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Bankruptcy

The Honorable John T. Laney, III*

Victoria Barbino Grantham**

Following the pandemic-related drop in bankruptcy filings during 2020,[1] bankruptcy filings for both individuals and corporations continued to decline in 2021.[2] Experts disagree about the cause of the decrease of filings during a period many believed would see a windfall.[3] Some cite government stimulus programs for both individuals,[4] and corporations,[5] others low-lending rates which allowed companies to

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1. For a discussion on opinions from 2020 that impacted bankruptcy law, see the Honorable John T. Laney, III & Victoria Barbino Grantham, *Bankruptcy, 2020 Eleventh Circuit Survey*, 72 MERCER L. REV. 1029 (2021).

2. Andrew Keshner, *Bankruptcy Filings Fell in 2021, But Post-COVID 'shadow debt' May Spell Trouble*, MARKETWATCH, https://www.marketwatch.com/story/bankruptcy-filings-fell-in-2021-but-will-post-covid-shadow-debt-spell-trouble-for-americans-11623781507 (last updated Jun. 19, 2021).

3. Hon. Charles Clevert, Jr., et al., *Bankruptcy Matters: The New Pandemic Wave is Coming*, JAMS ADR INSIGHTS (Dec. 14, 2021), https://www.jamsadr.com/blog/2021/bankruptcy-matters-the-new-pandemic-wave-is-coming.

4. Andrew Keshner, *'2022 Could Be the Year of Financial Reckoning': Bankruptcies Fell Dramatically in 2021, But These Challenges Await*, MARKETWATCH, https://www.marketwatch.com/story/2022-could-be-the-year-of-financial-reckoning-bankruptcy-cases-fell-dramatically-in-2021-but-new-challenges-await-11641296556 (last updated Jan. 8, 2022).

5. Alex Wolf, *Corporate Bankruptcy Wave Turns to Dust, Defying Expectations*, BLOOMBERG LAW (Jan. 5, 2022), https://www.bloomberglaw.com/bloomberglawnews/bankruptcy-law/X4N7TF5G000000?bna_news_filter=bankruptcy-law#jcite.

access capital more freely,[6] and some believe court closures and backlogs have discouraged parties from formal judicial restructuring.[7] No matter the cause, all experts expect filings to increase in 2022.[8]

The United States Court of Appeals for the Eleventh Circuit issued several notable published bankruptcy opinions this year.[9] Along with a brief analysis of the most consequential opinions in the bankruptcy realm, this Article will include a brief legislative update about the COVID-19 Bankruptcy Relief Extension Act of 2021.[10]

I. NOTABLE CASES

A. In re Hazan*: The Doctrine of Equitable Mootness*

The equitable mootness doctrine is unique to bankruptcy proceedings. At its core, it is the decision by the court that unraveling an estate after a confirmed plan is implausible.[11] Courts decide whether it would be inequitable to the parties in the bankruptcy case to allow an appeal of the confirmation of a bankruptcy plan or to "moot" the appeal for the sake of the disposition of the estate and its creditors.[12] Typically, courts invoke the doctrine in rare circumstances where an appeal of a final order goes to the heart of the confirmed plan and would displace the agreed upon reorganization or asset distribution.[13]

The doctrine is not without its critics.[14] While all circuits have adopted the doctrine in some respect, some courts have attempted to

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6. Lauren Coleman-Lochner, *Wait, What Happened to All Those Corporate Bankruptcies?*, BLOOMBERG BUSINESSWEEK (Jan. 6, 2022), https://www.bloomberg.com/news/articles/2022-01-06/why-bankruptcies-filed-in-2021-dropped-and-why-2022-could-be-different.

7. Clevert, Jr., *supra* note 3.

8. *Id.*

9. Reynolds v. Behrman Capital IV, L.P., 988 F.3d 1314 (11th Cir. 2021); Cutuli v. Elie (In re Cutuli), 13 F.4th 1342 (11th Cir. 2021). These cases are bankruptcy opinions published by the Eleventh Circuit this year; however, they are not covered in this Survey.

10. Pub. L. No. 117–5, § 1, 135 Stat. 249 (2021).

11. RICHARD LEVIN & HENRY J. SOMMER, 7 COLLIER ON BANKRUPTCY ¶ 1129.09 (16th ed. 2021).

12. LEVIN & SOMMER, *supra* note 11.

13. *Id.*

14. *See, e.g.*, Daniel Gill, *Courts Overuse 'Equitable Mootness' to Avoid Bankruptcy Appeals*, BLOOMBERG LAW, (Aug. 5, 2021), https://www.bloomberglaw.com/bloomberglawnews/bankruptcy-law/X3J4K2S4000000?bna_news_filter=bankruptcy-law#jcite; Robert Miller, *Equitable Mootness: Ignorance is Bliss and Unconstitutional*, 107 KY. L.J. 269 (2018).

limit the doctrine to the most complex reorganizations.[15] Yet, the Supreme Court of the United States has never issued a decision discussing the doctrine of equitable mootness or its bounds. On October 12, 2021, the Supreme Court denied certiorari to review a United States Court of Appeals for the Third Circuit case decided under the doctrine of equitable mootness.[16]

On September 1, 2021, the Eleventh Circuit published *In re Hazan*,[17] an opinion discussing its standard of equitable mootness.[18] The case began when Ms. Hazan purchased a property financed by NLG, LLC (NLG) and defaulted on her purchase money promissory note. Judge Robert N. Scola of the Eleventh Judicial Circuit of Florida in Miami-Dade County entered a judgment for NLG for roughly $1.6 million plus interest. In 2011, NLG sued to foreclose on the mortgage in the same court but was denied as NLG had already pursued and succeeded in receiving monetary damages for the breach. NLG appealed.[19]

During the litigation concerning Ms. Hazan's mortgage, 9197-5904 Quebec, Inc. (Quebec) obtained an unrelated $5 million judgment against NLG.[20] Selective Advisors Group (Selective) acquired Quebec's judgment against NLG, and NLG's rights and claims against Hazan were assigned to Selective to satisfy the judgment.[21]

NLG won the appeal concerning Ms. Hazan's mortgage.[22] On remand, the court entered a foreclosure judgment in favor of NLG for over $4.8 million and set the property for sale. One day before the foreclosure, Ms. Hazan filed a Chapter 11 bankruptcy case. NLG filed a proof of claim for the foreclosure judgment of $4.8 million. Selective filed an adversary proceeding which Ms. Hazan joined. Selective and Ms. Hazan requested the court determine the rights of Selective, Ms. Hazan, and NLG, claiming NLG had no claim against Ms. Hazan or the property because Selective was assigned all of NLG's rights and claims. At the time, Ms. Hazan had exercised her right of redemption to redeem the property. The bankruptcy court found NLG had no remaining rights in the property or claims against the estate, and NLG should be

15. LEVIN & SOMMER, *supra* note 11, at ¶ 1129.09 (citing One2One Commc'ns, LLC v. Quad/Graphics, Inc., 805 F.3d 428 (3d Cir. 2015); Tribune Media Co. v. Aurelius Cap. Mgmt., L.P., 799 F.3d 272, 288–89 (3d Cir. 2015), *cert. denied*, 136 S. Ct. 1459 (2016)).

16. In re Nuverra Env't Sols., 834 F. App'x 729 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 337 (2021).

17. 10 F.4th 1244 (11th Cir. 2021).

18. *Id.* at 1247.

19. *Id.*

20. *Id.*

21. *Id.* at 1247–48.

22. *Id.* at 1248.

credited $4.8 million towards the satisfaction of the Quebec judgment. NLG appealed.[23]

The bankruptcy court held a confirmation hearing on Ms. Hazan's plan on May 30, 2018, with all other creditors with objections satisfied, withdrawn, or settled.[24] NLG advised the court it had an appeal pending with the district court but confirmed there was no stay in place pending appeal.[25] The bankruptcy court warned NLG that if the plan was confirmed and substantially consummated, it could "moot out the appeal."[26] NLG raised no objection to confirmation and did not seek a stay. The bankruptcy court entered its order approving Ms. Hazan's plan on June 11, 2018, and Ms. Hazan began making payments. On August 8, 2018, NLG moved for stay pending appeal, which was denied. NLG appealed to the district court claiming the bankruptcy court violated the Rooker-Feldman doctrine and requested a stay pending appeal. The district court affirmed the bankruptcy court, and NLG appealed to the Eleventh Circuit.[27]

The Eleventh Circuit first addressed NLG's contention that the bankruptcy court violated the Rooker-Feldman doctrine in the adversary proceeding determining NLG's rights.[28] The Rooker-Feldman doctrine prevents parties that have lost in state court from a *de facto* appellate review by claiming the state judgment violates the losing party's federal rights.[29] The court quickly disposed of NLG's argument, highlighting that Selective was not a party in the state court proceedings and the adversary proceeding did not aim to overturn the state court judgments, but to determine the rights of the parties at that time in light of the state court judgments.[30]

The Eleventh Circuit then addressed whether NLG's appeal was properly dismissed for equitable mootness.[31] NLG claimed that equitable mootness only applies in large corporate bankruptcies, and not individual bankruptcies, and added that no transactions would have to be rescinded if the bankruptcy court's judgment was reversed.[32]

23. *Id.* at 1248–49.
24. *Id.* at 1249.
25. *Id.*
26. *Id.*
27. *Id.* at 1249–50.
28. *Id.* at 1250.
29. *Id.* (citing D.C. Ct. of Appeals v. Feldman, 460 U.S. 462, 482 (1983); Rooker v. Fid. Tr. Co., 263 U.S. 413, 416 (1923)).
30. *Id.* at 1250–51.
31. *Id.* at 1251.
32. *Id.*

The court first reiterated its standard of equitable mootness, stating the "doctrine provides that reviewing courts will, under certain circumstances, reject bankruptcy appeals if rulings have gone into effect and would be extremely burdensome, especially to non-parties, to undo."[33] The court added that bankruptcy plans are products of negotiations between parties and to allow an appeal of the plan would assign different rights than those for which the parties negotiated.[34]

The court then enumerated some factors courts should consider when dismissing an appeal for equitable mootness including "whether the appellant has obtained a stay pending appeal, whether the plan has been substantially consummated, and whether third parties' rights or the debtor's ability to successfully reorganize would be adversely affected by granting the relief sought by the appellant."[35] The court added "whether a stay is in place and whether the plan has been substantially consummated are especially important."[36] The court then addressed whether the dismissal of NLG's appeal was appropriate considering these factors.[37]

The court looked first as to whether a stay was in place pending appeal.[38] The court noted that NLG not only failed to move for a stay pending appeal, but NLG's counsel confirmed there was no stay and the bankruptcy court warned NLG that having no stay could moot its appeal.[39] NLG asked for a stay for the first time two months after the plan had been confirmed and moved again for a stay after the appeal was filed.[40] The Eleventh Circuit ruled that NLG's delays were "unreasonable."[41]

The court then looked to whether the plan had been "substantially consummated."[42] Substantial consummation is defined in 11 U.S.C. § 1101(2)[43] as the:

> (A) [T]ransfer of all or substantially all of the property proposed by the plan to be transferred;

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33. *Id.* at 1252 (citing Bennett v. Jefferson Cnty., 899 F.3d 1240, 1247 (11th Cir. 2018)).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 1253.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. 11 U.S.C. § 1101(2) (1978).

> (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and
>
> (C) commencement of distribution under the plan.[44]

While NLG claimed that "no property was transferred[,]" the court reiterated the district court's findings that prepetition property of the estate revested in Ms. Hazan and she assumed management and distribution of the property.[45] The Eleventh Circuit stated these facts demonstrated Ms. Hazan's plan had been substantially consummated.[46]

The court finally considered the adverse effect to third parties and the debtor's fresh start if the appeal was granted.[47] The court disfavored how the plan would have to be reorganized and how reorganization could affect the plan's funding and the equity cushion for at least one creditor, but ultimately emphasized that the appeal could "deprive" the parties that had consented to the plan and supported its confirmation, "the bargain to which they consented."[48] After addressing these three factors, the court affirmed the district court's dismissal of NLG's appeal under the doctrine of equitable mootness.[49]

Importantly, this case highlights the Eleventh Circuit's test for equitable mootness. Unlike some of its sister circuits that focus on the complexity of the transaction,[50] it seems the Eleventh Circuit primarily examines whether the party appealing had the opportunity to prevent the consequences of substantial consummation. As the Supreme Court continues to stay silent on the doctrine, it is important for practitioners in this Circuit to be aware of the court's considerations in these cases.

B. Suvicmon and In re Le Centre: The Standards for Post-Discharge Nominal Suits

In *Suvicmon Development, Inc. v. Morrison*,[51] the Eleventh Circuit found the discharge injunction for a Chapter 7 debtor prevented judgment creditors from bringing a related fraudulent transfer claim

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44. *Id.*
45. *In re Hazan*, 10 F.4th at 1253.
46. *Id.*
47. *Id.* at 1253–54.
48. *Id.* at 1254.
49. *Id.*
50. *See, e.g.*, *One2One Commc'ns, LLC*, 805 F.3d at 436; *In re Sneed Shipbuilding, Inc.*, 916 F.3d 405, 409 (5th Cir. 2019).
51. 991 F.3d 1213 (11th Cir. 2021).

against the debtor post-discharge.[52] In 2006, three creditors sued the debtor, Mr. Morrison, in Alabama state court for common law fraud and violations under the Alabama Securities Act, later adding a claim for fraudulent transfer under the Alabama Uniform Fraudulent Transfer Act. The creditors stated Mr. Morrison was transferring assets to his sons to siphon assets away from his creditors.[53]

Mr. Morrison filed Chapter 7 bankruptcy in August 2018.[54] The creditors successfully moved to lift the automatic stay to proceed with their state court case, but the court stayed the execution of any judgment; the judgment creditors also initiated an adversary proceeding against Mr. Morrison claiming their state court claims were non-dischargeable. In December 2019, the bankruptcy court entered Mr. Morrison's discharge order while the adversary proceeding was pending.[55]

In Alabama state court, a jury found in favor of the creditors under the Alabama Securities Act and common law fraud and awarded them just under $1.2 million, but the creditors were unsuccessful in their fraudulent transfer claims.[56] The bankruptcy court granted summary judgment to the creditors, finding the judgment obtained under the Alabama Securities Act was exempted from discharge under section 523(a) (19).[57] The creditors also filed a motion to proceed with an appeal and prosecution of the fraudulent transfer claims, claiming the discharge order did not prevent the creditors from pursuing their claims. The bankruptcy court ruled against the creditors, stating the discharge injunction barred the creditors' appeal. The district court affirmed. The creditors appealed to the Eleventh Circuit.[58]

The plaintiffs made two arguments to the Eleventh Circuit (1) the fraudulent transfer suit was not subject to the discharge injunction, and (2) the creditors could proceed normally against Mr. Morrison.[59] The Eleventh Circuit rejected both arguments and affirmed the bankruptcy court.[60]

First, the Eleventh Circuit addressed the plaintiff's argument that the fraudulent transfer suit was not subject to the discharge

52. *Id.* at 1218.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*; *see* 11 U.S.C. § 523(a)(19) (2019).
58. *Suvicmon*, 991 F.3d at 1218–19.
59. *Id.* at 1219.
60. *Id.*

injunction.[61] The plaintiffs claimed, because Mr. Morrison transferred the assets to his sons to avoid their collection from the non-dischargeable securities claim, the fraudulent transfer claim was merely a collection action for the non-dischargeable action and the discharge injunction did not apply.[62] The court held that a fraudulent transfer is a distinct cause of action and not merely a collection action.[63] A collection action, the court stated, does not require "any allegation of wrongdoing," but is merely an execution on the property of a debtor.[64] A fraudulent transfer claim requires proof of wrongdoing and the court chooses the appropriate remedy which could then require its own execution action.[65] The court held that while the fraudulent transfers may have occurred as a result of the securities-fraud case, "the fraudulent transfer claim gives rise to a debt that is distinct from the . . . securities-fraud judgment[], and a finding that the underlying debt is non-dischargeable does not mean that the debt arising from the fraudulent transfer is non-dischargeable."[66]

The court then addressed whether the creditors could proceed nominally against Mr. Morrison to recover from his sons.[67] The court revisited its ruling in *In re Jet Florida Systems, Inc.*,[68] to interpret its requirements of when an aggrieved party can proceed nominally against a debtor after discharge.[69] The court held that *In re Jet Florida* imposes two requirements: first, the suit cannot legally proceed without a debtor to recover from the third party and second, the debtor will not be economically burdened defending the suit.[70] The court also determined the standard of review of cases decided under *In re Jet Florida* is whether the bankruptcy court abused its discretion in not allowing the suit to proceed with the debtor as a party.[71]

The court ultimately held the bankruptcy court did not abuse its discretion in denying the creditors' motion.[72] First, the court held the

61. *Id.* at 1219–20.
62. *Id.* at 1220.
63. *Id.*
64. *Id.* at 1221.
65. *Id.* at 1222.
66. *Id.* at 1221.
67. *Id.* at 1222.
68. 883 F.2d 970 (11th Cir. 1989).
69. *Suvicmon*, 991 F.3d at 1222–23.
70. *Id.* at 1223.
71. *Id.* at 1225.
72. *Id.*

creditors could recover from the sons without Mr. Morrison as a party.[73] The court held, under Alabama law, a grantor is not a necessary party in a fraudulent transfer action, and even if Mr. Morrison would be a convenient party for purposes of discovery, that does not make him a legally necessary party.[74] The court also held the suit would economically burden Mr. Morrison because he would have to pay for his own defense of the action.[75] Therefore, the creditors did not meet the requirements under *In re Jet Florida* and the Eleventh Circuit affirmed the district court's decision.[76]

In the second case, *In re Le Centre on Fourth, LLC*,[77] the Eleventh Circuit held an aggrieved party could not proceed nominally against third parties after confirmation of a plan that released those third parties from liability.[78] Mr. Jackson was a guest at a hotel on Le Centre on Fourth's property when the hotel's valet driver struck and injured him. Mr. Jackson and his wife (the Jacksons) sued the valet driver and his company in Kentucky state court and added Le Centre on Fourth, LLC (Le Centre), Al J. Schneider Company Inc. (AJS), a parent of Le Centre, and Le Centre on Fourth Master Tenant, LLC (Master Tenant), the lessee of the property. Before Le Centre was added to Mr. Jacksons' complaint, it filed for Chapter 11 bankruptcy. The bankruptcy court lifted the stay as to the Jacksons on the premise that the plaintiffs would pursue only Le Centre's liability insurance related to the property on which Mr. Jackson was injured.[79]

While the Jacksons' lawsuit continued in Kentucky state court, Le Centre added the Jacksons to their list of creditors and filed its First Amended Disclosure Statement.[80] The Jacksons received the First Amended Disclosure Statement which included a notice to read the disclosure statement and Plan in their entirety before voting on the Plan's acceptance.[81] Within the disclosure statement was a provision that any person that voted for the Plan or abstained from voting "fully, completely, unconditionally, irrevocably, and forever release[d] the Released Parties."[82] Released Parties also received a discharge

73. *Id.* at 1226.
74. *Id.*
75. *Id.*
76. *Id.* at 1227.
77. 17 F.4th 1326 (11th Cir. 2021).
78. *Id.* at 1326.
79. *Id.* at 1328–30.
80. *Id.* at 1330.
81. *Id.* at 1330–31.
82. *Id.* at 1331.

injunction.[83] The term "Released Parties" was not a defined term in the Plan.[84] The Plan also added a release to "individuals and entities which are affiliates of the current members and managers of the Debtor."[85]

The Plan was set for confirmation.[86] Le Centre filed a Second Amended Disclosure Statement and a Second Amended Plan which included the same language about third parties. The hearing date for the Plan along with Le Centre's amended filings were sent to the attorneys for the Jacksons.[87]

On the day of the confirmation hearing, Le Centre filed a Third Amended Plan that made a small adjustment to one clause in its Plan unrelated to the Jacksons.[88] The court confirmed the Plan, noting the releases were integral to plan confirmation and Le Centre's reorganization. The Jacksons neither appeared at the hearing nor objected to confirmation at any point.[89]

Once Le Centre's Plan was confirmed, Le Centre, AJS, and Master Tenant sought dismissal of Jackson's claims in Kentucky state court, arguing the Plan and discharge injunction barred the suit from continuing.[90] The Jacksons argued they were suing the entities in a nominal capacity to reach their insurance; however, upon learning that AJS did not carry liability insurance at the time, Jackson moved to bring direct suit against AJS. The Jacksons also argued the notice they received did not comply with Rule 2002 and thus was insufficient. The bankruptcy court denied the Jacksons' motion and ruled that the Jacksons could not proceed nominally against the Released Parties because it would interfere with the implementation of the Plan. The Jacksons appealed, and the district court affirmed. The Jacksons appealed to the Eleventh Circuit.[91]

First, the court addressed the Jacksons' Rule 2002 argument.[92] Where a plan "provides for an injunction against conduct not otherwise enjoined under the Code," Federal Rule of Bankruptcy Procedure 2002 requires additional notice to parties.[93] That notice must include "in

83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at 1332.
91. *Id.* at 1332–33.
92. *Id.* at 1334.
93. FED. R. BANKR. P. 2002 (c)(3) (2020).

conspicuous language" that the plan includes an additional injunction, a brief description of the injunction, and the entities subject to the injunction.[94] The court held that, while the Jacksons did not receive notice in the form contemplated by Rule 2002, the Jacksons did have actual notice of the bankruptcy plan's provisions.[95] The court then looked to *United Student Aid Funds, Inc. v. Espinosa*,[96] a Supreme Court case that held actual notice satisfies the procedural notice required by the Bankruptcy Rules regarding adversary proceedings.[97] The Eleventh Circuit stated that since the Jacksons received all the information required by Rule 2002, even if not in the form contemplated by Rule 2002, they had actual notice of the injunction.[98] Therefore, the Eleventh Circuit held that the Jacksons' argument was unpersuasive.[99]

The court then addressed the Jacksons' contention that, even if the injunction was valid, the Jacksons could still continue with their nominal claims against AJS and Master Tenant.[100] The Eleventh Circuit upheld the bankruptcy court's exercise of its power under section 105(a) to release the third parties from liability to aid the debtor's reorganization.[101]

The court also upheld the bankruptcy court's decision to deny modifying the injunction under section 524(e).[102] The court said that the same reasoning for the prohibition against denying injunction modifications for discharged debtors should apply to third parties released by a debtor's plan.[103] Reiterating its reasoning in *Suvicmon*, the Eleventh Circuit stated the Jacksons' nominal claims must meet two requirements to continue against a post-discharge released party-first, that the released party is legally indispensable for the party to recover, and second, the debtor would not be economically burdened by the maintenance of the suit.[104] The court ruled that, under Kentucky law, Master Tenant was a legally indispensable party; however, the court held, because Le Centre had agreed to indemnify Master Tenant for premise liability actions, attorneys' fees, and litigation costs, Le

94. *Id.*
95. *In re Le Centre*, 17 F.4th at 1335.
96. 559 U.S. 260 (2010).
97. *Id.* at 272.
98. *In re Le Centre*, 17 F.4th at 1336.
99. *Id.*
100. *Id.* at 1337.
101. *Id.*
102. *Id.*
103. *Id.* at 1337–38.
104. *Id.* at 1338.

Centre could be economically burdened by the suit.[105] Therefore, the court held that the bankruptcy court did not abuse its discretion by preventing the nominal claims from proceeding.[106]

Third-party liability releases have drawn attention nationally, including in the bankruptcy cases of the Purdue Pharma,[107] Boys Scouts of America,[108] and USA Gymnastics.[109] Eleventh Circuit practitioners should be aware of the Eleventh Circuit's standard for allowing third-party discharges and their scope to understand their effect when plans containing them are confirmed. Furthermore, none of those parties objected to discharge before litigating the effect of a discharge injunction.[110] Counsel's careful review of all plans and pleadings before confirmation and understanding the scope of the discharge can better position clients pre-discharge rather than having to litigate the effect of post-discharge injunctions.

C. In re Harris: Collateral Estoppel of State Court Claims in Federal Court

In the case of *In re Harris*,[111] the Eleventh Circuit concluded the elements found in a Florida state court fraud judgment were not sufficiently similar to 11 U.S.C. § 523(a)(2)(A)[112] for purposes of collateral estoppel.[113] In 2008, Kevin Harris promised James Jayo a 15% annual return if he invested in his two companies. Mr. Jayo invested more than $600,000 over five years and allowed Mr. Harris to purchase over $300,000 of inventory on his credit card.[114]

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105. *Id.* at 1338–39.

106. *Id.* at 1339.

107. Brian Mann, *The DOJ Moves to Block the Purdue Pharma Bankruptcy Deal That Shields the Sacklers*, NPR (Sep. 16, 2021), https://www.npr.org/2021/09/16/1037806819/opioids-purdue-pharma-sackler-settlement-bankruptcy-deal.

108. Soma Biswas, *Boy Scouts Fall Short of Desired Vote on $2.7 Billion Abuse Settlement*, WSJ (Jan. 5, 2022), https://www.wsj.com/articles/boy-scouts-fall-short-of-desired-vote-on-2-7-billion-abuse-settlement-11641364299.

109. Samantha Horton, *Indiana Joins Others in Objecting to USA Gymnastics Settlement Plan*, WFYI (Dec. 6, 2021), https://www.wfyi.org/news/articles/indiana-joins-others-in-objecting-to-usa-gymnastics-settlement-plan.

110. *Suvicmon*, 991 F.3d at 1218–19; *In re Le Centre*, 17 F.4th at 1332.

111. 3 F.4th 1339 (11th Cir. 2021).

112. 11 U.S.C. § 523(a)(2)(A) (2019).

113. *In re Harris*, 3 F.4th at 1342.

114. *Id.*

By 2015, Mr. Jayo had only recovered $60,000.[115] Mr. Jayo sued Mr. Harris in Florida state court under several theories of tortious conduct, including fraudulent misrepresentation, negligent misrepresentation, investment fraud under Florida's fraudulent investment statute, and conspiracy to defraud. Mr. Harris answered the complaint, but because the Florida state court found Mr. Harris lied to the court about a heart attack when requesting additional time to respond, the court struck his answer and entered a $1.8 million default judgment against him. The order of default and default judgment did not specify which theories supported Mr. Jayo's recovery.[116]

Mr. Harris filed Chapter 7 bankruptcy and Mr. Jayo filed an adversary proceeding claiming that the debt from the state court default judgment was non-dischargeable under section 523(a)(2)(A).[117] The bankruptcy court found that the debt was non-dischargeable because, by entering the default judgment, the state court found all Mr. Jayo's allegations to be true. Mr. Harris appealed, and the district court affirmed, holding the default judgment established fraud and the debt was non-dischargeable under section 523(a)(2)(A).[118] Both the bankruptcy court and the district court relied on *In re Bush*,[119] where the Eleventh Circuit held a default judgment as a sanction entered in the bankruptcy court was fully litigated and therefore had a preclusive effect.[120] In that case, the court reiterated that typically default judgments do not have a preclusive effect but did except default judgments entered as a sanction for parties that had participated in the litigation from that general rule.[121]

The Eleventh Circuit held that the bankruptcy court and district court "misplaced" their reliance in *In re Bush*.[122] While the issues were seemingly identical, the Eleventh Circuit noted the default judgment in *In re Bush* was entered in federal court, and this case was a state law case.[123] Therefore, Florida preclusion law, not federal preclusion law, applied.[124]

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115. *Id.* at 1342–43.
116. *Id.* at 1343.
117. *Id.*
118. *Id.*
119. Bush v. Balfour Beatty Bahamas (In re Bush), 62 F.3d 1319 (11th Cir. 1995).
120. *Id.* at 1324–25.
121. *Id.*
122. *In re Harris*, 3 F.4th at 1344.
123. *Id.*
124. *Id.*

Florida collateral estoppel requires "the parties and issues be identical, and that the particular matter be fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction."[125] The court noted that some Florida cases add a "critical and necessary" element but determined that the court need not address the additional element unless the other two elements are met.[126]

The court held collateral estoppel did not apply because "each of the claims that could have satisfied the requirements of § 523(a)(2)(A) contained alternative factual allegations that did not do so."[127] Because the state court did not specify on what grounds the default judgment afforded Mr. Jayo relief, the court stated it must satisfy all potential grounds of relief on which the default judgment could have been based.[128]

Section 523(a)(2)(A) requires "(1) that Mr. Harris used false pretenses, or made a false representation, or committed actual fraud; (2) that he relied on Mr. Harris' conduct; (3) that his reliance was justified; and (4) that Mr. Harris' conduct caused [the] loss."[129] The court added that false pretense and false representation under section 523(a)(2)(A) require that Mr. Harris' conduct must have been intentionally and knowingly fraudulent.[130]

The court held the fraudulent representation claim did not satisfy section 523(a)(2)(A) because Mr. Jayo alleged that Mr. Harris "knew *or should have known* the representations were false."[131] Under Florida law, an individual can be found liable for fraudulent representation if he ought to have known the representation was false, in contrast with section 523(a)(2)(A), which requires actual knowledge.[132] Therefore, the state court could have granted the default judgment on the grounds that Mr. Harris ought to have known the representation was false which would be sufficient for Florida state law liability, but insufficient for section 523(a)(2)(A) liability. Because the court could have granted the default motion on either of Mr. Jayo's theories of liability, the scienter requirements were not identical and collateral estoppel did not

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125. *Id.* at 1345 (quoting Dadeland Depot, Inc. v. St. Paul Fire and Marine Ins. Co., 945 So. 2d 1216, 1235 (Fla. 2006)).

126. *Id.*

127. *Id.* at 1347–48.

128. *Id.* at 1348–49.

129. *Id.* at 1344.

130. *Id.* at 1345.

131. *Id.* at 1349.

132. *Id.*

apply.[133] The court held Mr. Jayo's state court claims for negligent misrepresentation, investment fraud, and conspiracy to defraud were similarly dissimilar to the requirements of section 523(a)(2)(A) and collateral estoppel did not apply.[134]

In addressing default judgments, the court set the standard in *In re Harris* that, if a default judgment does not include the underlying theory of recovery, all theories of recovery in the underlying suit must be identical to the non-dischargeability action for the court to accept a collateral estoppel argument. Because state court judgments are often the impetus for entities declaring bankruptcy, an awareness of this standard is crucial for practitioners.

D. In re Gaime: A Cautionary Tale of a Backfiring Legal Strategy

The Eleventh Circuit in *In re Gaime*,[135] held that the bankruptcy court did not abuse its discretion in refusing to lift the stay for State Farm to intervene in a wrongful death action. [136] The facts of the case are horrific: Kristina Gaime killed one of her sons and tried to kill herself and her other son by running her car in a closed garage. At the time, she had automobile and homeowner's insurance with State Farm. Gaime was sued by her sons' father, her deceased son's estate, and her surviving son, collectively the Rotells, for wrongful death and bodily injury. State Farm provided Gaime an attorney, but simultaneously filed a declaratory judgment action contending that State Farm had no duty to defend or indemnify Gaime because her policies did not cover her actions.[137]

While the declaratory judgment action was pending, the Rotells offered to settle with Gaime.[138] Gaime allegedly wished to accept the settlement because she would avoid future liability, but the State Farm-employed lawyer rejected it. After rejecting the offer, State Farm received a declaratory judgment in their favor that they had no duty to defend or indemnify Gaime and State Farm withdrew from the case. Gaime failed to respond to the Rotells' amended complaint in the wrongful death action and the court entered a default judgment. A jury awarded the Rotells close to $505 million.[139]

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133. *Id.*
134. *Id.* at 1350–51.
135. 17 F.4th 1349 (11th Cir. 2021).
136. *Id.* at 1351.
137. *Id.* at 1351–52.
138. *Id.* at 1352.
139. *Id.*

Knowing Gaime was insolvent, the Rotells filed an involuntary Chapter 7 case to recover from Gaime.[140] Gaime did not contest the case, and her estate was subjected to the control of the trustee. Gaime had no other liabilities other than the verdict and no assets other than a bad faith and malpractice claim against State Farm for rejecting the settlement while its declaratory judgment was pending.[141]

The Chapter 7 trustee sued State Farm for bad faith for rejecting the settlement, so State Farm moved to intervene and moved to vacate the judgment against Gaime.[142] To intervene, however, State Farm had to obtain relief from the automatic stay because the stay does not allow "the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the [bankruptcy] case."[143] The bankruptcy court denied State Farm's motion for relief from the stay, and the district court affirmed. State Farm appealed to the Eleventh Circuit.[144]

On appeal, State Farm argued that section 362(a) did not apply to its motion to intervene, and that, if it did, it violates the Due Process Clause, and the bankruptcy court procedurally erred in denying the lifting of the stay.[145] The Eleventh Circuit disagreed.[146] First, the court addressed State Farm's argument that section 362(a) did not apply to its motion to intervene.[147] The court held that intervening would continue the action and the action was already commenced before the bankruptcy petition.[148] Therefore, it fell squarely under section 362(a).[149]

Then the court addressed State Farm's argument that denying State Farm's motion to intervene deprives it of due process because it has the right to challenge the wrongful death action against Gaime.[150] State Farm argued that it must be allowed to intervene because there was no other forum in which it could contest the wrongful death judgment.[151]

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140. *Id.*
141. *Id.*
142. *Id.*
143. 11 U.S.C. § 362(a)(1) (2020).
144. *In re Gaime*, 17 F.4th at 1352.
145. *Id.* at 1352–53.
146. *Id.* at 1353.
147. *Id.* at 1353–54.
148. *Id.* at 1353.
149. *Id.* at 1353–54.
150. *Id.* at 1354.
151. *Id.*

Specifically, State Farm contended that it should be able to continue in the forum of the bankruptcy court because a Florida state court ruled that State Farm lacked "standing" to challenge the default judgment against Gaime.[152] The court reiterated that due process is merely the opportunity to be heard and noted State Farm had two chances to be heard when it voluntarily withdrew from the wrongful death action and when it litigated the bad-faith lawsuit in state court.[153]

Finally, the court held the bankruptcy court erred procedurally when it placed the burden on State Farm to show cause of lifting the stay rather than on the trustee to demonstrate why it should not be lifted.[154] However, the court held the error was harmless because the trustee also demonstrated that there was "no cause" to lift the stay.[155] The Eleventh Circuit upheld the bankruptcy court's view that State Farm wanted to intervene to relitigate the judgment and the burdens outweighed the benefits of doing so.[156]

This case illustrates the importance of considering the ethical ramifications of client representation when determining a litigation strategy. Cautionary tales of parties not ensuring that a client's best interest is at the forefront of a litigation strategy should signal to practitioners the importance of ethical representation in the legal profession.

II. LEGISLATIVE UPDATE: THE COVID-19 BANKRUPTCY RELIEF EXTENSION ACT OF 2021

While public policy often affects insolvency, the only directly relevant news from 2021 was the enaction of the "COVID-19 Bankruptcy Relief Extension Act of 2021" (COVID Relief Extension Act).[157] The Coronavirus Aid, Relief, and Economic Security Act (the CARES Act),[158] passed in early 2020, included provisions which increased the debt limit for Subchapter V, Chapter 11 cases, excluded some aid payments from a debtor's disposable income, and allowed modifications to Chapter 13 plans if a debtor was experiencing hardship related to COVID-19.[159]

152. *Id.*

153. *Id.*

154. *Id.* at 1355.

155. *Id.*

156. *Id.*

157. 135 Stat. at 249.

158. Pub. L. No. 116–136, 134 Stat. 281 (2020).

159. George Basharis & Kevin Checkett, *Understanding the Impact of the CARES Act on Bankruptcy*, MISSOURI LAWYERS WEEKLY (Aug. 7, 2020), https://www.stretto.com/wp-

The COVID Relief Extension Act extended the aid payment exclusions and debt limit provisions to March 27, 2022.[160] The CARES Act only allowed COVID-19 hardship modifications for Chapter 13 plans confirmed before March 27, 2020, but the COVID Relief Extension Act conferred that right to Chapter 13 plans confirmed after that date as well.[161]

content/uploads/2021/01/Understanding-the-Impact-of-the-CARES-Act-on-Bankruptcy.pdf.

160. 135 Stat. at 249.

161. 134 Stat. at 311; 135 Stat. at 249.