange for the disputed deed of trust, and that the loan was a fiction created by the debtor in an attempt to preserve the debtor's equity in his house. Acting pursuant to its authority under § 105(a), the court granted the trustee's motion to "surcharge" the debtor's entire homestead exemption, thereby making those funds available to offset the trustee's excess of $500,000 in legal fees. The Ninth Circuit Bankruptcy Appellate Panel affirmed.[62] The Bankruptcy Appellate Panel decision was affirmed by the Ninth Circuit, which found that the surcharge was proper because it was designed to compensate the estate for the cost of the litigation and warranted to protect the bankruptcy process.[63]

In reaching its holding, the Supreme Court noted that § 105(a) does not allow the bankruptcy court to issue orders that contradict specific sections of the Bankruptcy Code.[64] The Court stated that even though

60. *Id.* at 1193.
61. *Id.*
62. *Id.*
63. *Id.* at 1194.
64. *Id.* at 1194-95.

§ 105(a) grants the bankruptcy court authority to carry out provisions of the Code, it may not do so by taking action that is specifically prohibited elsewhere in the Code.[65] Thus, the Court concluded that the bankruptcy court's surcharge was unauthorized because it directly contravened 11 U.S.C. § 522(b)(3)(A),[66] which allowed the debtor to exempt $75,000 of equity in his home, and 11 U.S.C. § 522(k),[67] which made the exempted property unavailable "'for payment of any administrative expense.'"[68] The Court explained that even though the exemption statute specifically lists acts that would permit denying the exemption, it does not allow denying the exemption based on the specific fraud committed in this case.[69] Thus, the surcharge was not permitted under the Bankruptcy Code.[70]

C. *Health Savings Accounts*

Section 522(b) permits a state to opt out of the Bankruptcy Code's exemption statute and limit debtors to those exemptions specifically listed in the state's exemption statute.[71] Georgia has chosen to opt out, and for debtors residing in Georgia, section 44-13-100(a) of the Official Code of Georgia (O.C.G.A.)[72] contains the applicable exemptions.[73] In the case of *In re Mooney*,[74] the Bankruptcy Court for the Middle District of Georgia determined whether a debtor may exempt funds in a health savings account (HSA) from her bankruptcy estate.[75] HSAs were created as part of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003,[76] and "provide a tax-advantaged vehicle for payment of medical expenses by individuals with high-deductible health insurance plans."[77] Specifically, the court was asked to decide whether a HSA qualified as a payment on "account of illness" within the

65. *Id.* at 1194.
66. 11 U.S.C. § 522(b)(3)(A) (2012).
67. 11 U.S.C. § 522(k) (2012).
68. *Law*, 134 S. Ct. at 1195 (quoting 11 U.S.C. § 522(k)).
69. *Id.* at 1196.
70. *Id.* Although the trustee did not object to the debtor's exemption, it appears the Supreme Court would have reached the same result even if the trustee had timely objected.
71. 11 U.S.C. § 522(b).
72. O.C.G.A. § 44-13-100(a).
73. *Id.*
74. 503 B.R. 916 (2014).
75. *Id.* at 918.
76. Pub. L. No. 108-173, 117 Stat. 2066 (2003).
77. *In re Mooney*, 503 B.R. at 918.

scope of O.C.G.A. § 44-13-100(a)(2)(C) and (E), which allows a debtor to exempt such payments.[78]

The debtor filed a Chapter 7 petition on June 27, 2013. On Schedule B, the debtor listed a HSA valued at $17,570.93. On Schedule C, she claimed the full value of the HSA as exempt, and the Trustee objected.[79] The debtor argued that her HSA was exemptible under O.C.G.A. § 44-13-100(a)(2)(C) and (E), which provide an exemption for a debtor's right to "[a] disability, illness, or unemployment benefit,"[80] or "[a] payment under a pension, annuity, or similar plan or contract on account of illness . . . ."[81] According to the debtor, Congress intended to create a health and illness benefit when it authorized HSAs such that HSAs fell within the ordinary meaning of the term "illness benefit."[82] The court disagreed, and concluded that "[b]ecause the HSA is not a substitute for wages, it is not the type of illness benefit or right to receive payment on account of illness contemplated by O.C.G.A. § 44-13-100(a)(2)(C) and (E)."[83]

The court reasoned that "[b]ased on the ordinary definitions of illness and benefit, an HSA can be described as a benefit in that it is a 'useful aid' or 'advantage' for saving for medical expenses. However, that benefit or right to payment is not limited to 'unhealthy conditions.'"[84] The court noted that "[q]ualified medical expenses include expenses 'for the the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body.'"[85] In addition, the court explained that the Georgia Supreme Court's decision in *Silliman v. Cassell*,[86] established a narrow definition of payments on account of illness and illness benefits, which required such payments to be a "substitute[] for wages" in order to be exempt.[87] Accordingly, since there was nothing about the debtor's HSA to suggest it was intended as a substitute for wages, the court concluded that it was not the type of illness benefit or right to receive payment exemptible under O.C.G.A. § 44-13-100(a)(2)(C) and § 44-13-100(a)(2)(E).[88]

78. *Id.* at 918-19.
79. *Id.* at 917.
80. *Id.* at 918 (quoting O.C.G.A. § 44-13-100(a)(2)(C)).
81. *Id.* (quoting O.C.G.A § 44-13-100(a)(2)(E)).
82. *Id.* at 918-19.
83. *Id.* at 922.
84. *Id.* at 919.
85. *Id.* (quoting 26 U.S.C. § 213(d)(1)(A) (2012)).
86. 292 Ga. 464, 738 S.E.2d 606 (2013).
87. *In re Mooney*, 503 B.R. at 919 (quoting *Cassell*, 292 Ga. at 468, 738 S.E.2d at __).
88. *Id.* at 922.

IV. PROFESSIONALS

Having attorney fees paid through a Chapter 13 plan is a common occurrence in bankruptcy practice.[89] However, in the Eleventh Circuit, filing an "attorney-fee-centric" plan may result in a denial of confirmation.[90] In *Brown v. Gore (In re Brown)*,[91] the Eleventh Circuit affirmed a decision of the United States Bankruptcy Court for the Northern District of Alabama denying confirmation of a Chapter 13 plan that was designed primarily to finance the payment of the debtor's attorney fees.[92] The bankruptcy court found that the debtor filed his Chapter 13 case for the sole purpose of paying his attorney in installments and thus failed to satisfy 11 U.S.C. § 1325(a)(3)[93] and 11 U.S.C. § 1325(a)(7),[94] which both require that a bankruptcy petition is filed in good faith.[95]

The facts of *In re Brown* are simple. The debtor, Lerin Brown, filed a Chapter 13 petition and his schedules showed he had a total monthly income of $1364, and total monthly expenses of $1214. This left him with monthly net discretionary income of $150. Brown's schedules listed no real property and no non-exempt personal property, not even a vehicle. Brown's schedules listed a total of $16,203 owed to ten different creditors, all of which held unsecured, nonpriority claims. Brown proposed a thirty-six month long plan, which called for monthly payments of $150, for a total of $5400. From this total Brown would pay: (1) $2000 in attorney fees; (2) $281 court filing fee; (3) $50 for credit counseling; (4) $20 for a credit report; and (5) 4.5 percent of each $150 payment as the Chapter 13 trustee's commission. Accordingly, the plan proposed to pay $2806 to unsecured creditors, or approximately seventeen percent of the total unsecured debt.[96] The plan also "proposed to pay all attorney's fees and administrative expenses before any distributions to" unsecured creditors.[97] Thus, the creditors would have to wait almost seventeen months before receiving their first payment. Only three creditors, totaling $1,355.08, ended up filing claims.

89. *See, e.g.*, Brown v. Gore (*In re* Brown), 742 F.3d 1309, 1310 (11th Cir. 2014).
90. *See id.* at 1314-15.
91. *Id.* at 1309.
92. *Id.* at 1314-15.
93. 11 U.S.C. § 1325(a)(3) (2012).
94. 11 U.S.C. § 1325(a)(7) (2012).
95. *See id.* § 1325(a)(3).
96. *In re Brown*, 742 F.3d at 1310, 1311.
97. *Id.* at 1311.

Therefore, Brown's plan would pay more in attorney fees than it would to unsecured creditors.[98]

The trustee objected to confirmation on the grounds that the plan was not proposed in good faith and that it did not appear that the debtor would be able to comply with the plan. At the confirmation hearing, the bankruptcy court determined that the only reason Brown filed a Chapter 13 case, instead of a Chapter 7 case, was so that he could pay his attorney fees in installments through a Chapter 13 plan. In light of that finding, the bankruptcy court concluded that the petition and plan had not been proposed in good faith. Accordingly, the bankruptcy court orally dismissed the case.[99]

Following the oral dismissal the bankruptcy court entered a written order, wherein it went into great detail explaining its decision to dismiss for lack of good faith.[100] In its order, the bankruptcy court analyzed the proposed plan against the factors outlined in *In re Kitchens*[101] for determining good faith.[102] The Eleventh Circuit determined that the bankruptcy court did not clearly err in its determination that the debtor's motivation in seeking Chapter 13 relief was not to preserve assets and adjust debts, but was to finance his attorney fees.[103] The court noted that the debtor was the ideal candidate for Chapter 7, in that he had no non-exempt assets and no vehicle or home to preserve.[104] The court found that the debtor's plan was all about paying attorney fees and was not in his own best interest or the creditors'.[105] The court went on to explain that had the bankruptcy court affirmed the plan, there would have been nothing preventing the debtor from paying his first seventeen payments, thereby paying his attorney in full and then converting his case to a Chapter 7.[106] Such a scenario would allow the debtor to circumvent the Supreme Court's holding in *Lamie v. United States Trustee*,[107] that attorney fees cannot be paid out of estate funds in a Chapter 7 case unless the attorney is engaged by the trustee with court approval.[108]

98. *Id.*
99. *Id.* at 1311, 1312-13.
100. *Id.* at 1313.
101. 702 F.2d 885 (11th Cir. 1983).
102. *In re Brown*, 742 F.3d at 1313.
103. *Id.* at 1317-18.
104. *Id.* at 1317.
105. *Id.* at 1318.
106. *Id.*
107. 540 U.S. 526 (2004).
108. *In re Brown*, 742 F.3d at 1318.

Although the Eleventh Circuit affirmed the bankruptcy court's dismissal, it was careful to explain that its holding applied to the facts before it and that it was making no opinion as to other attorney-fee-centric Chapter 13 plans.[109] In doing so the Court stated, "There is no hard and fast rule to be applied. Each case has its own special circumstances, and Chapter 13 requires a case-by-case analysis by the fact-finder."[110] So, while the attorney-fee-centric plan was not filed in good faith in *In re Brown* that does not mean an attorney-fee-centric case will not be allowed under different circumstances.[111]

V. BANKRUPTCY APPEALS

In the case of *Atkinson v. Ernie Haire Ford, Inc. (In re Ernie Haire Ford, Inc.)*,[112] the Eleventh Circuit was faced with an issue of first impression–whether the "person aggrieved" standard for appealing a bankruptcy court order is satisfied when the sole interest allegedly harmed by that order is the interest in avoiding liability from an adversary proceeding.[113] The court held such an interest does not satisfy the person aggrieved standard.[114] In doing so the court also adopted the rule followed in many other circuits: for a person to be sufficiently "aggrieved," the interest that person seeks to defend on appeal must be one that is protected by the Bankruptcy Code.[115]

In *In re Ernie Haire Ford, Inc.*, the debtor's confirmed Chapter 11 plan called for, among other things, a liquidating agent who was empowered to sue third parties on behalf of the estate. The plan also called for a litigation bar date, after which the plan provided that the court may enjoin pursuit of any claim barred by the plan. In 2011, well after the litigation bar date, the liquidating agent brought an adversary proceeding against the defendant, Benjamin Atkinson, a former employee of the debtor. Atkinson moved to enjoin the agent from the proceeding pursuant to the terms of the plan. In response, the debtor filed a motion to modify the plan to allow for litigation against Atkinson.[116] The bankruptcy court granted the motion to modify because it found that the plan had not been substantially consummated as "the Debtor still

---

109. *Id.* at 1319.
110. *Id.*
111. *See id.*
112. 764 F.3d 1321 (11th Cir. 2014).
113. *Id.* at 1325-26.
114. *Id.*
115. *Id.* at 1326 (noting that the Second, Sixth, and Seventh Circuits have each issued similar rulings).
116. *Id.* at 1323-24.

controlled a number of assets . . . that were required to be sold under the [plan]."[117] On appeal, the district court affirmed the bankruptcy court's decision.[118]

The Eleventh Circuit had previously adopted the person aggrieved standard for bankruptcy appeals, which limits the right to appeal a bankruptcy court order to only "'those parties having a direct and substantial interest in the question being appealed.'"[119] An aggrieved person is one that is "'directly, adversely, and peculiarly affect[ed]' by a bankruptcy court's order."[120] Such is the case when the bankruptcy court's order "diminishes their property, increases their burdens, or impairs their rights."[121] In *In re Ernie Haire Ford, Inc.*, the court held "that a party is not aggrieved, for the purposes of appealing from a bankruptcy court order, when the only interest allegedly harmed by that order is the interest in avoiding liability from an adversary proceeding."[122] The court explained that orders allowing litigation to go forward do not burden a party's ability to defend against liability, but merely require parties to exercise that ability.[123] Thus, such an order does not diminish property or burden a party's rights.[124]

The court went on to hold that for a person to be aggrieved, the interest sought to be vindicated on appeal must be one that is protected or regulated by the Bankruptcy Code.[125] Atkinson argued that he met this standard because he had suffered a direct harm in that the bankruptcy court's order deprived him of a defense to the litigation–the litigation bar date.[126] The court was unpersuaded and explained that even if Atkins had suffered a direct harm, he still did not meet the aggrieved person standard because his interest was not protected or regulated by the bankruptcy code.[127] The interest he sought to protect–the litigation bar date defense–originated in the reorganization

---

117. *Id.* at 1324.

118. *Id.*

119. *Id.* at 1325 (quoting Westwood Cmty. Two Ass'n v. Barbee (*In re* Westwood Cmty. Two Ass'n), 293 F.3d 1332, 1335 (11th Cir. 2002)) (internal quotation marks omitted).

120. *Id.* (quoting *In re Westwood Cmty. Two Ass'n*, 293 F.3d at 1336) (alteration in original).

121. *Id.* (quoting *In re Westwood Cmty. Two Ass'n*, 293 F.3d at 1358).

122. *Id.* at 1325-26.

123. *Id.* at 1326.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 1327.

plan, not the Bankruptcy Code.[128] Thus, Atkins did not meet the aggrieved person standard.[129]

VI. CONSUMER ISSUES

A. *Lien Stripping*

1. Chapter 20. In prior years this Article has discussed a debtor's ability to "strip off" a wholly unsecured lien in the context of a Chapter 20 case,[130] and noted that bankruptcy courts in the Eleventh Circuit were split over whether the Bankruptcy Code permits such action.[131] During the survey period, the Eleventh Circuit decided the case of *Wells Fargo Bank v. Scantling (In re Scantling)*,[132] where the court held that a Chapter 13 debtor, who is statutorily ineligible for a discharge, may nevertheless strip off a wholly unsecured lien on his principal residence.[133] In doing so, the court put to rest the issue of whether lien stripping is possible in a Chapter 20 case.

The facts of *In re Scantling* were straightforward. The debtor filed a Chapter 13 case within one year of receiving a Chapter 7 discharge. As part of the Chapter 13 case, the debtor sought to strip off Wells Fargo's second and third liens on her residence. The bankruptcy court accepted the valuation of $118,000 for the residence. This amount was less than the amount of the first lien, which was also held by Wells Fargo. Thus, Wells Fargo was wholly unsecured as to the second and third liens.[134]

The bankruptcy court concluded that under 11 U.S.C. § 506[135] the debtor could strip off the junior liens.[136] The Eleventh Circuit agreed.[137] The court reasoned that because the junior liens were wholly unsecured, they could be modified under 11 U.S.C. § 1322(b),[138] thereby allowing a bankruptcy court to strip off the liens.[139] In its opinion, the Eleventh Circuit noted that prior to the Bankruptcy Abuse

---

128. *Id.*
129. *Id.*
130. A Chapter 13 case filed soon after receiving a Chapter 7 discharge.
131. James D. Walker, Jr., Amber Nickell & Tim Colletti, *Bankruptcy, Eleventh Circuit Survey*, 64 MERCER L. REV. 849, 863 (2013).
132. 754 F.3d 1323 (11th Cir. 2014).
133. *Id.* at 1325.
134. *Id.*
135. 11 U.S.C. § 506 (2012).
136. *In re Scantling*, 754 F.3d at 1325.
137. *Id.* at 1330.
138. 11 U.S.C. § 1322(b) (2012).
139. *In re Scantling*, 754 F.3d at 1329-30.

Prevention and Consumer Protection Act of 2005 (BAPCPA),[140] a debtor in a so called Chapter 20 was eligible for a discharge and was typically able to strip off a valueless lien.[141] The court explained that lien stripping is a two-step process.[142] First, the property is valued pursuant to § 506(a).[143] Then, if the property is valueless, the creditor's rights may be modified pursuant to § 1322(b)(2).[144] However, the court stated that the above approach was "not without limitations," and went on to examine the Supreme Court's decision in *Nobleman v. American Savings Bank*,[145] which held that a Chapter 13 debtor could not strip off a mortgage lien on a residence where there was at least some equity in the property.[146]

Next, the court turned to Congress's enactment of the BAPCPA and analyzed the interplay between § 506 and § 1322(b), following the enactment of the BAPCPA.[147] Under the BAPCPA a debtor who files a Chapter 13 case within two years of receiving a Chapter 7 discharge is not eligible for a discharge in her Chapter 13 case.[148] Wells Fargo argued the language of § 1325(a)(5), which provides that a holder of a secured claim retains the lien until either the debt is paid in full or the debtor receives a discharge, requires lien stripping to be premised upon a debtor's discharge.[149] The court did not agree.[150] The court reasoned that nothing in the BAPCPA amended § 506 or § 1322(b)(2), and therefore "the analysis permitting lien-stripping in Chapter 20 cases is no different than that in any other Chapter 13 case."[151] Accordingly, § 1325(a)(5) is not involved, and the debtor's eligibility for a discharge is irrelevant to a strip off in a Chapter 20 case.[152] The court found that its ruling was in line with the majority of courts to consider the issue, including the Fourth Circuit, and *Tanner v. First Plus Financial, Inc. (In re Tanner)*;[153] a previous Eleventh Circuit decision.[154]

---

140. Pub. L. No. 109-8, 119 Stat. 23 (2005).
141. *In re Scantling*, 754 F.3d at 1326.
142. *Id.*
143. *Id.*
144. *Id.*
145. 508 U.S. 324 (1993).
146. *In re Scantling*, 754 F.3d at 1326-27.
147. *Id.* at 1327-28.
148. *Id.*
149. *Id.* at 1328.
150. *Id.* at 1330.
151. *Id.* at 1329 (quoting Branigan v. Davis (*In re* Davis), 716 F.3d 331, 338 (4th Cir. 2013)).
152. *Id.* at 1329-30.
153. Tanner v. FirstPlus Fin., Inc. (*In re* Tanner), 217 F.3d 1357 (11th Cir. 2000).
154. *In re Scantling*, 754 F.3d at 1328-29.

2. Abandoned Property. Does a bankruptcy court have authority to strip off a wholly unsecured lien even if the trustee has abandoned the property to which the lien attaches? In the Southern District of Florida the answer may depend on the judge. In *La Paz at Boca Pointe Phase II Condominium Ass'n v. Bandy*,[155] the District Court for the Southern District of Florida held that abandonment removes property, for the purposes of lien stripping, from the jurisdiction of the bankruptcy court.[156] Therefore, a bankruptcy court lacks the authority to strip off an unsecured lien once the property is abandoned.[157] In doing so, the court reversed a bankruptcy court decision, which allowed the debtor to strip off a wholly unsecured junior lien even though the Chapter 7 trustee had abandoned the property.[158] However, in *In re Bodensiek*,[159] which was decided after *Bandy*, the Bankruptcy Court for the Southern District of Florida held that a court "may grant a motion to value and strip liens under section 506 without regard to whether the collateral was, or might be, abandoned by the estate."[160]

Section 506(a) of the Bankruptcy Code allows for the bifurcation of claims when the value of the property subject to a lien is less than the value of the claim.[161] After bifurcation, a claim is secured to the extent of the value of the collateral (or equity), and is unsecured for any amount remaining.[162] The argument against permitting lien stripping on abandoned property focuses on the language of § 506(a), which allows bifurcation only where collateral is "property in which the estate has an interest."[163] Thus, the argument goes, there can be no bifurcation under § 506(a) because the bankruptcy estate retains no interest in abandoned property.[164] In *Bandy*, the court relied heavily on *In re Dewsnup*,[165] a Tenth Circuit decision.[166] In that case the Tenth Circuit reasoned that the issue was simply a matter of statutory construction, ruling that "abandoned property is not property in which

155. 523 B.R. 267 (S.D. Fla. 2014).
156. *Id.* at 272.
157. *Id.*
158. *Id.* at 268 (discussing the holding of the bankruptcy court).
159. 522 B.R. 737 (S.D. Fla. 2015).
160. *Id.* at 741.
161. 11 U.S.C. § 506(a).
162. *In re Bodensiek*, 522 B.R. at 738.
163. 11 U.S.C. § 506(a).
164. *Bandy*, 523 B.R. at 271.
165. 908 F.2d 588 (10th Cir. 1990).
166. *Bandy*, 523 B.R. at 270-71.

the estate has an interest," and therefore "section 506(a) does not apply."[167] The ruling in *In re Dewsnup* was affirmed by the United States Supreme Court.[168] However, the Supreme Court did not address the jurisdictional issue.[169] Instead, the Supreme Court's decision focused on another issue and ultimately held that the "strip down" of a lien was impermissible.[170] The court in *Bandy* agreed with the Tenth Circuit, and found that its rationale was bolstered by the Supreme Court's affirmance of *In re Dewsnup* in *Dewsnup v. Timm*,[171] notwithstanding that the Supreme Court did not address the jurisdictional issue in its decision.[172] It also found that the Eleventh Circuit's holding in *In re McNeal* was not applicable because in that case the court did not address abandonment, and it did not address jurisdiction in the context of abandonment.[173]

Unlike the district court in *Bandy*, the bankruptcy court in *In re Bodensiek* disagreed with the Tenth Circuit's decision in *In re Dewsnup*.[174] Rather, it interpreted § 506(a) to be effective as of "the petition date and not some later date when the court considers a motion to value" the collateral.[175] Under this reading of the statute, because the estate has an interest in the property on the petition date, the unsecured junior lien can be stripped off regardless of whether the property is later abandoned.[176] This interpretation is in line with *Gaglia v. First Federal Savings & Loan Ass'n*,[177] a Third Circuit decision.[178] In *Gaglia*, which was decided prior to *Dewsnup*, the Third Circuit explicitly permitted lien stripping on abandoned property.[179]

---

167. *In re Dewsnup*, 908 F.2d at 591.
168. Dewsnup v. Timm, 502 U.S. 410, 420 (1992).
169. *Id.* at 416-17.
170. *Id.* at 417.
171. *Id.* at 410.
172. *Bandy*, 523 B.R. at 272 (stating that even though the Supreme Court did not address the jurisdictional issue, it affirmed the Tenth Circuit's decision "which was partially premised upon jurisdictional grounds").
173. *Id.* at 272.
174. *In re Bodensiek*, 522 B.R. at 739, 740. It is worth mentioning that, while a district court decision can be persuasive, it is not binding on a bankruptcy court if there is more than one district judge within the district. *See In re Barakat*, 173 B.R. 672, 678 (C.D. Cal. 1994) (discussing the doctrine of *stare decisis* and explaining that "in a district with more than one district judge, the appellate ruling by a district judge is only binding on the case in which it is made and not on the district as a whole unless the district judges themselves sit en banc and therefore bind themselves to the law enunciated in that opinion").
175. *In re Bodensiek*, 522 B.R. at 740.
176. *Id.* at 740-41.
177. 889 F.2d 1304 (3d Cir. 1989).
178. *Id.* at 1307.
179. *See id.*

Moreover, the court's decision in *In re Bodensiek* is supported by Justice Scalia's dissent in *Dewsup*, where he specifically addressed the jurisdictional issue of whether § 506 applies to abandoned property.[180] The court in *In re Bodensiek* quoted Justice Scalia when he explained that

> The fallacy in this is the assumption that the application of § 506(a) (and hence § 506(d)) can be undone if and when the estate ceases to "have an interest" in property in which it "had an interest" at the outset of the bankruptcy proceeding. The text does not read that way. Section 506 automatically operates upon all property in which the estate has an interest at the time the bankruptcy petition is filed. Once § 506(a)'s grant of [secured-creditor] rights, and § 506(d)'s elimination of the right to "underwater" liens and liens securing unallowed claims have occurred, they cannot be undone by later abandonment of the property.[181]

In a further deviation from the district court's decision in *Bandy*, the bankruptcy court found that *McNeal* was applicable in abandoned property cases, and therefore lien stripping was permissible.[182]

B. Claims

In the case of *Crawford v. LVNV Funding, LLC*,[183] the Eleventh Circuit was presented with the issue of whether the Fair Debt Collection Practices Act (FDCPA)[184] is violated when filing a proof of claim for a debt that is unenforceable due to the expiration of the applicable statute of limitations.[185] The court answered the question in the affirmative.[186] LVNV Funding has now filed a petition for a writ of certiorari to the Supreme Court.[187] Similar claims are pending in our court, so no further comment can be made at this time.

---

180. *Dewsnup*, 502 U.S. at 431.
181. 522 B.R. at 739 (quoting *Dewsnup*, 502 U.S. at 431).
182. *Id.* at 741.
183. 758 F.3d 1254 (11th Cir. 2014).
184. 15 U.S.C. §§ 1692–1692p (2012).
185. *Crawford*, 758 F.3d at 1256-57.
186. *Id.* at 1257.
187. *See* SUPREME COURT OF THE UNITED STATES, www.supremecourt.gov/search.aspx?filename=/docketfiles/14-858.htm (last visited May 12, 2015) (noting the petition for a writ of certiorari was filed January 2015)).

VII. AVOIDANCE

According to 11 U.S.C. § 548(a)(1),[188] a trustee can avoid any transfers made within two years of the bankruptcy filing if the trustee can show that the debtor received less than the reasonable equivalent value for the transfer and was insolvent at the time of the transfer.[189] 11 U.S.C. § 550(a)(1)[190] allows a trustee to then recover the value of any transfer voided under § 548 from the initial transferee of such transfer.[191] Read literally, § 550 allows the trustee to recover the value of the property avoided under § 548 from the first person to receive it, regardless of the circumstances.[192] However, there are exceptions to a trustee's ability to recover from a transferee that would otherwise meet the requirements of § 550(a)(1)–one such exception is the "mere conduit" exception.[193]

In the case of *Menotte v. United States (In re Custom Contractors, LLC)*[194] a bankruptcy trustee sought to recover estimated income tax payments by the debtor to the Internal Revenue Service (IRS) on behalf of its principal. The IRS argued, among other things, that it qualified as a mere conduit and therefore was not an initial transferee under § 550.[195]

In 2006, Brian Denson formed Custom Contracting, LLC, as a single-member limited liability company and structured it as a S corporation. As a S corporation, the company did not pay corporate, income tax. Instead, profits earned by the corporation were "passed through" to Denson, who then paid taxes on the income earned by the company. In 2007 and 2008, Custom Contracting, LLC paid Denson's estimated tax payments and listed the payments as a distribution to Denson. However, Custom Contracting, LLC operated at a loss in 2008, meaning Denson had no tax liability for that year and entitling him to a refund of the estimated tax payments. The IRS refunded the payment to Denson, but he never returned the money to Custom Contracting, LLC.[196]

188. 11 U.S.C. § 548(a)(1) (2012).
189. *Id.*
190. 11 U.S.C. § 550(a)(1) (2012).
191. *Id.*
192. *See id.*
193. *See* Menotte v. United States (*In re* Custom Contractors, LLC), 745 F.3d 1342, 1349 (11th Cir. 2014).
194. 745 F.3d 1342 (11th Cir. 2014).
195. *Id.* at 1344, 1349.
196. *Id.* at 1345.

In 2009, Custom Contracting, LLC filed a Chapter 7 petition in the United States Bankruptcy Court for the Southern District of Florida, and the trustee brought an adversary proceeding against the IRS seeking to recover eight payments from Custom Contracting, LLC to the IRS, including the 2008 payments. The bankruptcy court agreed with the trustee and found that the debtor was insolvent at the time of the 2008 payment and that the IRS qualified as an initial transferee under § 550(a)(1). The district court reversed the ruling, finding the IRS was simply acting as an intermediary, and was thus not an initial transferee.[197] On appeal, the Eleventh Circuit Court of Appeals affirmed the district court and held that, under the circumstances of the 2008 transfer, the IRS fell under the mere conduit exception and therefore did not qualify as an initial transferee.[198]

To meet the mere conduit exception a defendant must show "(1) that they did not have control over the assets received, i.e., that they merely served as a conduit for the assets that were under the actual control of the debtor-transferor *and* (2) that they acted in good faith and as an innocent participant in the fraudulent transfer."[199] In *In re Custom Contractors*, the parties agreed that the good faith prong of the test had been met. Thus, the question for the court was whether the IRS satisfied the control prong.[200]

In the Eleventh Circuit, the extent of the transferee's control over the transferred property is crucial in determining whether recovery is permitted under § 550.[201] The court is to view the transaction as a whole and "consider both the initial recipient's legal rights to the funds at issue as well as any existing obligations."[202] For example, where a bank receives deposits, courts have held that the bank does not qualify as an initial transferee because even though the bank may use the funds for loans, its "obligations owed to the transferor–namely to return the funds upon request–are sufficiently important" that courts do not hold the bank liable as an initial transferee in spite of significant control of the funds.[203]

In this particular case, the court concluded that the IRS qualified as a conduit for the refunded tax payments.[204] In doing so, the court

197. *Id.* at 1345-46.
198. *Id.* at 1352, 1353.
199. *Id.* at 1349-50 (quoting Martinez v. Hutton (*In re* Harwell), 628 F.3d 1312, 1323 (2010) (alteration in original) (internal quotation marks omitted)).
200. *Id.* at 1350.
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.* at 1352.

compared the IRS's role in the transfer to that of a bank receiving deposits.[205] The court reasoned that because Denson never actually owed taxes for 2008, the IRS held the payments "subject to the looming possibility" that it would be required to refund the funds to Denson.[206] Thus, the IRS's contingent obligation to refund the payments to Denson was essentially the same as a bank's obligation to return a depositors funds.[207]

The trustee also argued that she could avoid the transfers under § 544(b)(1) because the transfers were voidable under state law.[208] To counter, the IRS argued that the trustee's claim did not fall within the scope of 11 U.S.C. § 106(a),[209] which provides waiver of sovereign immunity.[210] According to the IRS, the trustee could not satisfy the actual creditor requirement of § 544(b)(1) because sovereign immunity would bar any creditors from suing the IRS in state court.[211] The court declined to rule on this issue because it found the debtor was not insolvent prior to 2008, and thus, the transfers were not avoidable under state law.[212] However, the court did note that courts were split on that particular issue, with several bankruptcy courts holding that § 106(a)'s abrogation of sovereign immunity allows the trustee to proceed with a § 544(b)(1) claim without showing the existence of an actual creditor who could avoid the transfer under state law.[213] On the other hand, the Seventh Circuit Court of Appeals has held that "§ 106(a)(1) does not displace the actual-creditor requirement in § 544(b)(1)."[214]

VIII. CONCLUSION

Issues relevant to consumer debtors were the most noticeable trend among this year's cases, and it is difficult to say what 2015 will bring.

---

205. *Id.* at 1352-53.
206. *Id.* at 1351.
207. *Id.*
208. *Id.* at 1346-47.
209. 11 U.S.C. § 106(a) (2012).
210. *In re Custom Contractors, LLC*, 745 F.3d at 1347.
211. *Id.*
212. *Id.* at 1348.
213. *See, e.g.*, VMI Liquidating Trust Dated December 16, 2011 v. United States (*In re* Valley Mortg., Inc.), No. 10–19101–SBB, 2013 Bankr. LEXIS 4025, at *12 (D. Colo. Sept. 18, 2013); Zazzali v. Swenson (*In re* DBSI, Inc.), No. 08–12687(PJW), 2011 Bankr. LEXIS 791, at *11-12 (D. Del. Feb. 11, 2011); Furr v. United States Dep't of Treasury (*In re* Pharmacy Distrib. Servs., Inc.), 455 B.R. 817, 820–21 (S.D. Fla. (2011); Tolz v. United States (*In re* Brandon Overseas, Inc.), No. 08–11035–BKC–RBR, 2010 Bankr. LEXIS 2326, at *9-10 (S.D. Fla. July 16, 2010); Liebersohn v. IRS (*In re* C.F. Foods, L.P.), 265 B.R. 71, 85–86 (E.D. Pa. (2001).
214. *In re* Equip. Acquisition Res., Inc., 742 F.3d 743, 744 (7th Cir. 2014).

But, looking forward, 2015 promises to be another exciting year for bankruptcy developments.