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Bankruptcy

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Bankruptcy

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I. INTRODUCTION

No one topic dominated bankruptcy cases arising in the Eleventh Circuit in 2004, but several developments took center stage. First, judicial estoppel re-emerged as a tool used to prevent a windfall to the debtor when the trustee is the real party in interest.[1] Second, any benefit accruing to debtors after last year's Supreme Court decision[2] on state sovereign immunity may have been effectively eliminated by a recent circuit court decision.[3] Third, student loan creditors endeavored to eviscerate the last remnants of the undue hardship discharge by invoking the availability of the income contingent repayment plan.[4] This Article addresses these and other recent developments in bankruptcy law. Where applicable, the Article also points out changes resulting from the recent enactment of bankruptcy reform.

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1. *See* Parker v. Wendy's Int'l, Inc., 365 F.3d 1268, 1271-72 (11th Cir. 2004); *In re* Upshur, 317 B.R. 446, 454 (Bankr. N.D. Ga. 2004); *In re* Huggins, 305 B.R. 63, 67 (Bankr. N.D. Ala. 2003).

2. Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440 (2004).

3. Ga. Higher Educ. Assistance Corp. v. Crow, 394 F.3d 918 (11th Cir. 2004).

4. *See* McLaney v. Ky. Higher Educ. Assistance Auth., 314 B.R. 228 (Bankr. M.D. Ala. 2004); Educ. Credit Mgt. Corp. v. Boykin, 313 B.R. 516 (M.D. Ga. 2004); Nanton-Marie v. United States Dep't of Educ., 303 B.R. 228 (Bankr. S.D. Fla. 2003).

II. PROCEDURE

A. Judicial Estoppel

In *Parker v. Wendy's International, Inc.*[5] the court of appeals advanced the seemingly straightforward rule that inconsistent positions asserted by a debtor in two different proceedings cannot be the basis of a judicial estoppel defense against the Chapter 7 trustee.[6] However, judicial estoppel may be effective against the trustee when the nonbankruptcy recovery exceeds the total amount of claims, costs, and fees in the Chapter 7 case.[7] In *Parker* the court of appeals acknowledged this "unlikely scenario" and stated that "perhaps judicial estoppel could be invoked by the defendant to limit any recovery to only that amount and prevent an undeserved windfall from devolving on the non-disclosing debtor."[8]

In two cases[9] in which the debtor or trustee sought to reopen the bankruptcy to assert a previously undisclosed cause of action, the courts faced the issue of whether the trustee's recovery should be limited.[10] In *In re Huggins*,[11] the bankruptcy court reopened the case but limited the trustee's authority to recover to no more than "the amount of the proofs of claim filed in this case, reasonable attorney fees and reasonable expenses . . . ."[12] In contrast, the court in *In re Upshur*[13] declined to make any findings relating to the judicial estoppel defense. Instead, the court limited its decision to the issue of reopening the bankruptcy case.[14] All questions relating to judicial estoppel—including, presumably, any limitation on the amount of recovery—were for the nonbankruptcy court to decide.[15]

As these cases demonstrate, the circuit court's "unlikely scenario" is not so unlikely. The cases also show some disagreement among

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5. 365 F.3d 1268 (11th Cir. 2004).

6. *Id.* at 1271-72. For an overview of judicial estoppel in the bankruptcy context, see Hon. James D. Walker, Jr. & Amber Nickell, *Bankruptcy*, 55 MERCER L. REV. 1101, 1104-08 (2004).

7. *See Parker*, 365 F.3d at 1273 n.4.

8. *Id.*

9. *In re* Upshur, 317 B.R. 446 (Bankr. N.D. Ga. 2004); *In re* Huggins, 305 B.R. 63 (Bankr. N.D. Ala. 2003).

10. *Id.*

11. 305 B.R. 63 (Bankr. N.D. Ala. 2003).

12. *Id.* at 67.

13. 317 B.R. 446 (Bankr. N.D. Ga. 2004).

14. *Id.* at 454.

15. *Id.* at 454 n.5.

bankruptcy judges about the role of the bankruptcy court in the judicial estoppel analysis.

B. *Sovereign Immunity*

Last year, in *Tennessee Student Assistance Corp. v. Hood*,[16] the Supreme Court held that sovereign immunity cannot be raised as a defense to the discharge of student loans because such a proceeding is not a suit within the meaning of the Eleventh Amendment.[17] Instead, the bankruptcy court's power to discharge such a debt derives from its *in rem* jurisdiction over property of the estate.[18] As it turns out, the decision in *Hood* may represent an empty victory for debtors. According to the court of appeals, while a bankruptcy court may discharge an obligation owed to the state, a bankruptcy court may not be able to enforce that discharge against the state.[19]

In *Georgia Higher Education Assistance Corp. v. Crow (In re Crow)*,[20] debtors filed an adversary proceeding to determine if their student loans were dischargeable. The complaint included a request for sanctions for the state's violation of the automatic stay. The issue was whether state sovereign immunity under the Eleventh Amendment precluded such sanctions.[21] The court said, "[b]ecause count two seeks affirmative relief from the state through a coercive judicial process, the bankruptcy court's jurisdiction over it is premised on the persona of the state, not on the res of the debtor's property."[22] Thus, the state could raise sovereign immunity as a defense. However, the defense is only valid if Congress's attempt to abrogate sovereign immunity pursuant to § 106(a) of the Bankruptcy Code[23] was ineffective.[24] The court, following the majority of circuits, concluded that Congress has no authority to abrogate state sovereign immunity in bankruptcy proceedings pursuant to either Article I[25] or the Fourteenth Amendment.[26] Consequently, the court ruled that the debtors' request for sanctions based on a stay violation must be dismissed.[27]

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16. 124 S. Ct. 1905 (2004).
17. *Id.* at 1906; U.S. CONST. amend. XI.
18. *Hood*, 124 S. Ct. at 1906.
19. *Id.* at 1911 n.4.
20. 394 F.3d 918 (11th Cir. 2004).
21. *Id.* at 921.
22. *Id.* (citations omitted).
23. 11 U.S.C. § 106(a) (2000).
24. *Crow*, 394 F.3d at 921.
25. U.S. CONST. art. I.
26. *Crow*, 394 F.3d at 921-24; U.S. CONST. amend. XIV.
27. *Crow*, 394 F.3d at 924.

Although *Crow* dealt with a stay violation, the same result will likely follow from a violation of the discharge injunction. Once the discharge is entered, no property of the estate exists on which to base *in rem* jurisdiction. Thus, any efforts to enforce the injunction would be based on *in personam* jurisdiction. Under *Crow* sovereign immunity bars such jurisdiction.[28] Thus, while a bankruptcy court can rely on *Hood* to discharge a debt owed to the state, *Crow* prevents any effective enforcement of that discharge.

C. *Venue*

According to the decision in *Swinney v. Turner*,[29] a bankruptcy court lacks the authority to retain a case filed in an improper venue.[30] The debtors in *Swinney* lived in the Middle District of Alabama but filed their bankruptcy case in the Middle District of Georgia because the Georgia bankruptcy court was significantly closer to their home. They acknowledged the improper venue on their bankruptcy petition. The bankruptcy court transferred the case on the motion of the trustee and the debtors appealed, contending that the court could retain the case for the convenience of the parties.[31]

The district court examined three provisions of the Judicial Code[32] relating to bankruptcy in determining that the court has no discretion to retain a case filed in an improper venue.[33] Under 28 U.S.C. § 1408,[34] venue is proper in the district where the debtor is domiciled.[35] Under 28 U.S.C. § 1412,[36] a district court may transfer a case to a different venue "in the interest of justice or for the convenience of the parties."[37] Under 28 U.S.C. § 1406(a),[38] the district court "shall" dismiss or transfer a case filed in an improper venue.[39] Based on these provisions, while a court may transfer a case filed in the proper venue on convenience grounds, "no current statutory provision authorizes a court to *retain* a case in an improper venue for the convenience of the

28. *Id.* at 921.
29. 309 B.R. 638 (Bankr. M.D. Ga. 2004).
30. *Id.* at 641.
31. *Id.* at 639-40.
32. 28 U.S.C. §§ 1406(a), 1408, 1412 (2000).
33. *Swinney*, 309 B.R. at 640.
34. 28 U.S.C. § 1408 (2000).
35. *Id.*
36. 28 U.S.C. § 1412 (2000).
37. *Id.*
38. 28 U.S.C. § 1406(a) (2000).
39. *Id.*

parties."[40] In fact, a provision of the Judicial Code that had allowed such retention was repealed.[41]

Debtors argued that this scheme, which would allow them to file in Alabama and then have the case transferred to Georgia, but would not allow them to file in Georgia, "makes no sense."[42] While the court acknowledged that the plain language of the statutes "could lead to curious (and some may suggest unjust) results," the court implicitly rejected the assertion that the results were sufficiently absurd to allow the court to look beyond the statutory text for an alternative interpretation.[43] Instead, any "perceived problem" must be remedied by Congress rather than by the courts.[44]

III. DEBTOR PROTECTIONS

In *In re Shell*,[45] the court determined that Chapter 7 debtors' attorneys who are paid via postdated checks risk running afoul of the automatic stay and the discharge injunction.[46] In *Shell* the debtor's attorney accepted, but did not negotiate, payment for his fees via checks from the debtor that were dated after the date when the bankruptcy petition was filed.[47] One circuit court has approved the use of postdated checks to pay Chapter 7 attorney fees under the doctrine of necessity.[48] However, in this case, the court followed the majority in holding that any effort to collect attorney fees post-discharge would violate the discharge injunction because the attorney fees arise pre-petition and any effort to collect the attorney fees post-petition violates the automatic stay.[49] Thus, to be paid in full, the Chapter 7 debtor's attorney must receive all payments—meaning checks must be negotiated—prior to the date of filing.[50] Nevertheless, the court was sympathetic to the practical problems this procedure creates and urged Congress to implement a better system for the payment of Chapter 7 debtors' attorneys.[51]

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40. *Swinney*, 309 B.R. at 640.
41. *Id.* at 641 n.2. *See* 28 U.S.C. § 1477(a) (repealed 1984).
42. *Swinney*, 309 B.R. at 641.
43. *Id.*
44. *Id.*
45. 312 B.R. 431 (Bankr. M.D. Ala. 2004).
46. *Id.* at 435-36.
47. *Id.* at 433.
48. *Id.* at 435 (citing Gordon v. Hines (*In re* Hines), 147 F.3d 1185, 1191 (9th Cir. 1998)).
49. *Id.*
50. *Id.* at 436.
51. *Id.* at 436 n.3.

IV. BANKRUPTCY ESTATE

A. *Property of the Estate*

Timing is everything, especially when determining whether an asset is property of the estate. In *Bracewell v. Kelley (In re Bracewell)*,[52] the debtor planted, harvested, and sold certain crops ("2001 crops") pre-petition. After the debtor filed for bankruptcy and converted his Chapter 12 case to Chapter 7, the President signed the Agricultural Assistance Act,[53] which provided disaster payments to farmers who suffered losses for their 2001 crops. The debtor received a disaster payment, and the Chapter 7 trustee contended that the payment was property of the estate. The bankruptcy court found that the payment was property of the estate under § 541(a)(1) because the debtor had a pre-petition right to the payment, but not under § 541(a)(6), which deals with proceeds of estate property.[54] The district court affirmed in part and reversed in part, holding that the crop payments are not property of the estate under either provision.[55]

The payments are not property of the estate under § 541(a)(1) because no interest was created until the legislation was passed.[56] Because the legislation in this case was passed pre-petition and post-conversion, no pre-petition interest existed to become property of the estate.[57] Similarly, because the entitlement to payment did not arise pre-petition, the payment itself was not proceeds of estate property.[58]

B. *Turnover*

Ownership of repossessed collateral is officially different under Georgia law than under Alabama and Florida law. In *Motors Acceptance Corp. v. Rozier (In re Rozier)*,[59] the debtor's car was repossessed pre-petition, and the debtor sought turnover of the car, as property of the estate, and sanctions for the creditor's failure to return the car on demand. The bankruptcy court ruled in favor of the debtor and the district court affirmed.[60]

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52. 322 B.R. 698 (Bankr. M.D. Ga. 2005).
53. Pub. L. No. 108-07, 117 Stat. 538, Div. N. Title II (Feb. 20, 2003).
54. 322 B.R. at 702-03.
55. *Id.* at 701.
56. *Id.* at 707.
57. *Id.*
58. *Id.* at 709.
59. 376 F.3d 1323 (11th Cir. 2004).
60. *Id.* at 1324.

The Eleventh Circuit Court of Appeals had previously ruled that under Alabama and Florida law, a debtor retains only a right of redemption in a repossessed vehicle, which is not sufficient to bring the vehicle into the bankruptcy estate.[61] After certifying to the Georgia Supreme Court the question of whether a debtor retains any ownership interest, other than a right of redemption, in repossessed collateral, the circuit court affirmed the district court.[62] In Georgia the debtor retains legal title in a vehicle repossessed pre-petition until the creditor has "complie[d] with the disposition or retention procedures of the Georgia [Uniform Commercial Code]."[63] Thus, a creditor who refuses to turn over a repossessed vehicle may be subject to sanctions for violating the automatic stay.[64]

C. Exempt Property

1. Individual Retirement Accounts. In *Rousey v. Jacoway*,[65] the Supreme Court unanimously held that individual retirement accounts ("IRAs") are exempt from the bankruptcy estate under § 522(d)(10)(E) of the Bankruptcy Code.[66] The debtors had rolled over the balance of their employee-sponsored pension plans into accounts that qualified as IRAs under the Internal Revenue Code. When the debtors filed for bankruptcy, they listed their IRAs as exempt pursuant to § 522(d)(10)(E), which provides an exemption for a debtor's right to receive "a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor."[67] The trustee objected to the exemption, arguing that an IRA is not a "similar plan" to those listed in § 522(d)(10)(E) and that the debtors' right to payments from the IRA is not on account of age.[68]

The Court first considered whether the right to receive payments from an IRA is "on account of" age.[69] Based on their ordinary meaning, the

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61. Bell-Tel Fed. Credit Union v. Kalter (*In re* Kalter), 292 F.3d 1350, 1355 (11th Cir. 2002); Lewis v. Charles R. Hall Motors, Inc. (*In re* Lewis), 137 F.3d 1280, 1285 (11th Cir. 1998).

62. *Rozier*, 376 F.3d at 1324.

63. *Id.*

64. *Id.*

65. 125 S. Ct. 1561 (2005).

66. *Id.* at 1564. Recent amendments to the Bankruptcy Code affirm this decision by expressly exempting IRAs in newly added § 522(d)(12). Pub. L. No. 109-8, § 224(a)(2).

67. 125 S. Ct. at 1564-65.

68. *Id.* at 1565.

69. *Id.* at 1566.

words "on account of" mean "because of"; in other words, some causal connection exists.[70] In the case of an IRA, the owner suffers a ten percent tax penalty if he withdraws money prior to reaching fifty-nine and one half years of age.[71] This means the right to receive the full balance of the account—without having any withheld as a penalty—is "on account of" age.[72]

Next, the Court considered whether an IRA is "similar" to the plans described in § 522(d)(10)(E).[73] To be similar, it "must share characteristics common to the listed plans."[74] IRAs are similar because, like the listed plans, their primary purpose is to "provide a substitute for wages" rather than serving as "mere savings accounts."[75] Consequently, the Court concluded that IRAs meet all the requirements for exemption.[76]

2. Jointly Owned Property. Marriage can be a boon to debtors trying to exempt real property in Florida and Georgia, even when their spouses have not filed for bankruptcy. According to the court of appeals in *Musdino v. Sinnreich* (*In re Sinnreich*),[77] "[p]roperty owned by a Chapter 13 bankruptcy debtor as tenancy by the entireties with a non-debtor under Florida law is not part of the bankruptcy estate and therefore cannot be reached by creditors."[78] The spouses' rights in the property are indivisible, and § 522(b)(2)(B) of the Bankruptcy Code[79] exempts such an interest.[80] The court rejected the argument that the special powers to reach such property granted to the Internal Revenue Service ("IRS"), pursuant to the Supremacy Clause,[81] should be extended to other creditors.[82] To do so would render § 522(b)(2)(B) superfluous.[83]

Turning to Georgia law, the state's homestead exemption,[84] as it applies to married debtors, has been the subject of some dispute. Debtors are allowed a $10,000 exemption in their residence, with the

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70. *Id.*
71. *Id.* at 1567.
72. *Id.*
73. *Id.* at 1568.
74. *Id.*
75. *Id.*
76. *Id.* at 1571.
77. 391 F.3d 1295 (11th Cir. 2004).
78. *Id.* at 1296.
79. 11 U.S.C. § 522(b)(2)(B) (2000).
80. *Sinnreich*, 391 F.3d at 1297.
81. U.S. CONST. art. VI.
82. *Sinnreich*, 391 F.3d at 1297.
83. *Id.* at 1298.
84. O.C.G.A. § 44-13-100(a)(1) (2002 & Supp. 2004).

following exception: "In the event title to the property used for the exemption provided under this paragraph is in one of two spouses who is a debtor, the amount of the exemption hereunder shall be $20,000."[85] Courts are split on how to apply this language when the debtor is separated or divorcing.

In *In re Neary*,[86] the debtor's divorce was pending when she filed her bankruptcy petition. The debtor had purchased her residence prior to the marriage, and the residence had always been titled solely in her name. Relying on the plain language of the statute, the debtor claimed a homestead exemption of $17,000.[87] The bankruptcy court concluded that the construction of Georgia statutes requires the court to look for the intent of the legislature and to avoid an absurd result.[88] In this case, the legislature intended "to protect the resident non-debtor spouse's interest in the property where only one spouse filed for bankruptcy . . . ."[89] The nondebtor spouse did not even have an equitable interest in the property because it was acquired prior to the marriage.[90] For these reasons the court limited the debtor's exemption to $10,000.[91]

In *In re Green*,[92] the court took a different approach.[93] In *Green* the debtor and his spouse had been separated for twenty years but had not divorced. They individually owned separate residences, which had been purchased several years before the bankruptcy filing. The debtor sought a $20,000 exemption because he was married, was a debtor in bankruptcy, and the residence was titled solely in his name.[94] Relying on the plain language of the statute, the court allowed the exemption.[95] After acknowledging that the Georgia Code requires courts to consider legislative intent when construing statutes, the court found the only evidence of intent was the language itself.[96] The court wrote, "[W]hile the legislature understandably would not want inadvertent typographical or stylistic errors in the language of statutes to void the meaning of a statute, neither would it want the courts to reject the natural consequences of a statute's plain language by characterizing the result

85. *Id.*
86. No. 03-97808, 2004 Bankr. LEXIS 617 (Bankr. N.D. Ga. Apr. 21, 2004).
87. *Id.* at *2.
88. *Id.* at *6.
89. *Id.* at *7.
90. *Id.* at **8-9 (citing Wright v. Wright, 277 Ga. 133, 133, 587 S.E.2d 600, 601 (2003)).
91. *Id.* at *9.
92. 319 B.R. 913 (Bankr. M.D. Ga. 2004).
93. *Id.* at 915-16.
94. *Id.* at 914.
95. *Id.* at 916-17.
96. *Id.* at 915.

as unintentional."[97] Thus, because the debtor satisfied the requirements for a $20,000 exemption according to the terms of the statute, the court allowed such an exemption.[98]

V. CLAIMS

A. *Untimely Claims*

In *In re Hernandez*,[99] the IRS did not receive notice of the debtor's bankruptcy until after the deadline for filing a proof of claim. The IRS filed a late claim, and the debtor objected.[100] The court disallowed the claim as untimely.[101] Under § 502(b)(9)[102] a government's claim must be filed within 180 days of the bankruptcy filing.[103] Pursuant to Rules 3002(c)(1)[104] and 9006(b)(3),[105] the deadline can only be extended if the extension is sought prior to the expiration of the deadline.[106] The court stated that "Congress does not make any exception to the 180-day deadline for failure to receive notice in a Chapter 13 case."[107] While disallowed claims may be discharged, the court noted that the IRS is not without remedies, including: (1) stay relief for cause; (2) dismissal for cause; (3) conversion to Chapter 7; (4) relief from the confirmation order; (5) revocation of confirmation; and (6) determination of nondischargeability.[108]

B. *Post-confirmation Objections to Claims*

Whether a Chapter 13 debtor may object to a claim after his plan is confirmed may turn on when he received notice of the claim at issue. In *In re Shank*,[109] the debtor raised post-confirmation objections to credit card claims. The plan did not state the amount of the claims but did provide for the full payment of unsecured claims.[110] The court noted

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97. *Id.* at 916.
98. *Id.* at 917.
99. No. 99-13443-BKC-RAM, 2004 WL 962208 (Bankr. S.D. Fla. Mar. 17, 2004).
100. *Id.* at *1.
101. *Id.* at *1, 4.
102. 11 U.S.C. § 502(b)(9) (2000).
103. *Id.*
104. FED. R. BANKR. P. 3002(c)(1) (2000).
105. FED. R. BANKR. P. 9006(b)(3) (2000).
106. *Hernandez*, 2004 WL 962208, at *2.
107. *Id.*
108. *Id.* at *3 n.1.
109. 315 B.R. 799 (Bankr. N.D. Ga. 2004).
110. *Id.* at 801.

that nothing in the applicable law precludes post-confirmation objections.[111] In addition, strong policy reasons exist for allowing post-confirmation objections. Notably, efficiency would be greatly hindered if debtors were required to raise objections prior to confirmation.[112] The confirmation hearing would have to be scheduled after the deadline for filing claims to prevent the debtor's right to object from being terminated.[113] Such a delay in confirmation would result in a corresponding delay in the distribution of payments to creditors.[114] Furthermore,

> [u]ntil the debtor and other parties in the case know that the plan is confirmed, it often does not make economic sense to spend a lot of time trying to sort out claims; if the plan is not confirmed and the case is dismissed . . ., all that effort goes down the drain.[115]

The court found that its decision did not conflict with the court of appeals statement in *Universal American Mortgage Co. v. Bateman (In re Bateman)*[116] that an objection to a claim "must be filed prior to confirmation."[117] In *Shank* the court determined that the plan in *Bateman* specified the amount of the creditor's arrearage claim that differed from the amount set forth in the proof of claim.[118] Accordingly, the court's statement in *Bateman* regarding pre-confirmation objections was made in the context of holding that the plan cannot be used as a vehicle for objecting to the claim.[119] The debtor in *Bateman* disputed the amount of the claim and should have raised it through an objection rather than a plan provision.[120] Thus, "neither the holding of *Bateman*, nor its rationale . . . support[s] the proposition that claims objections must be filed prior to confirmation."[121]

In *In re Swanson*,[122] the court relied on *Bateman* to reach a different result.[123] *Swanson* involved a mortgage claim. The plan provided for full payment of the claim, including certain post-petition fees. After

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111. *Id.*
112. *Id.* at 801-02.
113. *Id.*
114. *Id.*
115. *Id.* at 803.
116. 331 F.3d 821 (11th Cir. 2003).
117. *Id.* at 827.
118. *Shank*, 315 B.R. at 804-05.
119. *Id.* at 805.
120. *Id.* at 806.
121. *Id.* at 808.
122. 307 B.R. 306 (Bankr. M.D. Fla. 2004).
123. *Id.* at 307.

confirmation, the debtor objected to the post-petition fees.[124] The court found that *Bateman* prohibited such an objection.[125] Under the rule from *Bateman*, "a party in interest who fails to raise an objection to a claim prior to confirmation in a Chapter 11 or 13 case forfeits the right to object to the claim."[126] Nevertheless, the court noted that the *Bateman* rule should be limited to those cases in which the debtor has sufficient notice of the claim prior to confirmation.[127] "The sanctity and efficacy of a bar date for objections to claims must cede to concerns of due process when an aggrieved party, in reality, cannot timely object . . . ."[128]

VI. AVOIDANCE

In *Barrett Dodge Chrysler Plymouth, Inc. v. Cranshaw (In re Issac Leaseco, Inc.)*,[129] the court considered the impact of industry standards in defending a preference action.[130] Defendant sold used cars to the debtor during the course of a business relationship that had been in effect for six months. Ten of those sales took place in the ninety days preceding the bankruptcy filing and were challenged by the trustee as preferences. Defendant raised the defense that the transfers were made in the ordinary course of business, which requires evidence that they were made according to the usual business dealings of the parties and according to industry standards.[131] The bankruptcy court determined that the industry standard required payment within twenty to forty-five days after the transfer. Three of the payments at issue were made outside that time limit and were avoidable. Defendant appealed.[132]

The court of appeals rejected defendant's argument that a change in payment terms is only relevant if it is motivated by the debtor's financial problems.[133] On the contrary, requiring the payment terms to conform to industry standards provides an objective basis for evaluating self-serving testimony regarding the transactions and it prevents special dealings done between the parties for the purpose of avoiding a

124. *Id.*
125. *Id.* at 308.
126. *Id.*
127. *Id.* at 309.
128. *Id.*
129. 389 F.3d 1205 (11th Cir. 2004).
130. *Id.* at 1205-06.
131. *Id.* at 1208.
132. *Id.* at 1209.
133. *Id.* at 1210.

preference action.[134] In this case, because the parties had been doing business together for a mere six months, "the bankruptcy court had no choice but to evaluate their dealings strictly according to industry standards."[135] The expert testimony supported the bankruptcy court's finding that the standard payment period for the industry was twenty to forty-five days.[136] The transactions that fell outside that period were preferences.[137]

The "ordinary course" defense to a preference action has been changed somewhat by the bankruptcy amendments. Previously, the creditor had to prove that the transfer was made according to the usual dealings between the parties *and* according to industry standards.[138] Under the new law, the creditor needs to prove only one of these items.[139]

VII. CONSUMER ISSUES

A. *Dischargeability of Debts*

1. Student Loans—§ 523(a)(8).[140] One of the latest arguments in the student loan creditor's arsenal is the availability of the income contingent repayment program ("ICRP"). Most lawyers who graduated from law school within the past ten years are probably aware of, if not personally familiar with, this plan. Under the William D. Ford student loan program,[141] borrowers have several options for repaying student loans.[142] These options generally accommodate the reality that earning potential—and ability to repay student loans—increases as employees gain experience through years in the workforce. The ICRP sets monthly payments based on income.[143] If income falls below the poverty level, payments are zero dollars. Any balance remaining after twenty-five years is cancelled.[144]

In *Educational Credit Management Corp. v. Boykin (In re Boykin)*,[145] the district court found that the availability of the ICRP is relevant to

134. *Id.*
135. *Id.* at 1210-11.
136. *Id.* at 1211.
137. *Id.*
138. 11 U.S.C. § 547(c)(2) (2000).
139. Pub. L. No. 109-8, § 409.
140. 11 U.S.C. § 523(a)(8) (2000).
141. 20 U.S.C. § 1087(a)-(j) (2000); 34 C.F.R. 684 (2004).
142. 34 C.F.R. 685.209 (2004).
143. *Id.*
144. *Id.*
145. 313 B.R. 516 (M.D. Ga. 2004).

the good-faith prong of the undue hardship analysis.[146] Because the debtor's payments under the ICRP would be zero dollars, the court stated that "it is difficult to conclude that [the debtors] have fully explored, in good faith, all means of repayment that are reasonably within their control."[147]

However, in *Nanton-Marie v. United States Department of Education*,[148] the court explained that using failure to participate in the ICRP as a per se bar to discharge is troublesome.[149] The court determined that "[w]hile that program may be available, there is no section of the Bankruptcy Code that requires it as a condition precedent to an undue hardship discharge."[150] The court reasoned that the creditor's position would eliminate any possibility of student loan discharge when the debtor is eligible for the ICRP.[151] The court continued, stating "'[t]his cannot be right. The [ICRP] cannot trump the Congressionally mandated individualized determination of undue hardship.'"[152] The court further noted that "'even a debtor who pays little or nothing on student loans under the [ICRP] will carry the every [sic] increasing debt for the better part of his life, eliminating or severely curtailing the debtor's ability to incur credit in an increasingly credit driven economy.'"[153] As a final blow to the already financially distressed debtor, any amount cancelled after twenty-five years can result in an income tax liability.[154]

An entirely different issue was raised in *McLaney v. Kentucky Higher Education Assistance Authority (In re McLaney)*,[155] which considered whether a debtor's charitable contributions may be included in an analysis of his ability to repay student loans under the first prong of the undue hardship test.[156] When Congress passed the Religious Liberty

146. *Id.* at 523. To prove undue hardship, the debtor must show: (1) an inability to maintain a minimal standard of living if required to repay the student loans; (2) additional circumstances making the inability to repay likely to persist; and (3) good faith efforts to repay the loans. Hemar Ins. Corp. v. Cox (*In re* Cox), 338 F.3d 1238, 1241 (11th Cir. 2003).

147. *Boykin*, 313 B.R. at 523.

148. 303 B.R. 228 (Bankr. S.D. Fla. 2003).

149. *Id.* at 235. *See also* Rutherford v. William D. Ford Direct Loan Program (*In re* Rutherford), 317 B.R. 865, 881 (Bankr. N.D. Ala. 2004).

150. *Nanton-Marie*, 303 B.R. at 235.

151. *Id.*

152. *Id.* at 235-36 (quoting Korhonen v. Educ. Credit Mgmt. Corp. (*In re* Korhonen), 296 B.R. 492, 496 (Bankr. D. Minn. 2003)).

153. *Id.* at 236 (quoting *Korhonen*, 296 B.R. at 496-97).

154. *Id.*

155. 314 B.R. 228 (Bankr. M.D. Ala. 2004).

156. *Id.* at 233.

and Charitable Donation Protection Act[157] in 1998, it amended several provisions of the Bankruptcy Code to protect essentially a debtor's practice of giving to charity by preventing avoidance of such contributions, by removing such contributions from consideration in the substantial abuse analysis, and by allowing the contributions to be considered in a disposable income analysis.[158] However, the Act did nothing to affect the undue hardship analysis of § 523(a)(8).[159] Courts have split on the issue, with one line of cases excluding the contributions from the analysis and a second line of cases allowing the contributions in appropriate circumstances.[160] In *McLaney* the court sided with the second line of cases, stating that "[t]o conclude otherwise would be tantamount [to] 'writing in' to the statute an exclusion which the statute does not contain . . . ."[161] The court concluded that charitable giving, which falls within the scope of § 548(a)(2)[162]—meaning it either does not exceed fifteen percent of the debtor's gross annual income or it is consistent with the debtor's history of giving—should be considered in the undue hardship analysis.[163]

Turning to the second prong of the undue hardship analysis, it requires the court to determine whether circumstances, in addition to the debtor's present inability to repay, will prevent repayment of the student loan in the future.[164] This inquiry does not require the court to predict the future; it only requires the court to examine existing circumstances that may affect the future.[165] When those circumstances include a medical disability, the evidence must include "more than the debtor's testimony as to the existence of the medical condition and its effect on the debtor's ability to maintain employment . . . ."[166] Although expert testimony is not necessary, some corroboration is required.

It is worth mentioning that the new bankruptcy law expands the scope of § 523(a)(8) to include all educational loans, not only government-

157. Pub. L. No. 105-183, 112 Stat. 517, 519 (1998).
158. *McLaney*, 314 B.R. at 235-36.
159. *Id.* at 236.
160. *Id.*
161. *Id.* at 236 n.11.
162. 11 U.S.C. § 548(a)(2) (2000).
163. *McLaney*, 314 B.R. at 237.
164. Ulm v. Educ. Credit Mgmt. Corp., 304 B.R. 915, 920 (S.D. Ga. 2004).
165. *Id.* at 921.
166. Folsom v. United States Dep't of Educ. (*In re* Folsom), 315 B.R. 161, 165 (Bankr. M.D. Fla. 2004).

backed loans.[167] The "undue hardship" test, however, remains in place.[168]

2. Securities Fraud—§ 523(a)(19). The newest addition to § 523(a)[169] already survived its first constitutional challenge. In *Fishbach v. Simon* (*In re Simon*),[170] the debtor argued that § 523(a)(19) violates the uniformity requirement of the Bankruptcy Clause "to the extent it incorporates state securities laws."[171] The court rejected this argument noting that the "Supreme Court has made it clear that the constitutional requirement for uniformity in bankruptcy laws does not preclude the Bankruptcy Code from incorporating state laws which . . . may lead to different results in different states."[172] The only bankruptcy provision ever found to violate the uniformity requirement was a provision that was, in effect, a private bankruptcy law because the provision applied to a single debtor.[173] Section 523(a)(19) is not a private bankruptcy law because it "excepts from discharge all debts resulting from judgments, orders, and settlement agreements arising out of the violation of state or federal securities laws."[174] The court noted, with some amusement, that the debtor's outrage over incorporating differing state laws into the Bankruptcy Code did not extend to Florida's unlimited homestead exemption, which applied to the debtor with the same force as Florida's securities fraud laws.[175]

B. Chapter 13 Plans

A debtor may strip off a wholly unsecured mortgage through his Chapter 13 plan without making a separate objection to the secured claim.[176] In *In re Seranque*,[177] both the debtor's proposed plan and the confirmation notice indicated that the plan sought to value collateral securing certain claims under 11 U.S.C. § 506(a).[178] The plan valued the collateral securing the creditor's second mortgage at zero dollars. After the plan was confirmed, the debtor sought a recordable order

167. Pub. L. No. 109-8, § 220.
168. *Id.*
169. 11 U.S.C. § 523(a) (2000).
170. 311 B.R. 641 (Bankr. S.D. Fla. 2004).
171. *Id.* at 645.
172. *Id.*
173. *Id.* at 646.
174. *Id.*
175. *Id.*
176. *In re* Sernaque, 311 B.R. 632, 637 (Bankr. S.D. Fla. 2004).
177. 311 B.R. 632 (Bankr. S.D. Fla. 2004).
178. 11 U.S.C. § 506(a) (2000).

stripping off the second mortgage. The creditor opposed the strip off.[179]

The court relied on a court of appeals case to conclude that valuation of collateral did not require a hearing separate from the confirmation hearing.[180] Thus, the valuation procedure in this case was proper.[181] The court was left with the question of whether the debtor must raise a claim objection separate from the proposed plan.[182] In *Universal American Mortgage Co. v. Bateman (In re Bateman)*,[183] the circuit court concluded that a plan provision reducing the amount of the creditor's arrearage claim was no substitute for a pre-confirmation objection to the claim.[184] The bankruptcy court distinguished *Bateman* because the debtor in that case was using the plan to change the amount of the claim.[185] In *Seranque* the debtor used the plan for "valuation of the collateral securing the claim, a separate and distinct issue."[186] So long as the creditor receives notice that the plan will value the collateral, no separate objection to the claim is required.[187] Once the plan is confirmed, the valuation binds the creditor.[188]

VIII. CHAPTER 11

A. *Alter-ego Actions*

In *Baillie Lumber Co. v. Thompson (In re Icarus Holding, LLC)*,[189] the debtor's principal misused the debtor's assets. Consequently, a creditor asserted an alter-ego claim against the principal. However, the debtor contended that the alter-ego claim was property of the estate and entered into an agreement to settle the claim. The principal sought to enjoin any further alter-ego actions brought by individual creditors. The issue was whether the alter-ego claim was property of the estate, which would give the debtor the exclusive right to assert the claim.[190] The

179. *Sernaque*, 311 B.R. at 635.
180. *Id.* at 636-37 (citing *In re* Calvert, 907 F.2d 1069, 1072 (11th Cir. 1990)).
181. *Id.* at 637.
182. *Id.*
183. 331 F.3d 821 (11th Cir. 2003).
184. *Id.* at 828.
185. *Sernaque*, 311 B.R. at 638.
186. *Id.* at 639.
187. *Id.* (citing *Calvert*, 907 F.2d at 1072).
188. *Id.* at 641.
189. 391 F.3d 1315 (11th Cir. 2004).
190. *Id.* at 1318.

bankruptcy court found that the alter-ego claim was property of the estate, and the district court affirmed; the creditor appealed.[191]

According to the circuit court, whether an alter-ego claim is property of the estate depends on the following factors: (1) whether the claim is "a general claim common to all creditors," and (2) whether state law will permit a corporation to pierce its own veil.[192] The court determined that the claim was general because the principal looted the debtor's assets.[193] In such circumstances, any creditor could sue the principal.[194] However, on the second part of the test, the court determined the law was muddled.[195] The state courts have never directly addressed the issue of whether a corporation can pierce its own veil, and the bankruptcy courts that had considered the issue reached different results.[196] Thus, the court certified to the Georgia Supreme Court the following questions: "(1) Will Georgia law allow the representative of a debtor corporation to bring an alter ego claim against the corporation's former principal? (2) If so, what is the measure of recovery?"[197] The Georgia Supreme Court answered the first question in the affirmative—essentially approving the district court ruling.[198] On the second question, the court said the liability is the full amount of the corporation's debt.[199] A final ruling from the Eleventh Circuit is pending.

B. Dismissal

According to the court in *State Street Houses, Inc. v. New York State Urban Development Corp. (In re State Street Houses, Inc.)*,[200] the factors set forth in *In re Phoenix Picadilly*[201] continue to be the proper test for determining whether a single-asset real estate Chapter 11 case has been filed in bad faith.[202] The court rejected arguments that amendments to the Bankruptcy Code—particularly 11 U.S.C. § 362(d)

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191. *Id.*
192. *Id.* at 1319-20.
193. *Id.* at 1321.
194. *Id.*
195. *Id.*
196. *Id.* at 1321-22.
197. *Id.* at 1322.
198. Baillie Lumber Co. v. Thompson, No. S05Q0587, 2005 WL 949253, at *4 (Ga. Apr. 26, 2005).
199. *Id.* at *5.
200. 356 F.3d 1345 (11th Cir. 2004).
201. 849 F.2d 1393 (11th Cir. 1988). *See also In re* Albany Partners, 749 F.2d 670 (11th Cir. 1984).
202. *In re Pheonix Picadilly*, 849 F.2d at 1393.

(3)[203]—legislatively overruled *Phoenix Piccadilly* and held that the guidelines "have not been modified by the Bankruptcy Reform Act of 1994."[204]

C. *Exemption of Stamp Tax*

Section 1146(c) of the Bankruptcy Code[205] provides that a transfer made under a Chapter 11 plan is not subject to a stamp or similar tax.[206] In *Florida Department of Revenue v. T.H. Orlando, Ltd. (In re T.H. Orlando)*,[207] the debtor had to obtain refinancing for its hotels in order to confirm its plan.[208] A lender agreed to provide the financing only on the condition that a hotel owned by a nondebtor third party was also included in the financing package. The nondebtor agreed. The issue was whether the transfer relating to the nondebtor was exempt from Florida's documentary stamp tax, which required the court to construe the meaning of the phrase "under a plan."[209] The court adopted the view of the other circuit courts to consider the issue, and the court held that a "transfer 'under a plan' refers to a transfer authorized by a confirmed Chapter 11 plan. In turn, a plan authorizes any transfer that is necessary to the consummation of the plan."[210] Thus, any transfer necessary to consummation of the plan—even one involving nondebtors—is exempt from the stamp tax.[211]

The court rejected the argument that the exemption was an improper "adjudication of a third party's tax liability," which is outside the scope of a bankruptcy court's jurisdiction.[212] On the contrary, the court is only determining the applicability of a provision of the Bankruptcy Code.[213] The court wrote, "[I]f bankruptcy courts were divested of jurisdiction in any case in which a state sought to impose a stamp tax or similar tax on a nondebtor, states could circumvent the exemption provided under § 1146(c) by shifting the tax burden entirely to third parties . . . ."[214]

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203. 11 U.S.C. § 362(d)(3) (2000).
204. *State Street Houses*, 356 F.3d at 1347.
205. 11 U.S.C. § 1146(c) (2000).
206. *Id.*
207. 391 F.3d 1287 (11th Cir. 2004).
208. *Id.* at 1289-90.
209. *Id.*
210. *Id.* at 1291.
211. *Id.* at 1291-92.
212. *Id.* at 1292.
213. *Id.*
214. *Id.*

IX. CONCLUSION

On April 20, 2005, the sleeping giant of bankruptcy reform was finally awakened when President Bush signed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 into law.[215] The bulk of the legislation, including its centerpiece—means testing—becomes effective on October 17, 2005.

As the courts and practitioners begin operating under the new law, the Supreme Court will take up an old issue: abrogation of state sovereign immunity.[216] In 2004 the Court considered the issue in *Tennessee Student Assistance Corp. v. Hood*,[217] but avoided reaching a conclusion by deciding the case on other grounds. *Hood* raised a student loan dischargeability issue, and the Court held that bankruptcy courts had in rem jurisdiction to discharge a debt.[218] In *Central Virginia Community College v. Katz (In re Wallace's Bookstore)*,[219] the trustee is seeking to recover preferential transfers made to the state. In *Hood* the Court expressly distinguished a dischargeability proceeding from "an adversary proceeding by the bankruptcy trustee seeking to recover property in the hands of the State on the grounds that the transfer was a voidable preference."[220] Because *Wallace's Bookstore* presents the exact issue referenced in *Hood*, the Court is unlikely to dodge the issue of sovereign immunity a second time.

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215. Pub. L. No. 109-8.

216. Central Va. Community College v. Katz (*In re* Wallace's Bookstore), 125 S. Ct. 1727 (2005).

217. 124 S. Ct. 1905 (2004).

218. *Id.* at 1912-13.

219. 125 S. Ct. 1727 (2005).

220. 124 S. Ct. at 1914.