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Manuel Farach

City of Chicago v. Fulton, Case No. 19–357 (2021).
The mere retention of estate property after the filing of a bankruptcy petition does not violate the automatic stay under 11 U.S.C. §362(a)(3) of the Bankruptcy Code.

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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CITY OF CHICAGO, ILLINOIS *v.* FULTON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 19–357. Argued October 13, 2020—Decided January 14, 2021

The filing of a petition under the Bankruptcy Code automatically "creates an estate" that, with some exceptions, comprises "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U. S. C. §541(a). Section 541 is intended to include within the estate any property made available by other provisions of the Bankruptcy Code. Section 542 is one such provision, as it provides that an entity in possession of property of the bankruptcy estate "shall deliver to the trustee, and account for" that property. The filing of a petition also automatically "operates as a stay, applicable to all entities," of efforts to collect prepetition debts outside the bankruptcy forum, §362(a), including "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate," §362(a)(3). Here, each respondent filed a bankruptcy petition and requested that the city of Chicago (City) return his or her vehicle, which had been impounded for failure to pay fines for motor vehicle infractions. In each case, the City's refusal was held by a bankruptcy court to violate the automatic stay. The Seventh Circuit affirmed, concluding that by retaining possession of the vehicles the City had acted "to exercise control over" respondents' property in violation of §362(a)(3).

Held: The mere retention of estate property after the filing of a bankruptcy petition does not violate §362(a)(3) of the Bankruptcy Code. Under that provision, the filing of a bankruptcy petition operates as a "stay" of "any act" to "exercise control" over the property of the estate. Taken together, the most natural reading of these terms is that §362(a)(3) prohibits affirmative acts that would disturb the status quo of estate property as of the time when the bankruptcy petition was

filed. Respondents' alternative reading would create at least two serious problems. First, reading §362(a)(3) to cover mere retention of property would render §542's central command—that an entity in possession of certain estate property "shall deliver to the trustee . . . such property"—largely superfluous, even though §542 appears to be the provision governing the turnover of estate property. Second, respondents' reading would render the commands of §362(a)(3) and §542 contradictory. Section 542 carves out exceptions to the turnover command. Under respondents' reading, an entity would be required to turn over property under §362(a)(3) even if that property were exempt from turnover under §542. The history of the Bankruptcy Code confirms the better reading. The Code originally included both §362(a)(3) and §542(a), but the former provision lacked the phrase "or to exercise control over property of the estate." When that phrase was later added by amendment, Congress made no mention of transforming §362(a)(3) into an affirmative turnover obligation. It is unlikely that Congress would have made such an important change simply by adding the phrase "exercise control," rather than by adding a cross-reference to §542(a) or some other indication that it was so transforming §362(a)(3). Pp. 3–7.

926 F. 3d 916, vacated and remanded.

ALITO, J., delivered the opinion of the Court, in which all other Members joined, except BARRETT, J., who took no part in the consideration or decision of the case. SOTOMAYOR, J., filed a concurring opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 19–357

CITY OF CHICAGO, ILLINOIS, PETITIONER *v.* ROBBIN L. FULTON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[January 14, 2021]

JUSTICE ALITO delivered the opinion of the Court.

When a debtor files a petition for bankruptcy, the Bankruptcy Code protects the debtor's interests by imposing an automatic stay on efforts to collect prepetition debts outside the bankruptcy forum. *Ritzen Group, Inc.* v. *Jackson Masonry, LLC*, 589 U. S. ___, ___–___ (2020) (slip op., at 6–7). Those prohibited efforts include "any act . . . to exercise control over property" of the bankruptcy estate. 11 U. S. C. §362(a)(3). The question in this case is whether an entity violates that prohibition by retaining possession of a debtor's property after a bankruptcy petition is filed. We hold that mere retention of property does not violate §362(a)(3).

I

Under the Bankruptcy Code, the filing of a bankruptcy petition has certain immediate consequences. For one thing, a petition "creates an estate" that, with some exceptions, comprises "all legal or equitable interests of the debtor in property as of the commencement of the case." §541(a)(1). Section 541 "is intended to include in the estate

any property made available to the estate by other provisions of the Bankruptcy Code." *United States* v. *Whiting Pools*, *Inc*., 462 U. S. 198, 205 (1983). One such provision, §542, is important for present purposes. Titled "Turnover of property to the estate," §542 provides, with just a few exceptions, that an entity (other than a custodian) in possession of property of the bankruptcy estate "shall deliver to the trustee, and account for" that property.

A second automatic consequence of the filing of a bankruptcy petition is that, with certain exceptions, the petition "operates as a stay, applicable to all entities," of efforts to collect from the debtor outside of the bankruptcy forum. §362(a). The automatic stay serves the debtor's interests by protecting the estate from dismemberment, and it also benefits creditors as a group by preventing individual creditors from pursuing their own interests to the detriment of the others. Under the Code, an individual injured by any willful violation of the stay "shall recover actual damages, including costs and attorneys' fees, and in appropriate circumstances, may recover punitive damages." §362(k)(1).

Among the many collection efforts prohibited by the stay is "any act to obtain possession of property of the estate or of property from the estate or *to exercise control over property of the estate*." §362(a)(3) (emphasis added). The prohibition against exercising control over estate property is the subject of the present dispute.

In the case before us, the city of Chicago (City) impounded each respondent's vehicle for failure to pay fines for motor vehicle infractions. Each respondent filed a Chapter 13 bankruptcy petition and requested that the City return his or her vehicle. The City refused, and in each case a bankruptcy court held that the City's refusal violated the automatic stay. The Court of Appeals affirmed all of the judgments in a consolidated opinion. *In re Fulton*, 926 F. 3d 916 (CA7 2019). The court concluded that "by retaining possession of the debtors' vehicles after they declared

bankruptcy," the City had acted "to exercise control over" respondents' property in violation of §362(a)(3). *Id.,* at 924–925. We granted certiorari to resolve a split in the Courts of Appeals over whether an entity that retains possession of the property of a bankruptcy estate violates §362(a)(3).[1] 589 U. S. ___ (2019). We now vacate the judgment below.

II

The language used in §362(a)(3) suggests that merely retaining possession of estate property does not violate the automatic stay. Under that provision, the filing of a bankruptcy petition operates as a "stay" of "any act" to "exercise control" over the property of the estate. Taken together, the most natural reading of these terms—"stay," "act," and "exercise control"—is that §362(a)(3) prohibits affirmative acts that would disturb the status quo of estate property as of the time when the bankruptcy petition was filed.

Taking the provision's operative words in turn, the term "stay" is commonly used to describe an order that "suspend[s] judicial alteration of the status quo." *Nken* v. *Holder*, 556 U. S. 418, 429 (2009) (brackets in original; internal quotation marks omitted). An "act" is "[s]omething done or performed . . . ; a deed." Black's Law Dictionary 30 (11th ed. 2019); see also Webster's New International Dictionary 25 (2d ed. 1934) ("that which is done," "the exercise of power," "a deed"). To "exercise" in the sense relevant here means "to bring into play" or "make effective in action." Webster's Third New International Dictionary 795 (1993). And to "exercise" something like control is "to put in practice or carry out in action." Webster's New International

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[1] Compare *In re Fulton*, 926 F. 3d 916, 924 (CA7 2019), *In re Weber*, 719 F. 3d 72, 81 (CA2 2013), *In re Del Mission Ltd.*, 98 F. 3d 1147, 1151–1152 (CA9 1996), and *In re Knaus*, 889 F. 2d 773, 774–775 (CA8 1989), with *In re Denby-Peterson*, 941 F. 3d 115, 132 (CA3 2019), and *In re Cowen*, 849 F. 3d 943, 950 (CA10 2017).

Dictionary, at 892. The suggestion conveyed by the combination of these terms is that §362(a)(3) halts any affirmative act that would alter the status quo as of the time of the filing of a bankruptcy petition.

We do not maintain that these terms definitively rule out the alternative interpretation adopted by the court below and advocated by respondents. As respondents point out, omissions can qualify as "acts" in certain contexts, and the term "'control'" can mean "'to have power over.'" *Thompson* v. *General Motors Acceptance Corp.*, 566 F. 3d 699, 702 (CA7 2009) (quoting Merriam-Webster's Collegiate Dictionary 272 (11th ed. 2003)). But saying that a person engages in an "act" to "exercise" his or her power over a thing communicates more than merely "having" that power. Thus the language of §362(a)(3) implies that something more than merely retaining power is required to violate the disputed provision.

Any ambiguity in the text of §362(a)(3) is resolved decidedly in the City's favor by the existence of a separate provision, §542, that expressly governs the turnover of estate property. Section 542(a), with two exceptions, provides as follows:

> "[A]n entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate."

The exceptions to §542(a) shield (1) transfers of estate property made from one entity to another in good faith without notice or knowledge of the bankruptcy petition and (2) good-faith transfers to satisfy certain life insurance obligations.

See §§542(c), (d). Reading §362(a)(3) to cover mere retention of property, as respondents advocate, would create at least two serious problems.

First, it would render the central command of §542 largely superfluous. "The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Yates* v. *United States*, 574 U. S. 528, 543 (2015) (plurality opinion; internal quotation marks and brackets omitted). Reading "any act . . . to exercise control" in §362(a)(3) to include merely retaining possession of a debtor's property would make that section a blanket turnover provision. But as noted, §542 expressly governs "[t]urnover of property to the estate," and subsection (a) describes the broad range of property that an entity "shall deliver to the trustee." That mandate would be surplusage if §362(a)(3) already required an entity affirmatively to relinquish control of the debtor's property at the moment a bankruptcy petition is filed.

Respondents and their *amici* contend that §542(a) would still perform some work by specifying the party to whom the property in question must be turned over and by requiring that an entity "account for . . . the value of" the debtor's property if the property is damaged or lost. But that is a small amount of work for a large amount of text in a section that appears to be the Code provision that is designed to govern the turnover of estate property. Under this alternative interpretation, §362(a)(3), not §542, would be the chief provision governing turnover—even though §362(a)(3) says nothing expressly on that question. And §542 would be reduced to a footnote—even though it appears on its face to be the governing provision. The better account of the two provisions is that §362(a)(3) prohibits collection efforts outside the bankruptcy proceeding that would change the status quo, while §542(a) works within the bankruptcy process to draw far-flung estate property back into the hands of the debtor or trustee.

Second, respondents' reading would render the commands of §362(a)(3) and §542 contradictory. Section 542 carves out exceptions to the turnover command, and §542(a) by its terms does not mandate turnover of property that is "of inconsequential value or benefit to the estate." Under respondents' reading, in cases where those exceptions to turnover under §542 would apply, §362(a)(3) would command turnover all the same. But it would be "an odd construction" of §362(a)(3) to require a creditor to do immediately what §542 specifically excuses. *Citizens Bank of Md.* v. *Strumpf*, 516 U. S. 16, 20 (1995). Respondents would have us resolve the conflicting commands by engrafting §542's exceptions onto §362(a)(3), but there is no textual basis for doing so.

The history of the Bankruptcy Code confirms what its text and structure convey. Both §362(a)(3) and §542(a) were included in the original Bankruptcy Code in 1978. See Bankruptcy Reform Act of 1978, 92 Stat. 2570, 2595. At the time, §362(a)(3) applied the stay only to "any act to obtain possession of property of the estate or of property from the estate." *Id.*, at 2570. The phrase "or to exercise control over property of the estate" was not added until 1984. Bankruptcy Amendments and Federal Judgeship Act of 1984, 98 Stat. 371.

Respondents do not seriously dispute that §362(a)(3) imposed no turnover obligation prior to the 1984 amendment. But transforming the stay in §362 into an affirmative turnover obligation would have constituted an important change. And it would have been odd for Congress to accomplish that change by simply adding the phrase "exercise control," a phrase that does not naturally comprehend the mere retention of property and that does not admit of the exceptions set out in §542. Had Congress wanted to make §362(a)(3) an enforcement arm of sorts for §542(a), the least one would expect would be a cross-reference to the latter provision, but Congress did not include such a cross-

reference or provide any other indication that it was transforming §362(a)(3). The better account of the statutory history is that the 1984 amendment, by adding the phrase regarding the exercise of control, simply extended the stay to acts that would change the status quo with respect to intangible property and acts that would change the status quo with respect to tangible property without "obtain[ing]" such property.

* * *

Though the parties debate the issue at some length, we need not decide how the turnover obligation in §542 operates. Nor do we settle the meaning of other subsections of §362(a).[2] We hold only that mere retention of estate property after the filing of a bankruptcy petition does not violate §362(a)(3) of the Bankruptcy Code. The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BARRETT took no part in the consideration or decision of this case.

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[2] In respondent Shannon's case, the Bankruptcy Court determined that by retaining Shannon's vehicle and demanding payment, the City also had violated §§362(a)(4) and (a)(6). Shannon presented those theories to the Court of Appeals, but the court did not reach them. 926 F. 3d, at 926, n. 1. Neither do we.

SUPREME COURT OF THE UNITED STATES

No. 19–357

CITY OF CHICAGO, ILLINOIS, PETITIONER *v.* ROBBIN L. FULTON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[January 14, 2021]

JUSTICE SOTOMAYOR, concurring.

Section 362(a)(3) of the Bankruptcy Code provides that the filing of a bankruptcy petition "operates as a stay" of "any act . . . to exercise control over property of the [bankruptcy] estate." 11 U. S. C. §362(a)(3). I join the Court's opinion because I agree that, as used in §362(a)(3), the phrase "exercise control over" does not cover a creditor's passive retention of property lawfully seized prebankruptcy. Hence, when a creditor has taken possession of a debtor's property, §362(a)(3) does not require the creditor to return the property upon the filing of a bankruptcy petition.

I write separately to emphasize that the Court has not decided whether and when §362(a)'s other provisions may require a creditor to return a debtor's property. Those provisions stay, among other things, "any act to create, perfect, or enforce any lien against property of the estate" and "any act to collect, assess, or recover a claim against [a] debtor" that arose prior to bankruptcy proceedings. §§362(a)(4), (6); see, *e.g., In re Kuehn*, 563 F. 3d 289, 294 (CA7 2009) (holding that a university's refusal to provide a transcript to a student-debtor "was an act to collect a debt" that violated the automatic stay). Nor has the Court addressed how bankruptcy courts should go about enforcing creditors' separate obligation to "deliver" estate property to the trustee or debtor under §542(a). The City's conduct may very well

violate one or both of these other provisions. The Court does not decide one way or the other.

Regardless of whether the City's policy of refusing to return impounded vehicles satisfies the letter of the Code, it hardly comports with its spirit. "The principal purpose of the Bankruptcy Code is to grant a '"fresh start"'" to debtors. *Marrama* v. *Citizens Bank of Mass.*, 549 U. S. 365, 367 (2007) (quoting *Grogan* v. *Garner*, 498 U. S. 279, 286 (1991)). When a debtor files for Chapter 13 bankruptcy, as respondents did here, "the debtor retains possession of his property" and works toward completing a court-approved repayment plan. 549 U. S., at 367. For a Chapter 13 bankruptcy to succeed, therefore, the debtor must continue earning an income so he can pay his creditors. Indeed, Chapter 13 bankruptcy is available only to "individual[s] with regular income." 11 U. S. C. §109(e).

For many, having a car is essential to maintaining employment. Take, for example, respondent George Peake. Before the City seized his car, Peake relied on his 200,000-mile 2007 Lincoln MKZ to travel 45 miles each day from his home on the South Side of Chicago to his job in Joliet, Illinois. In June 2018, when the City impounded Peake's car for unpaid parking and red-light tickets, the vehicle was worth just around $4,300 (and was already serving as collateral for a roughly $7,300 debt). Without his car, Peake had to pay for rides to Joliet. He filed for bankruptcy, hoping to recover his vehicle and repay his $5,393.27 debt to the City through a Chapter 13 plan. The City, however, refused to return the car until either Peake paid $1,250 upfront or after the court confirmed Peake's bankruptcy plan. As a result, Peake's car remained in the City's possession for months. By denying Peake access to the vehicle he needed to commute to work, the City jeopardized Peake's ability to make payments to *all* his creditors, the City included. Surely, Peake's vehicle would have been more valuable in the hands of its owner than parked in the City's

impound lot.[1]

Peake's situation is far too common.[2] Drivers in low-income communities across the country face similar vicious cycles: A driver is assessed a fine she cannot immediately pay; the balance balloons as late fees accrue; the local government seizes the driver's vehicle, adding impounding and storage fees to the growing debt; and the driver, now without reliable transportation to and from work, finds it all but impossible to repay her debt and recover her vehicle. See Brief for American Civil Liberties Union et al. as *Amici Curiae* 11–16, 31–32. Such drivers may turn to Chapter 13 bankruptcy for a "fresh start." *Marrama*, 549 U. S., at 367 (internal quotation marks omitted).[3] But without their vehicles, many debtors quickly find themselves unable to make their Chapter 13 payments. The cycle thus continues, disproportionately burdening communities of color, see Brief for American Civil Liberties Union et al. as *Amici Curiae* 17, and interfering not only with debtors' ability to earn an income and pay their creditors but also with their access to childcare, groceries, medical appointments, and other necessities.

Although the Court today holds that §362(a)(3) does not

[1] Even though §362(a)(3) does not require turnover, whether and when the City may sell impounded cars is an entirely different matter. See, *e.g., In re Cowen*, 849 F. 3d 943, 950 (CA10 2017) ("It's not hard to come up with examples of . . . 'acts' that 'exercise control' over, but do not 'obtain possession of,' the estate's property, e.g.*,* a creditor in possession who improperly sells property belonging to the estate").

[2] See, *e.g.,* Ramos, Chicago Seized and Sold Nearly 50,000 Cars Over Tickets Since 2011, Sticking Owners With Debt, WBEZ News (Jan. 7, 2019) (online source archived at www.supremecourt.gov).

[3] The 10-year period from 2007 to 2017, for instance, saw a tenfold increase in the number of Chicagoans filing Chapter 13 bankruptcies that involved debt to the City. See Sanchez & Kambhampati, Driven Into Debt: How Chicago Ticket Debt Sends Black Motorists Into Bankruptcy, ProPublica Illinois (Feb. 27, 2018) (online source archived at www.supremecourt.gov).

require creditors to turn over impounded vehicles, bankruptcy courts are not powerless to facilitate the return of debtors' vehicles to their owners. Most obviously, the Court leaves open the possibility of relief under §542(a). That section requires any "entity," subject to some exceptions, to turn over "property" belonging to the bankruptcy estate. 11 U. S. C. §542(a). The debtor, in turn, must be able to provide the creditor with "adequate protection" of its interest in the returned property, §363(e); for example, the debtor may need to demonstrate that her car is sufficiently insured. In this way, §542(a) maximizes value for all parties involved in a bankruptcy: The debtor is able to use her asset, which makes it easier to earn an income; the debtor's unsecured creditors, in turn, receive timely payments from the debtor; and the debtor's secured creditor, for its part, receives "adequate protection [to] replace the protection afforded by possession." *United States* v. *Whiting Pools, Inc.*, 462 U. S. 198, 207 (1983). Secured creditors cannot opt out of this arrangement. As even the City acknowledges, §542(a) "impose[s] a duty of turnover that is mandatory when the statute's conditions . . . are met." Brief for Petitioner 37.

The trouble with §542(a), however, is that turnover proceedings can be quite slow. The Federal Rules of Bankruptcy Procedure treat most "proceeding[s] to recover . . . property" as "adversary proceedings." Rule 7001(1). Such actions are, in simplified terms, "essentially full civil lawsuits carried out under the umbrella of [a] bankruptcy case." *Bullard* v. *Blue Hills Bank*, 575 U. S. 496, 505 (2015). Because adversary proceedings require more process, they take more time. Of the turnover proceedings filed after July 2019 and concluding before June 2020, the average case was pending for over 100 days. See Administrative Office of the United States Courts, Time Intervals in Months From Filing to Closing of Adversary Proceedings Filed Under 11 U. S. C. §542 for the 12-Month Period Ending June

30, 2020, Washington, DC: Sept. 25, 2020.

One hundred days is a long time to wait for a creditor to return your car, especially when you need that car to get to work so you can earn an income and make your bankruptcy-plan payments. To address this problem, some courts have adopted strategies to hurry things along. At least one bankruptcy court has held that §542(a)'s turnover obligation is automatic even absent a court order. See *In re Larimer*, 27 B. R. 514, 516 (Idaho 1983). Other courts apparently will permit debtors to seek turnover by simple motion, in lieu of filing a full adversary proceeding, at least where the creditor has received adequate notice. See Tr. of Oral Arg. 81 (counsel for the City stating that "[i]n most bankruptcy courts, if a creditor responds to a motion [for turnover] by" arguing that the debtor should have instituted an adversary proceeding, the bankruptcy judge will ask whether the creditor received "actual notice"); Brief for United States as *Amicus Curiae* 32 (reporting that "some courts have granted [turnover] orders based solely on a motion"); but see, *e.g., In re Denby-Peterson*, 941 F. 3d 115, 128–131 (CA3 2019) (holding that debtors must seek turnover through adversary proceedings). Similarly, even when a turnover request does take the form of an adversary proceeding, bankruptcy courts may find it prudent to expedite proceedings or order preliminary relief requiring temporary turnover. See, *e.g., In re Reid*, 423 B. R. 726, 727–728 (Bkrtcy. Ct. ED Pa. 2010); see generally 10 Collier on Bankruptcy ¶ 7065.02 (16th ed. 2019).

Ultimately, however, any gap left by the Court's ruling today is best addressed by rule drafters and policymakers, not bankruptcy judges. It is up to the Advisory Committee on Rules of Bankruptcy Procedure to consider amendments to the Rules that ensure prompt resolution of debtors' requests for turnover under §542(a), especially where debtors' vehicles are concerned. Congress, too, could offer a statu-

tory fix, either by ensuring that expedited review is available for §542(a) proceedings seeking turnover of a vehicle or by enacting entirely new statutory mechanisms that require creditors to return cars to debtors in a timely manner.

Nothing in today's opinion forecloses these alternative solutions. With that understanding, I concur.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12736

D.C. Docket No. 1:12-cv-04020-AT

UNITED STATES OF AMERICA EX REL,

Plaintiff,

VICTOR E. BIBBY,
BRIAN J. DONNELLY,

Plaintiffs-Appellants
Cross-Appellees,

versus

MORTGAGE INVESTORS CORPORATION,
WILLIAM L. EDWARDS,
"Bill",

Defendants-Appellees
Cross-Appellants,

WILLIAM L. EDWARDS, AS TRUSTEE OF WILLIAM
L. EDWARDS REVOCABLE TRUST,

Defendant.

Appeals from the United States District Court
for the Northern District of Georgia

(January 15, 2021)

Before WILSON, NEWSOM, and ED CARNES, Circuit Judges.

WILSON, Circuit Judge:

More than 14 years ago, Appellants Victor Bibby and Brian Donnelly (Relators) brought this qui tam action against Mortgage Investors Corporation (MIC) under the False Claims Act (FCA).

The FCA imposes liability on any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," or "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(A)–(B). As an enforcement mechanism, the FCA includes a qui tam provision under which private individuals, known as relators, can sue "in the name of the [United States] Government" to recover money obtained in violation of § 3729. *Id.* § 3730(b)(1).[1]

[1] The government has the option to intervene in the action, either within 60 days after receiving the complaint or upon a later showing of good cause. 31 U.S.C. § 3730(b)(2), (b)(4), (c)(3). In this case, the government communicated with Relators about their allegations but eventually decided not to intervene.

If the relators prevail, they are entitled to retain a percentage of any proceeds as a reward for their efforts. *Id.* § 3730(d).

The Relators in this case are mortgage brokers. For years, they specialized in originating United States Department of Veterans Affairs (VA) mortgage loans, particularly Interest Rate Reduction Refinance Loans (IRRRL). Relators learned through their work with IRRRLs that lenders often charged veterans fees that were prohibited by VA regulations, while falsely certifying to the VA that they were charging only permissible fees. In doing so, these lenders allegedly induced the VA to insure the IRRRLs, thereby reducing the lenders' risk of loss in the event a borrower defaults.

On March 3, 2006, Relators filed this qui tam action under the FCA against MIC to recover the money the VA had paid when borrowers defaulted on MIC-originated loans.[2] Relators later amended their complaint to add a state law fraudulent transfer claim against MIC executive William L. Edwards. The district court granted Edwards's motion to dismiss the fraudulent transfer claim for lack of standing. And it granted MIC's motion for summary judgment on the FCA claim, holding that no reasonable jury could find MIC's alleged fraud was material. Relators now appeal. In a conditional cross appeal, MIC argues that if we reverse

[2] Relators originally filed suit against 27 other mortgage lenders, but MIC is the only remaining defendant.

the district court's ruling on materiality, the FCA claim is nonetheless barred by previous public disclosure.

We conclude that summary judgment was improper on Relators' FCA claim because genuine issues of material fact remain as to whether MIC's alleged false certifications were material. Further, we agree with the district court that Relators' claim is not barred by previous public disclosure. Finally, we hold that Relators lack standing on the fraudulent transfer claim because their pre-judgment interest in preventing a fraudulent transfer is a mere byproduct of their FCA claim and cannot give rise to an Article III injury in fact.

I. BACKGROUND

A. IRRRL Program Background

An overview of the IRRRL program is necessary to understand Relators' claims on appeal. The program seeks to help veterans stay in their homes by allowing them to refinance existing VA-backed mortgages at more favorable terms. In keeping with the program's goal of helping veterans, VA regulations restrict the fees and charges that participating lenders can collect from veterans. 38 C.F.R. § 36.4313(a). And to hold lenders accountable, the regulations require lenders to certify their compliance as a prerequisite to obtaining a VA loan guaranty. *Id.* Specifically, § 36.4313(a) permits lenders to collect only those fees and charges that are "expressly permitted under paragraph (d) or (e) of this section

. . . ." *Id.* Relevant to this appeal, paragraph (d) allows veterans to pay "reasonable and customary" charges for "[t]itle examination and title insurance," as well as various other itemized fees. *Id.* § 36.4313(d)(1).[3] Attorney fees are not among the permitted fees and charges. *Id.* § 36.4313(d).

The mechanics of the loan certification process work like this. Once a lender has approved an IRRRL, it "gives closing instructions to the attorney or title company handling the closing for the lender."[4] The lender or its agent then prepares a statement, known as a HUD-1, listing all the closing costs and fees. The HUD-1 requires lenders to break out the costs they incurred and the amounts they are collecting for various charges and fees, such as title search and title examination. Before closing, the lender is to review the HUD-1 for accuracy. Then, after the lender's agent closes the loan, the lender sends the HUD-1 to the VA along with a certification that it has not imposed impermissible fees on the veteran borrower. Only upon this certification does the VA issue a guaranty to the lender.

Complicating matters, once lenders such as MIC obtain VA loan guaranties on IRRRLs, they sell those loans on the secondary market to holders in due course.

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[3] Paragraph (d) further provides that "[a] lender may charge . . . a flat charge not exceeding 1 percent of the amount of the loan, provided that such flat charge shall be in lieu of all other charges relating to costs of origination not expressly specified and allowed in this schedule." 38 C.F.R. § 36.4313(d)(2).

[4] In outlining the loan certification process, we rely in part on allegations in Relators' Fourth Amended Complaint that MIC does not appear to contest.

This is an important wrinkle because when a holder in due course holds the IRRRLs, the VA is required by statute and regulation to honor the guaranties corresponding to those loans. *See* 38 U.S.C. § 3721 (the Incontestability Statute) ("Any evidence of guaranty or insurance issued by the Secretary shall be conclusive evidence of the eligibility of the loan for guaranty or insurance under the provisions of this chapter and of the amount of such guaranty or insurance."); 38 C.F.R. § 36.4328(a)(1) (providing that misrepresentation or fraud by the lender shall not constitute a defense against liability as to a holder in due course). In other words, the guaranties are incontestable vis-à-vis holders in due course. The VA must turn to the originating lender to seek a remedy for that lender's fraud or material misrepresentation—it cannot simply refuse to honor the guaranties. *See id.*

B. Procedural Background

Relators filed suit under the FCA's qui tam provision in 2006, alleging the following facts. MIC charged veterans impermissible closing fees and attempted to cover its tracks by "bundling" the unallowable charges with allowable charges, listing them together as one line-item on HUD-1 forms. For example, MIC would collect prohibited attorney fees from veterans and bundle those fees with allowable title examination and title insurance fees, so that the attorney fees were concealed. By doing so, and by falsely certifying its compliance with VA regulations, MIC

induced the VA to guaranty IRRRLs and to ultimately honor those guaranties when borrowers defaulted. MIC countered, in relevant part, that the FCA claim is barred because a 2002 court filing had already publicly disclosed Relators' allegations.

In late 2011, as Relators' case against MIC proceeded, MIC began to distribute assets to its shareholders—in large part to Edwards, MIC's majority shareholder and chairman of its Board of Directors. This trend escalated in 2012 and 2013. During that two-year period, MIC allegedly transferred a whopping $242,006,838 to Edwards and MSP (Edwards's wholly-owned entity), leaving MIC insolvent. According to Relators, MIC then shut down its operation to prevent Relators from collecting any judgment they might obtain in this FCA action. MIC initially insisted that it remained solvent and was "here for the long haul." But by May 2015, when the district court inquired about MIC's continued solvency, counsel for MIC responded that "it's not a secret that my client stopped making loans some time ago, but that's it." And in June 2015, MIC's counsel could not "make any representation about the financial state of the company." Relators amended their complaint in January 2016 to add a state law fraudulent transfer claim against Edwards.

In a series of orders, the district court first dismissed Relators' fraudulent transfer claim for lack of standing. It then found that Relators' FCA claim was not

barred by public disclosure but ultimately granted MIC summary judgment on the ground that Relators provided insufficient evidence to create a genuine issue of material fact on the element of materiality.

II. STANDARD OF REVIEW

We review de novo the district court's grant of summary judgment on the FCA claim, applying the same standard applied by the district court. *Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1050 (11th Cir. 2015). Under this standard, summary judgment is appropriate only if the record shows "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Even self-serving and uncorroborated statements can create an issue of material fact. *United States v. Stein*, 881 F.3d 853, 856 (11th Cir. 2018) (en banc). And all reasonable inferences from the evidence are to be drawn in favor of the non-moving party; the court may not resolve factual disputes by weighing conflicting evidence. *Ryder Int'l Corp. v. First Am. Nat. Bank*, 943 F.2d 1521, 1523 (11th Cir. 1991).

We also review de novo the district court's dismissal of Relators' fraudulent transfer claim for lack of standing. *Ga. State Conf. of NAACP Branches v. Cox*, 183 F.3d 1259, 1262 (11th Cir. 1999).

III. DISCUSSION

First, we address the district court's grant of summary judgment on Relators' FCA claim. After careful review, we reverse the district court because it impermissibly resolved factual disputes by weighing conflicting evidence, a task that should have been left to the factfinder. Because genuine issues of material fact remain on the element of materiality, MIC is not entitled to summary judgment.[5]

Second, we affirm the district court's finding that Relators' FCA claim is not barred by previous public disclosure. The previous court filings at issue did not disclose the allegations on which Relators' claim is based.

Third, we affirm the district court's finding that Relators lack standing to bring the fraudulent transfer claim. Relators have standing to pursue an FCA action only through the government's assignment of its damages claim. And because the FCA does not assign the right to bring additional causes of action related to the FCA claim, Relators lack Article III standing to assert this claim.

A. The FCA's Materiality Standard

To prevail on their FCA claim, Relators must prove: "(1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due." *Urquilla-Diaz*, 780

[5] MIC also asserts that it is entitled to summary judgment because Relators failed to establish causation. Because the district court has not yet addressed that issue, we remand to give the district court an opportunity do so.

F.3d at 1045. In a comprehensive 83-page order, the district court granted MIC summary judgment, finding that Relators failed to provide sufficient evidence to create a genuine issue of material fact on the third element—materiality.

The Supreme Court recently addressed materiality under the FCA in a landmark decision. *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016). In *Escobar*, the Court emphasized that the FCA's "materiality standard is demanding." *Id.* at 2003. The FCA is not "an all-purpose antifraud statute," nor is it "a vehicle for punishing garden-variety breaches of contract or regulatory violations." *Id.* Therefore, "noncompliance [that] is minor or insubstantial" will not satisfy the FCA's materiality requirement. *Id.*

Materiality is defined as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." *Id.* at 2002. And while several factors can be relevant to the analysis, "materiality cannot rest on a 'single fact or occurrence as always determinative.'" *Id.* at 2001 (quoting *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 39 (2011)). Accordingly, several of our sister circuits have described the test as "holistic." *United States ex rel. Escobar v. Universal Health Servs., Inc.*, 842 F.3d 103, 109 (1st Cir. 2016) (*Escobar II*); *United States ex rel. Harman v. Trinity Indus. Inc.*, 872 F.3d 645, 661 (5th Cir. 2017); *United States v. Brookdale Senior Living Cmtys., Inc.*, 892 F.3d 822, 831 (6th Cir. 2018), *cert. denied sub nom. Brookdale Senior Living Cmtys.,*

Inc. v. United States ex rel. Prather, 139 S. Ct. 1323 (2019); *United States ex rel. Janssen v. Lawrence Mem'l Hosp.*, 949 F.3d 533, 541 (10th Cir. 2020), *cert. denied sub nom. United States, ex rel. Janssen v. Lawrence Mem'l Hosp.*, No. 20-286, 2020 WL 5883407 (U.S. Oct. 5, 2020).

While no single factor is dispositive, some factors that are relevant to the materiality analysis include: (1) whether the requirement is a condition of the government's payment, (2) whether the misrepresentations went to the essence of the bargain with the government, and (3) to the extent the government had actual knowledge of the misrepresentations, the effect on the government's behavior.[6] *Escobar*, 136 S. Ct. at 2003 & n.5, 2004. We address these factors in turn.

1. Condition of Payment

"[T]he Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive" to the materiality analysis. *Id.* at 2003. Here, we agree with the district court's conclusion that a lender's truthful certification that it charged only permissible fees was a condition of the government's payment on IRRRL guaranties. The relevant VA regulation clearly designates that requirement a condition to payment: "no loan shall be guaranteed or insured unless the lender certifies . . . that it has not imposed

[6] While *Escobar* does not impose a rigid three-part test or an exhaustive list of factors, it gives guidance on factors that can be relevant to the materiality inquiry.

and will not impose any [impermissible] charges or fees . . . ." 38 C.F.R. § 36.4313(a). Therefore, this factor weighs in favor of materiality.

2. Essence of the Bargain

We also consider the extent to which the requirement that was violated is central to, or goes "to the very essence of[,] the bargain." *Escobar*, 136 S. Ct. at 2003 n.5; *see also Escobar II*, 842 F.3d at 110 (considering "the centrality of the . . . requirements" in the context of the regulatory program); *John T. Boese, Civil False Claims and* Qui Tam *Actions* 2-268–69 (5th ed. 2020) (explaining that it is *Escobar*'s "basic requirement" to show that the "misrepresentation [went] to the very essence of the bargain") (internal quotation mark omitted).

When viewing the evidence in the light most favorable to Relators, a reasonable factfinder could conclude that the VA's fee regulations were essential to the bargain with IRRRL lenders. The central aim of the IRRRL program was to help veterans stay in their homes, and fee regulations contributed to that goal. VA Pamphlet 26-7 draws this connection neatly, summarizing the purpose of the IRRRL program as follows: "The VA home loan program involves a veteran's benefit. VA policy has evolved around the objective of helping the veteran to use his or her home loan benefit. Therefore, VA regulations limit the fees that the veteran can pay to obtain a loan." The Pamphlet further provides:

> The limitations imposed upon the types of charges and fees which can be paid by veteran borrowers and the

> concomitant certification by the lender as to its compliance with this requirement furthers the purpose of "limit[ing] the fees that the veteran can pay to obtain a loan" which, in turn, ensures that a veteran borrower can effectively "use his or her home loan benefit."

These excerpts suggest that fee compliance was essential to the bargain, rather than an ancillary requirement that the government labeled a condition of payment. Therefore, a reasonable factfinder could conclude that the requirement went to the essence of the bargain.

3. Effect on the VA's Behavior

The government's reaction to the defendant's violations is also a factor in the materiality inquiry. *Escobar*, 136 S. Ct. at 2003–04. *Escobar* discusses three ways the government might behave upon learning of noncompliance and instructs us on how that behavior factors into the materiality analysis.

First, the government might refuse to pay claims. *Id.* at 2003. If "the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance," that is evidence of materiality. *Id.* Second, and "[c]onversely, if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is *very strong evidence* that those requirements are not material." *Id.* (emphasis added). And third is a middle possibility: "if the Government regularly pays a particular *type* of claim in full despite actual knowledge that certain requirements were

violated, and has signaled no change in position, that is *strong evidence* that the requirements are not material." *Id.* at 2003–04 (emphases added).

Because these three possibilities each hinge on the government discovering the defendant's violations, the logical first step in this analysis is to determine what the government actually knew.

a. The VA's Actual Knowledge

Assessing the government's actual knowledge requires that we drill down to when that knowledge was acquired, and what exactly the government learned. *See Harman*, 872 F.3d at 668 (finding no materiality as a matter of law only after determining that there was "no question about 'what the government knew and when'"). Here, the district court determined that the VA had gained "the requisite knowledge of the alleged fraud" by 2009, largely through communication with Relators about their allegations and through the VA's own investigatory audits.

As to the first of these two sources, Relators' counsel discussed Relators' allegations with the government in February 2006, shortly before filing the initial complaint. Then, after filing the complaint, Relators' counsel engaged in discussions with the Department of Justice, the United States Attorney's Office, and the VA Office of Inspector General. And for the next several years, Relators continued to correspond with the government. Therefore, the VA was aware of Relators' allegations since 2006.

MIC argues that this knowledge of Relators' allegations is sufficient to establish the VA's actual knowledge of noncompliance during the relevant timeframe. We have not previously addressed whether the government's knowledge of *allegations* is tantamount to knowledge of *violations* for purposes of the materiality analysis. And decisions by our sister circuits have varied in their treatment of this issue. *Compare Escobar II*, 842 F.3d at 112 ("[M]ere awareness of allegations concerning noncompliance with regulations is different from knowledge of actual noncompliance."); *with United States ex rel. Nargol v. DePuy Orthopaedics, Inc*., 865 F.3d 29, 34 (1st Cir. 2017) (holding that government inaction "in the wake of Relators' allegations . . . renders a claim of materiality implausible").

Yet we need not answer this question here because, in any event, the VA had actual knowledge of MIC's noncompliance through another source—the VA audit findings. VA investigatory audits came in two varieties: (1) ongoing spot audits of loan samples by the VA's Regional Loan Centers (RLC Audits); and (2) periodic onsite audits by the Loan Guarantee Service Monitoring Unit (LGSMU Audits). The RLC Audits, which reviewed ten percent of all IRRRLs, revealed instances of MIC and other lenders violating fee regulations. In fact, according to VA representative Jeffrey London, lenders collecting impermissible fees and charges was "one of the most common loan deficiencies" identified in the RLC Audits. As

a result, the VA sent MIC post-audit deficiency letters between 2009 and 2011, indicating that MIC had charged veteran borrowers unallowable fees and that those fees should be refunded. Likewise, the LGSMU Audits in both 2010 and 2012 identified noncompliant fees and charges by MIC. The VA subsequently directed MIC to "review the VA *Lender's Handbook* and make the necessary adjustments to ensure future compliance." Based on these audit findings, it is undisputed that the VA was aware of MIC's violation of fee regulations.

Relators contend, however, that the VA believed that any noncompliance was the result of inadvertent, good faith mistakes. Relators urge us to draw a distinction between the VA's knowledge of inadvertent violations based on audit findings and its knowledge of actual fraud. Specifically, Relators point to the testimony of London and former VA employee William White that the VA would have investigated further if it had been aware of IRRRL lenders intentionally bundling fees and knowingly submitting false certifications of compliance. Relators argue that the district court erred when it discounted that testimony as "speculative and seemingly self-serving."

We agree that to the extent the testimony was self-serving, it must nevertheless be credited as true at this stage. *See Stein*, 881 F.3d at 856. But even taking that testimony as true, *Escobar* does not distinguish between inadvertent mistakes and intentional violations. What matters is simply whether the

government knew "that certain requirements were violated." *Escobar*, 136 S. Ct. at 2003–04. For this reason, our sister circuits have declined to explain away the government's actual knowledge of violations based on post hoc rationalizations that the government *might* have done more if it had investigated further. *See United States ex rel. McBride v. Halliburton Co.*, 848 F.3d 1027, 1034 (D.C. Cir. 2017) (explaining that the analysis should remain focused on "what actually occurred" rather than on testimony that hypothesizes what might have occurred). Here, regardless of whether the VA assumed MIC's noncompliance was inadvertent, it is undisputed that VA audits had revealed MIC's violations of IRRRL fee requirements by 2009. Therefore, the VA had actual knowledge of MIC's noncompliance during the relevant time frame.

b. The VA's Reaction

Having considered the VA's actual knowledge of MIC's violations, we now consider the VA's reaction in the wake of discovering those violations. *Escobar*, 136 S. Ct. at 2003–04. But before proceeding, we must address a threshold question: Which government action is relevant to the materiality inquiry in this case? MIC argues that what matters is the government's decision to continue paying claims, despite knowledge of noncompliance. In support of its position, MIC points to language in *Escobar* that appears to link materiality to the government's *payment* decision. *Id.*; *see also id.* at 2002 (looking to whether

noncompliance has a "natural tendency to influence, or be capable of influencing, the payment or receipt of money or property"). Relators, along with the government as amicus curiae, contend that the VA's continued payment merits little weight because the payments were required by law, regardless of any fraud by the originating lender.

While we agree with MIC that, under *Escobar*, the government action relevant to the materiality inquiry is typically the payment decision, the significance of continued payment may vary depending on the circumstances. *See United States ex rel. Campie v. Gilead Scis., Inc.*, 862 F.3d 890, 906 (9th Cir. 2017) (cautioning that "to read too much into the FDA's continued approval—and its effect on the government's payment decision—would be a mistake" where there were other reasons for that approval). Here, there was a reason for the VA's continued payment of IRRRLs other than violations of fee regulations being immaterial. Once the VA issues guaranties, it is required by law to honor those guaranties and to pay holders in due course in possession of the IRRRLs, regardless of any fraud by the original lender. 38 U.S.C. § 3721. Given this constraint, we disagree with the district court that much can be drawn from Relators' failure to submit "any evidence that . . . noncompliance would have a palpable and concrete effect on the VA's *decision to honor the loan guarantees* . . . ." (emphasis added). The VA was bound to honor the guaranties.

Consequently, the facts of this case require that we cast our materiality inquiry more broadly to consider "the full array of tools" at the VA's disposal "for detecting, deterring, and punishing false statements," and which of those it employed. *See Nargol*, 865 F.3d at 34 (internal quotation mark omitted).

With that in mind, we return to the framework *Escobar* provides. In order to find "very strong evidence" that MIC's conduct was *not* material, we would need to find that the VA paid particular claims—or as relevant here, took comparable action—despite its actual knowledge of violations. *Escobar*, 136 S. Ct. at 2003. That is, while the Incontestability Statute rendered the VA's *payment* decision less probative, MIC might have established "very strong evidence" of materiality by showing, for example, that the VA agreed to *guaranty* a particular loan despite actual knowledge that MIC had falsely certified fee compliance on that loan.[7] But on the quite voluminous record before us, MIC has not pointed to a single such instance. *See* Oral Argument Recording at 32:43–33:15 (Oct. 21, 2020).

Next, in order to find even "strong evidence" that the requirements were not material, we would need to find that the VA paid a particular *type* of claim—or took comparable action—despite its "actual knowledge" of violations. *Escobar*,

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[7] We find support for looking to the government's guaranty decision in a post-*Escobar* FCA case from the Fifth Circuit. *United States v. Hodge*, 933 F.3d 468 (5th Cir. 2019). In *Hodge*, lenders were accused of "fraudulently obtaining FHA insurance for loans that later defaulted." *Id.* at 472. The Fifth Circuit said that the "gist of this [materiality] inquiry is whether false representations . . . *induced HUD to issue insurance*." *Id.* at 474 (emphasis added).

136 S. Ct. at 2003–04. Here, MIC fares better if we consider the VA's issuance of a guaranty to be the relevant government action. Although the VA never issued a guaranty with knowledge that improper fees were collected on that particular loan, it did issue loan guaranties related to a "particular type of claim," despite its knowledge of audit findings that MIC imposed impermissible fees on a certain percentage of its loans.[8] *Id.*

But once we divorce our analysis from a strict focus on the government's payment decision, we see no reason to limit our view only to the VA's issuance of guaranties. Looking at the VA's behavior holistically, the record shows that the VA took a number of actions to address noncompliance with fee regulations. First, the VA released Circular 26-10-01 on January 7, 2010, reminding lenders of the applicable fee regulations and warning of the consequences of noncompliance. Citing VA regulations, the Circular reminded lenders that they are to charge only the "reasonable and customary amount for certain itemized fees," and that "[t]he lender may NOT charge the veteran for attorney's fees associated with settlement." The Circular further stated: "Lenders must comply with these policies when making VA loans. Any lender who does not comply with these policies is subject

[8] London testified that, based on the VA's audit findings, the VA "infer[red] that there were fee issues with other loans" that had not been audited.

to removal from the program, fines by the VA, government-wide debarment, and other civil and criminal penalties that may be applicable."

Second, after learning of Relators' allegations, the VA implemented more frequent and more rigorous audits in 2010 and 2011 to root out improper fees and charges. The change in audit methodology incorporated data from a website, Bankrate.com, that surveys lenders and provides information on average fees and charges in the mortgage industry. By comparing actual fees and charges imposed by IRRRL lenders with industry averages, the VA hoped to identify fraudulent fee bundling more effectively. Although the change in methodology apparently proved ineffective, it is nonetheless evidence of the VA attempting to use tools at its disposal to detect and address false statements.

Third, the VA consistently required lenders to refund any improperly charged fees that they discovered. Both London and White offered testimony to that effect in their depositions.

MIC argues that the VA could have pursued more severe remedies such as recoupment, debarment, or suspension from the IRRRL program. Certainly, imposing such remedies would have been evidence of materiality. *See United States v. Luce*, 873 F.3d 999, 1007 (7th Cir. 2017) (finding materiality as a matter of law where the government debarred the defendant from the relevant government program upon discovering its noncompliance). But these were not the only tools in

the VA's toolbox. The bottom line is that, because the Incontestability Statute precludes us from focusing narrowly on the VA's payment decision, we must broaden our view to consider the VA's pattern of behavior as a whole. And while the VA did not take the strongest possible action against MIC, it did take some enforcement actions.

To recap, we have thus far considered the following indicators of materiality: (1) whether the requirement is a condition of payment, (2) whether the misrepresentation was essential to the bargain, and (3) the VA's relevant actions based on its actual knowledge of violations. On the first point, the VA's fee requirements are a condition of payment. That is indicative of materiality but does not, by itself, "automatically" establish materiality. *Escobar*, 136 S. Ct. at 2003. The *Escobar* Court drove home that the government cannot take "insignificant regulatory or contractual violations" and imbue them with materiality simply by labeling them as such. *Id.* at 2004.

But here, the requirement's centrality within the regulatory scheme also points toward materiality. As the district court found, "the [VA's] charges and fees regulation is . . . more than an insignificant regulatory requirement." The requirement promoted the IRRRL program's central purpose, and a reasonable factfinder could have found that it was essential to the bargain between the VA and

MIC. So both the requirement's designation as a condition of payment and its centrality to the government program favor materiality.

The district court, however, weighed this evidence against countervailing evidence of the VA's knowledge and its reaction to noncompliance. This countervailing evidence, the court found, "significantly belie[d] the notion that the VA characterized the alleged noncompliance in this case as material." The court thus held that the "sheer weight" of the evidence militated against materiality.

To resolve the issue by weighing conflicting evidence was error. *See Ryder*, 943 F.2d at 1523. The materiality test is holistic, with no single element—including the government's knowledge and its enforcement action—being dispositive. To be sure, the materiality standard is "demanding," and courts may dismiss FCA cases at summary judgment where relators fail to create a genuine issue of material fact on that element. *Escobar*, 136 S. Ct. at 2003, 2004 n.6. That is particularly true where "'very strong evidence' . . . of . . . continued payment remains unrebutted." *See Harman*, 872 F.3d at 665. But here, we do not have "very strong evidence" of immateriality. *Escobar*, 136 S. Ct. at 2003. And even if we viewed the VA's continued issuance of guaranties as "strong evidence" of immateriality, that evidence is not unrebutted. *Id.* at 2004. A factfinder would still have to weigh that factor against others, including, as relevant here, the fee and charges requirement being a condition to payment and essential to the IRRRL

program. Because there is sufficient evidence to support a finding of materiality, we must leave that determination to the factfinder. We therefore reverse the district court's grant of summary judgment.

B. The FCA's Public Disclosure Bar

Next, because we reverse the district court's grant of summary judgment on the issue of materiality, we must address MIC's conditional cross-appeal arguing that Relators' FCA claim is barred by previous public disclosure. An FCA action cannot be based on allegations that are already publicly disclosed. 31 U.S.C. § 3730 (2006).[9] The relevant provision of the FCA provides that:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

Id. § 3730(e)(4)(A).

The reason for the public disclosure bar is fairly obvious. Without it, opportunistic relators—with nothing new to contribute—could exploit the FCA's

[9] Congress amended this section in 2010. The pre-2010 version categorized documents as "public" if they were filed on the publicly available docket. In the post-2010 version, Congress significantly narrowed the scope of a public disclosure, making it easier for relators to clear the public disclosure hurdle. While the facts of our case straddle the pre- and post-amendment timeframes, the district court reasoned that it need not determine which version applied because there was no public disclosure even under the broader pre-2010 version. Our analysis follows the same trajectory.

qui tam provisions for their personal benefit. *See United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994) (recalling the "notorious plaintiff who copied the information on which his *qui tam* suit was based from the government's own criminal indictment"). Here, MIC argues that Relators' allegations had already been publicly disclosed in a 2002 South Carolina consumer protection case, *Cox v. Mortgage Investors Corp. d/b/a Amerigroup Mortgage Corp.*, in which a solitary MIC HUD-1 (the Cox HUD-1) was filed on the docket—first in state court and later in federal court. Case No. 2:02-cv-3883-DCN (D.S.C. Nov. 15, 2002). At his deposition, Relator Donnelly admitted that the Cox HUD-1 appears to reflect fee bundling. MIC argues that if fee bundling is apparent on the face of the Cox HUD-1—based on inflated fees listed on a particular line-item—then the filing of that form in 2002 was a previous public disclosure of Relators' allegations.

We have framed the public disclosure inquiry as a three-part test: "(1) have the allegations made by the plaintiff been publically disclosed; (2) if so, is the disclosed information the basis of the plaintiff's suit; (3) if yes, is the plaintiff an 'original source' of that information." *Cooper v. Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 565 n.4 (11th Cir. 1994) (per curiam). So, under the *Cooper* framework, the first prong becomes dispositive where the plaintiff's allegations have not been publicly disclosed.

Here, on the first *Cooper* prong, we must determine whether the Cox HUD-1 publicly disclosed the "allegations" on which Relators' claim is based. *Id.* Because the *Cooper* test does not further define "allegations," we have found instructive the D.C. Circuit's *Springfield* formula. Under that formula, "one generally must present a submitted statement or claim (X) and the true set of facts (Y), which shows that X is untrue. These two things together allow the conclusion (Z) that fraud has occurred." *United States ex rel. Saldivar v. Fresenius Med. Care Holdings, Inc.*, 841 F.3d 927, 935 (11th Cir. 2016) (citing *Springfield*, 14 F.3d at 654). There is no allegation of fraud under this formula unless each variable is present. "[W]here only one element of the fraudulent transaction is in the public domain (*e.g.*, X), the *qui tam* plaintiff may mount a case by coming forward with either the additional elements necessary to state a case of fraud (*e.g.*, Y) *or* allegations of fraud itself (*e.g.*, Z)." *Springfield*, 14 F.3d at 655.

The Cox HUD-1 is not an "allegation" under the *Springfield* test. Even if we were to view the form as presenting the "statement or claim" that MIC did not impose excess fees and charges on veterans, it would set forth only the (X) variable. *Id.* at 654. To be an allegation of fraud, the Cox HUD-1 would also have to reveal the true set of facts (Y): that MIC actually collected impermissible fees and bundled those fees on the same line-item as permissible fees.

As the district court found, the Cox HUD-1, standing alone, does not do so. True, Donnelly was able to combine his industry knowledge with the information presented on the Cox HUD-1 to surmise that the form reflected bundled fees. But putting aside Donnelly's knowledge about fee bundling in the IRRRL industry, the information on the face of the HUD-1 alone does not disclose that MIC concealed impermissible fees. To the contrary, the form purports to show that MIC collected only permissible fees. As such, Relators were not barred from using their industry knowledge to "mount a case by coming forward" with allegations that MIC fraudulently bundled fees on HUD-1s to conceal violations of VA regulations. *Id.* at 655.

So, in conclusion, the Cox HUD-1 is not an allegation of fraud under the *Springfield* formula, and, accordingly, it fails the first prong of the *Cooper* test. Therefore, we affirm the district court's finding on MIC's conditional cross appeal that Relators' FCA claim is not barred by previous public disclosure.

C. Fraudulent Transfer

Having addressed the FCA claim, we now turn to the second issue Relators appeal: whether the district court correctly held that Relators lack Article III

standing to pursue a state law claim against Edwards under Georgia's Uniform Voidable Transfers Act (UVTA). After careful review, we affirm.[10]

It is well-established that a plaintiff must satisfy three requirements to establish Article III standing. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). First, there must be an "injury in fact" that is both "concrete and particularized," as well as "actual or imminent, not conjectural or hypothetical." *Id.* (internal quotation marks omitted). "Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant." *Id.* (alteration in original) (internal quotation mark omitted). "Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (internal quotation marks omitted).

The Supreme Court has addressed the first of those requirements—injury in fact—in the context of relators bringing qui tam actions under the FCA. *See Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000). There, the Court explained that a relator does not have standing to pursue a qui tam action based on his *own* injury in fact. *Id.* at 772–73. Before obtaining a judgment, a relator's interest is comparable to that of a person "who has placed a wager upon

[10] Because Relators lack standing to bring this claim against Edwards, we need not address Edwards's conditional cross appeal contesting personal jurisdiction.

the outcome" of a case. *Id.* at 772. So how, then, do relators have standing to bring qui tam actions? The answer, *Stevens* tells us, is found in the common law doctrine of assignment: an assignee has standing to vindicate the rights of an assignor. *Id.* at 773. As the doctrine of assignment applies in this context, the FCA's qui tam provision "effect[s] a partial assignment" of the government's claim to the relator. *Id.* And only as an assignee does the relator have standing to pursue the qui tam action. *Id.*

But because the assignment to relators is "partial" rather than total, relators are not assigned *all* of the government's rights associated with a particular action. *Id.* The FCA assigns the narrow right to "bring a civil action for a violation of section 3729 for the person and for the United States Government." 31 U.S.C. § 3730(b)(1). It does not assign relators the right to pursue additional claims that arise from, or are related to, the qui tam action. Indeed, *Stevens* states that "an interest that is merely a 'byproduct' of the [FCA] suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes." 529 U.S. at 773. As Relators conceded at oral argument, that is what we have here. *See* Oral Argument Recording at 22:52–23:11 (Oct. 21, 2020). Therefore, the FCA itself does not confer standing on Relators to pursue the fraudulent transfer claim.

Relators argue, however, that they can show an injury in fact, notwithstanding *Stevens*, because they base their fraudulent transfer claim on their

own injury in fact suffered as creditors under Georgia's UVTA. *See* O.C.G.A. § 18-2-70, *et seq*. That statute gives creditors the right to avoid fraudulent transfers and to obtain an injunction against the debtor to prevent further disposition of property. *Id.* § 18-2-77(a). And because the UVTA applies pre-judgment, Relators argue that they have standing under that statute as pre-judgment creditors of Edwards. *See id.* § 18-2-71(3) ("'Claim' means a right to payment, whether or not the right is reduced to judgment . . . .").

At oral argument in this case, Relators argued that the *Stevens* Court envisioned this scenario when it noted that Congress could "define new legal rights, which in turn will confer standing to vindicate an injury caused to the claimant." 529 U.S. at 773. Picking up on that language, Relators argue that, through the UVTA, the Georgia legislature conferred a new legal right to assert a pre-judgment claim that is contingent upon the underlying FCA claim.

It is true that Congress can take "concrete, *de facto* injuries that were previously inadequate in law" and "elevat[e] [them] to the status of legally cognizable injuries." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (citing *Lujan*, 504 U.S. at 578) (first alteration in original). We can assume for purposes of our decision (without deciding) that a state legislature can do the same. And when courts analyze what "constitutes injury in fact," legislative judgment can play an "important role[]" in that determination. *Id.* at 1547–48. But legislatures

cannot simply create an injury in fact where there is no concrete injury. "Injury in fact is a constitutional requirement, and 'it is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.'" *Id.* (internal citation and brackets omitted).

This means (on our assumption) that the Georgia legislature could give relators the right to pursue a fraudulent transfer claim only if relators have a concrete interest in a claim that is a byproduct of the underlying suit. *Stevens* makes clear that they do not.[11] 529 U.S. at 773. Consequently, it would be inconsistent with *Spokeo* to hold that the UVTA can create a concrete injury where none existed. To do so would be to "erase Article III's standing requirements" by finding that the Georgia legislature "statutorily grant[ed] the right to sue to a plaintiff who would not otherwise have standing." *Spokeo*, 136 S. Ct. at 1547–48. Accordingly, Relators cannot establish standing under Georgia's UVTA. Therefore, we affirm the district court's holding that Relators lack standing to assert a fraudulent transfer claim against Edwards.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

[11] This is not to say, of course, that pre-judgment creditors cannot establish Article III standing based on their *own* damages claim. For example, in *Enterprise Financial Group, Inc. v. Podhorn*, 930 F.3d 946 (8th Cir. 2019), cited by Relators, a pre-judgment creditor had Article III standing based on its own damages claim, rather than a damages claim that the government had partially assigned to it.

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-1995

R.J. REYNOLDS TOBACCO COMPANY,

Appellant,

v.

FRANCES BESSENT-DIXON, individually and as Personal Representative of the ESTATE OF TYRONE M. DIXON, deceased, et al.,

Appellees.

On appeal from the Circuit Court for Alachua County.
Donna M. Keim, Judge.

January 15, 2021

B.L. THOMAS, J.

R.J. Reynolds appeals the trial court's final judgment awarding compensatory and punitive damages to Appellee. We reverse with directions to grant Appellant a new trial.

The trial court erred when it failed to instruct the jury that to prove the intentional tort of conspiracy to fraudulently conceal information, Appellee was required to prove that the decedent

relied to his detriment on a false statement by Reynolds.[*] *See R.J. Reynolds Tobacco Co. v. Whitmire*, 260 So. 3d 536 (Fla. 1st DCA 2018):

> Liability for fraudulent concealment cannot be shown without reliance on a false statement, absent a fiduciary relationship that would create a duty to disclose. *See TransPetrol, Ltd. v. Radulovic*, 764 So. 2d 878, 879 (Fla. 4th DCA 2000) ("A defendant's knowing concealment or non-disclosure of a material fact may only support an action for fraud where there is a duty to disclose"); *State v. Mark Marks, P.A.*, 654 So. 2d 1184, 1189 (Fla. 4th DCA 1995) ("[S]uch duty arises when one party has information that the other party has a right to know because of a fiduciary or other relation of trust or confidence between them."). In a commercial transaction in which "the parties are dealing at arm's length, a fiduciary relationship does not exist because there is no duty imposed on either party to protect or benefit the other." *Taylor Woodrow Homes Fla., Inc. v. 4/46-A Corp.*, 850 So. 2d 536, 541 (Fla. 5th DCA 2003).
>
> Thus, even with the benefit of the *Engle* findings, plaintiffs claiming fraudulent concealment must prove that they relied to their detriment on false statements from the tobacco companies. *Hess v. Philip Morris USA, Inc.*, 175 So. 3d 687, 698 (Fla. 2015) ("*Engle*-progeny plaintiffs must *certainly prove* detrimental reliance in order to prevail on their fraudulent concealment claims.") (emphasis added). Otherwise no duty to disclose information would be imposed on the companies in this transaction between a tobacco company and a consumer who purchased cigarettes. The supreme court in *Philip Morris USA, Inc. v. Douglas* noted that the very reason the *Engle* class was decertified was " 'because *individualized issues* such as legal causation,

[*]Contrary to Appellee's assertions, the jury instruction Appellant requested was not materially different from the one requested in *R.J. Reynolds v. Prentice*, 290 So. 3d 963 (Fla. 1st DCA 2019).

> comparative fault, and damages predominate.' " 110 So. 3d 419, 424 (Fla. 2013) (quoting *Engle*, 945 So. 2d at 1268) (emphasis added). In the context of fraudulent concealment, "causation" includes individual reliance.

Id., at 537–38 (citation omitted).

We reiterated this rule of law in *R.J. Reynolds v. Prentice*, which involved the intentional tort of conspiracy to commit fraudulent concealment. 290 So. 3d 963, 965–66 (Fla. 1st DCA 2019), *review dismissed*, No. SC20-291, 2020 WL 1888588 (Fla. Apr. 15, 2020), *review granted*, No. SC20-291, 2020 WL 4590156 (Fla. Aug. 11, 2020) (holding the trial court's refusal to instruct the jury that the plaintiff must rely to his detriment on a specific statement that concealed or omitted material information about the health risks of smoking to prove a conspiracy to commit fraudulent concealment claim was error based on this Court's decision in *Whitmire*, 260 So. 3d 536).

As Appellant correctly argues, this error cannot be deemed harmless: "As the beneficiary-indeed author-of the trial court's instructional error, (Appellee) has the burden of proving there is no reasonable possibility that (the error) affected the outcome. *Special v. West Boca Med. Ctr.,* 160 So.3d 1251, 1253 (Fla. 2014). . . . An instruction that allows a party to recover on a claim without proving all the elements cannot be harmless." Appellant's Initial Br. 21. We agree. The incorrect instruction allowed Appellee to argue that the jury could find Appellant liable for an intentional tort where no evidence was presented, or argument offered, that the decedent relied on false information.

We reverse and remand for a new trial with a jury instruction that complies with the holdings in *Whitmire* and *Prentice*.

REVERSED and REMANDED.

ROWE and M.K. THOMAS, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Val Leppert and William L. Durham II of King & Spalding LLP, Atlanta, GA, for Appellant.

Celene H. Humphries of Brannock & Humphries, Tampa; Rod Smith and Dawn M. Vallejos-Nichols of Avera & Smith, Gainesville; Joshua A. Whitman and Eric L. Leach of Milton Leach Whitman D'Andrea & Eslinger, P.A., Jacksonville, for Appellees.

④ Third District Court of Appeal
State of Florida

Opinion filed January 13, 2021.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-2513
Lower Tribunal No. 08-36794

Alvaro Gorrin Ramos,
Appellant/Cross-Appellee,

vs.

Mississippi Real Estate Dispositions, LLC, et al.,
Appellees/Cross-Appellants.

An Appeal from the Circuit Court for Miami-Dade County, Jennifer D. Bailey, Judge.

Law Offices of Mendez & Mendez, P.A., and Sergio L. Mendez, Daniel J. Mendez and Lorena Friger, for appellant/cross-appellee.

Carlton Fields, P.A., and Jose A. Loredo and Rachel A. Oostendorp, for appellee Mississippi Real Estate Dispositions, LLC; Mark Pollack Law P.A., and Mark E. Pollack (Boynton Beach), for appellee/cross appellant Sunstate Bank.
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Before SCALES, HENDON and MILLER, JJ.

SCALES, J.

Appellant, the judgment debtor below, Alvaro Gorrin Ramos ("Ramos") appeals a December 20, 2019 order in proceedings supplementary (the "Order") that requires cross-appellant Sunstate Bank ("Sunstate") to pay the sum of $2,827,034 to appellee, the judgment creditor below, Mississippi Real Estate Dispositions, LLC ("Mississippi"), for Ramos's membership units in a Florida limited liability company. We reverse because the Order provides Mississippi with a remedy not authorized by section 605.0503 of the Florida Statutes.

I. Facts

A. Proceedings Supplementary and the Charging Order

In 2005, Ramos and his son, Alvaro Gorrin, Jr., personally guaranteed $56 million in loans that Ocean Bank provided to two development companies to finance the purchase of rental apartments in Orange County, Florida, and to convert the apartments into residential condominiums. The projects were unsuccessful and spawned multiple litigations. In one of them, Poker Run Acquisitions, Inc. ("Poker Run"), which had purchased the Ramos/Gorrin, Jr. loan/guaranty package from Ocean Bank, sued Ramos and Gorrin Jr. for breach of the guaranties. In 2013, Poker Run obtained a total judgment against Ramos and Gorrin Jr. of approximately $30 million.

In February 2016, Poker Run initiated supplementary proceedings in aid of execution. Among other things, it sought execution against Ramos's 41,085

membership units in Intercontinental Bankshares LLC, a multi-member limited liability company related to Intercontinental Bank (the "Membership Units").[1] The Membership Units were represented by Certificate 25.

In 2010, however, Ramos had pledged the Membership Units as collateral for a loan Ramos received from a friend in Venezuela named Romulo Alberto Moncada Yepez ("Yepez"). In December 2014, Ramos filed in the trial court documents memorializing the Yepez loan transaction, including a Unit Pledge Agreement, a Hypothecation Security Agreement and a Promissory Note. According to the Yepez loan transaction documents, the Membership Units that secured the loan are held by escrow agent Enrique Vejar Santos ("Santos").[2]

Poker Run impleaded Intercontinental Bankshares LLC and, in May 2016, the trial court entered a charging order, constituting a lien against the Membership Units (the "Charging Order"). The Charging Order expressly states that its entry does not constitute an adjudication regarding priorities over any competing interests in the

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[1] Alvaro Gorrin Jr. holds 415 membership units in Intercontinental Bankshares, LLC that are subject to a charging order but are not at issue in this appeal.

[2] In 2017, Poker Run filed a Third Amended Complaint in Proceedings Supplementary, seeking, among other things, to add both Yepez and Santos as proceedings supplementary defendants. Poker Run, though, was unable to obtain service on either Yepez or Santos and, on June 26, 2018, the trial court dismissed both men from the case. Hence, the trial court has no personal jurisdiction over Yepez or Santos.

Membership Units. Then, in May 2018, Poker Run assigned its interests in the judgment against Ramos to Mississippi and Mississippi substituted into the case below as plaintiff/judgment creditor.

B. Sunstate and The Merger Agreement

In March 2018, Sunstate entered into a merger agreement with Intercontinental Bank, the merger closing in August 2018 (the "Merger Agreement"). Sunstate was the surviving entity of the merger. Mississippi obtained an order amending the Charging Order and impleaded Sunstate, Intercontinental Bank and Intercontinental Bankshares LLC (the latter, after an earlier dismissal of it as a supplementary defendant).

The Merger Agreement authorized Intercontinental Bankshares LLC's members to redeem their membership units and receive a cash payment from Sunstate. The Merger Agreement expressly provided that, to redeem their units for payment, holders of membership units (including Ramos) must transmit to an escrow agent the original certificate representing the membership units, along with a Transmittal Letter warranting that the membership units are free of encumbrance.

After being impleaded as a supplementary defendant, Sunstate filed a response stating to the trial court that it could not pay Ramos for the Membership Units until Ramos complied with the specific redemption provisions of the Merger Agreement – that is, Ramos must surrender the original Certificate 25 to Sunstate's

escrow agent together with the delivery of the required Letter of Transmittal. The trial court entered a September 2018 order that enjoined Clear Trust, LLC, the exchange agent for the merger of Sunstate and Intercontinental Bank, from disbursing funds to Ramos pursuant to the Merger Agreement.

C. The Turnover Motions

In November 2018, and again in February 2019, Mississippi filed a Motion in Proceedings Supplementary to Turnover Funds to Satisfy Charging Orders (the "Turnover Motion"). In these motions, Mississippi sought an order from the trial court requiring Clear Trust, LLC, on behalf of Sunstate, to pay the redemption proceeds for the Membership Units to Mississippi. On October 1, 2019, the trial court entered an order partly granting Mississippi's February 2019 Turnover Motion. This October 1, 2019 order required Ramos to surrender the Membership Units and execute the Transmittal Letter. In response to the order, Ramos declared that he was unable to comply because he was not in possession of the original Certificate 25, having pledged the Membership Units, some nine years earlier, to Yepez as collateral for the Yepez loan. Mississippi then filed its third Turnover Motion, in which it asked the trial court to exercise its equitable powers under section 56.29(6)

of the Florida Statutes[3] and fashion a remedy to overcome Ramos's inability to comply with the redemption provisions of the Merger Agreement.

D. The Order

On November 26, 2019, the trial court conducted a hearing on Mississippi's third Turnover Motion and, on December 20, 2019, entered the Order. In the Order, the trial court found that Ramos, by pledging the Membership Units as collateral for the Yepez loan, "created the circumstances of his inability to comply with the requirements of the Merger Agreement." The trial court, in reliance upon section 56.29(6), ordered Sunstate to remit to Mississippi the sum of $2,827,034[4] to satisfy the Charging Order, irrespective of the redemption provisions of the Merger Agreement. Ostensibly to protect Sunstate from any claim by Yepez, the trial court also required Mississippi to post a $3,000,000 surety bond for a period of five years, and obligated Mississippi to indemnify and hold Sunstate harmless from any future

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[3] In relevant part, this statute provides: "The court may order any property of the judgment debtor, not exempt from execution, or any property, debt, or other obligation due to the judgment debtor, in the hands of or under the control of any person subject to the Notice to Appear, to be levied upon and applied toward the satisfaction of the judgment debt. The court may enter any orders, judgments, or writs required to carry out the purpose of this section . . . against any person to whom a Notice to Appear has been directed and over whom the court obtained personal jurisdiction . . . , subject to applicable principles of equity . . . ." § 56.29(6), Fla. Stat. (2019).

[4] The Merger Agreement established this value of the Membership Units by dividing the total purchase price of membership units by the outstanding number of membership units to yield a "Per Share Consideration."

claims related to the Membership Units. Both Ramos and Sunstate timely appealed the Order.

II. Analysis[5]

Ramos and Sunstate argue that, in fashioning its remedy benefiting judgment creditor Mississippi under the auspices of section 56.29, the trial court contravened the express limitations set forth in section 605.0503, which governs a judgment creditor's rights with respect to a judgment debtor's membership interest in a limited liability company. Mississippi counters by asserting that section 56.29 vests the trial court with broad equitable powers in proceedings supplementary and provides sufficient authority for the trial court to fashion the remedy prescribed in the Order. Given the facts of this case, we agree with Ramos and Sunstate that the trial court's equitable powers to fashion remedies in proceedings supplementary are limited by the specific provisions of section 605.0503.[6]

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[5] We review a question of law arising from supplementary proceedings below *de novo*. Longo v. Associated Limousine Servs., Inc., 236 So. 3d 1115, 1118 (Fla. 4th DCA 2018).

[6] Because we reverse on this ground, we do not reach, and express no opinion on, Sunstate's argument that section 56.29's authority for the trial court to fashion an equitable remedy in proceedings supplementary does not include the power to alter the express terms of a bilateral agreement, such as the Merger Agreement, when one of the parties to the agreement (Sunstate) is neither a judgment creditor nor a debtor. Additionally, while we are concerned that the Order might have affected the collateral securing the Yepez loan – a loan made before Poker Run's judgment – because of our reversal of the Order on other grounds, we need not, and therefore do

Section 605.0503 provides, in relevant part, as follows: "On application to a court of competent jurisdiction by a judgment creditor of a member . . . , the court may enter a charging order against the transferable interest of the member . . . for payment of the unsatisfied amount of the judgment with interest . . . . [A] charging order constitutes a lien upon a judgment debtor's transferable interest and requires the limited liability company to pay over to the judgment creditor a distribution that would otherwise be paid to the judgment debtor." § 605.0503(1), Fla. Stat. (2019). Critically, subsection 605.0503(3) further provides that the charging order authorized by subsection 605.0503(1): "…is the *sole and exclusive remedy* by which a judgment creditor . . . may satisfy a judgment from the judgment debtor's interest in a limited liability company or rights to distribution from the limited liability company." § 605.0503(3), Fla. Stat. (2019) (emphasis supplied).[7]

Florida's courts have concluded that section 605.0503(3)'s "sole and exclusive remedy" language restricts courts from providing a remedy beyond the narrow scope of the permissible charging order authorized in section 605.0503(1).

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not, reach the issue as to whether the trial court's lack of personal jurisdiction over Yepez and Santos provides an additional basis for reversal of the Order.

[7] Sections 605.0503(4) and (5) provide broader remedies to a creditor of a debtor who is a member of a limited liability company with only one member, but these sections are inapplicable because International Bankshares LLC is a multi-member LLC.

One such case – with clear echoes of the instant case – is Gorrin v. Poker Run Acquisitions, Inc., 237 So. 3d 1149 (Fla. 3d DCA 2018). There, Alvaro Gorrin, Jr. transferred most of his ownership in an LLC (not the LLC of the instant case) to a family trust after Poker Run filed suit on the Ramos/Gorrin, Jr. Ocean Bank guaranties. In proceedings supplementary, Gorrin, Jr. maintained that the transfer was for an estate planning purpose rather than for the fraudulent purpose alleged by Poker Run. Id. at 1152. The trial court granted both summary judgment and a charging order in favor of Poker Run against Gorrin Jr.'s interest in the LLC. Id. at 1153. In furtherance of the charging order, the trial court ordered that the "status quo be preserved as to all assets" of the LLC, which, Gorrin, Jr. argued, amounted to an unauthorized permanent injunction against the LLC. Id.

This Court, emphasizing the limited remedy provided by the statute, held that the portion of the order freezing the assets of the LLC "exceeded the scope of that allowed under section 605.0503." Id. at 1156; see McClandon v. Dakem & Assocs., LLC, 219 So. 3d 269, 271 (Fla. 5th DCA 2017) (reversing a portion of a charging order that, to give the charging order "teeth," also appointed a receiver to take control of the LLCs' finances); Young v. Levy, 140 So. 3d 1109, 1112 (Fla. 4th DCA 2014) (reversing the trial court's garnishment order that required a multi-member LLC to disburse the LLC's profits to a creditor, based on the "sole and exclusive remedy" provision of section 605.0503's predecessor statute); see also

Abukasis v. MTM Finest, Ltd., 199 So. 3d 421, 423 (Fla. 3d DCA 2016) (reversing a post-judgment order that transferred the judgment debtor's membership units in an LLC to the judgment debtor).

Like the lower court orders reversed by the appellate courts in those cases, the Order in this case went beyond what section 605.0503(1) permits – that is, a charging order merely restricting Ramos's alienability of the Membership Units and requiring that Mississippi be paid distributions otherwise payable to Ramos. While we are not unsympathetic to the trial court's attempt to craft a fair and practical result in this difficult case, it is well settled that a trial court may not exercise its equitable powers to contravene statutory law. See State v. Hernandez, 278 So. 3d 845, 849 (Fla. 3d DCA 2019).

III. Conclusion

Section 605.0503(3) plainly states that the charging lien provided for in section 605.0503(1) is a judgment creditor's "sole and exclusive remedy" regarding a judgment debtor's membership interest in a multi-member limited liability company. Hence, notwithstanding the equitable powers vested in a trial court pursuant to section 56.29(6), we are compelled to reverse the Order because the relief provided therein to Mississippi exceeds the express scope of relief a trial court may afford a judgment creditor under section 605.0503(1).

Reversed.

Third District Court of Appeal

State of Florida

Opinion filed January 13, 2021.
Not final until disposition of timely filed motion for rehearing.

No. 3D20-730
Lower Tribunal No. 15-23495

National Medical Imaging, LLC, et al.,
Appellants,

vs.

Lyon Financial Services, Inc., etc.,
Appellee.

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, Michael A. Hanzman, Judge.

Genovese Joblove & Battista, P.A., and W. Barry Blum and Jessica Serell Erenbaum, for appellants.

Shutts & Bowen LLP, and Jack C. McElroy, John W. Bustard and Patrick G. Brugger, for appellee.

Before EMAS, C.J., and FERNANDEZ, LOGUE, SCALES, LINDSEY, HENDON, MILLER, GORDO, and LOBREE, JJ.

SCALES, J.

This Court, on its own motion,[1] rehears *en banc* National Medical Imaging, LLC v. Lyon Financial Services, Inc., 3D20-730, 2020 WL 5228979 (Fla. 3d DCA Sept. 2, 2020) ("panel opinion"). The panel opinion, in reliance upon Shop in the Grove, Ltd. v. Union Federal Savings & Loan Ass'n of Miami, 425 So. 2d 1138 (Fla. 3d DCA 1982), begrudgingly denied Appellee Lyon Financial Services, Inc. d/b/a U.S. Bank Portfolio Services' August 14, 2020 motion to stay the proceedings in our Court ("stay motion") during the pending bankruptcy proceedings in which Appellants National Medical Imaging, LLC and National Medical Imaging Holding Company, LLC are the debtors. Shop in the Grove held that the automatic stay provision in 11 U.S.C. § 362(a)(1) is inapplicable in this Court where the debtor – who is the defendant below and who has filed for federal bankruptcy protection – is the appellant. Shop in the Grove, Ltd., 425 So. 2d at 1139. Persuaded by (a) the clear and unambiguous text of the federal bankruptcy code's automatic stay provision, (b) precedent from virtually every other jurisdiction to have addressed the issue, and (c) a slight nudge by the federal bankruptcy judge presiding over appellants' bankruptcy case, we take this opportunity to, *en banc*, recede from Shop in the Grove (and, necessarily, the result reached in the panel opinion), and grant Appellee's stay motion.

[1] "A rehearing en banc may be ordered by a district court of appeal on its own motion or on motion of a party." Fla. R. App. P. 9.331(d)(1).

I. RELEVANT BACKGROUND, THE PANEL OPINION, AND THIS COURT'S *EN BANC* CONSIDERATION

In 2015, Appellee obtained a $12 million judgment against Appellants in a Pennsylvania state court. Appellee domesticated the judgment in the Miami-Dade County Circuit Court and obtained an April 28, 2020 final order below authorizing Appellee's execution on certain choses in action owned by Appellants. On May 7, 2020, Appellants appealed this final order to our Court (appellate case number 3D20-730). After Appellants served their initial brief, Appellants, on June 12, 2020, filed voluntary Chapter 11 bankruptcy petitions in the United States Bankruptcy Court for the Eastern District of Pennsylvania ("Bankruptcy Court"). See In re: National Medical Imaging, LLC, Case No. 20-12618-elf (Bankr. E.D. Pa.) (consolidated). Not wanting to violate the automatic stay by filing an answer brief, or otherwise defending against the appeal in our Court, on August 14, 2020, Appellee filed the instant stay motion seeking an order from this Court staying appellate proceedings in appellate case number 3D20-730 pending further order of the Bankruptcy Court. On September 22, 2020, a panel of this Court, in reliance upon this Court's 1982 opinion in Shop in the Grove, issued the panel opinion denying Appellee's stay motion. Nat'l Med. Imaging, LLC, 2020 WL 5228979, at *1.

Noting infirmities in Shop in the Grove, including the overwhelming precedent making Shop in the Grove an outlier, the panel opinion questioned the continued viability of Shop in the Grove, and not-so-subtly suggested *en banc* review was in order. Id. Tellingly, the panel opinion noted how Shop in the Grove's outlier status placed parties, and their counsel, "on the horns of a dilemma." Id. at *2. Specifically, the panel opinion noted not only that federal bankruptcy courts are not bound by Shop in the Grove, but also that the Bankruptcy Court in which the Appellants' bankruptcy case is pending is bound by precedent that is contrary to Shop in the Grove. Id.

Indeed, after the parties in this case provided the Bankruptcy Court with a copy of the panel opinion, the Bankruptcy Court entered an October 20, 2020 order enjoining the parties "from filing any briefs in, or in any other way continuing" the parties' appellate proceedings in this Court.[2]

II. JUSTIFICATION FOR REHEARING *EN BANC*

[2] In addition to appellate case number 3D20-730, there are three related matters pending in our court. In appellate case number 3D20-773, Appellants seek review of lower court orders directing the lower court clerk to schedule an online auction for the sale of certain choses in action owned by Appellants. In appellate case number 3D20-786, Appellants seeks review of a trial court order denying Appellants' motion to dismiss the operative pleading for improper venue. In appellate case number 3D20-820, Appellants seek to prohibit the trial court judge from presiding further over the lower court proceedings in this case.

While critical of this Court's Shop in the Grove precedent, the panel opinion noted that the panel was powerless to, on its own, recede from Shop in the Grove; only this Court, sitting *en banc*, may recede from a prior panel's decision. Nat'l Med. Imaging, LLC, 2020 WL 5228979, at *1 n.2. The Bankruptcy Court's injunction order – filed in the multiple appellate cases pending before different panels of this Court – placed into sharp focus the dilemma that our continued adherence to Shop in the Grove places on parties who are involved in bankruptcy proceedings in this Court. Viewed against the backdrop of both the plain text of the automatic stay provision and Shop in the Grove's outlier status (both of which were highlighted in the panel opinion), the Bankruptcy Court's injunction order provides this Court with sufficient justification to determine, on its own motion, that the issue of whether we should recede from Shop in the Grove is a matter of exceptional importance, and that rehearing *en banc* of the panel opinion is therefore warranted.

III. ANALYSIS

While the panel opinion touches upon some of the problems posed by Shop in the Grove, we feel it important to, in this *en banc* opinion, detail with more specificity the three principal reasons why we are receding from Shop in the Grove's long-standing precedent.

A. *The Plain Text of the Automatic Stay Provision Compels Receding from Shop in the Grove and Granting the Stay Motion*

Congress enacted the Bankruptcy Reform Act of 1978 ("Act") and included in it a provision that automatically stays all legal proceedings against a debtor upon the debtor's filing of a petition seeking bankruptcy protection. The Act provides, in relevant part:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of –
>
> > (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title[.]

11 U.S.C.A. § 362(a)(1) (2020).

The Act's text is clear and unambiguous. The debtor's filing of a bankruptcy petition stays any "action or proceeding against the debtor," including the "continuation" of an "action or proceeding against the debtor." Id. When the debtor is a defendant in a legal action, as Appellants are here, the debtor-defendant's appeal of an adverse order or judgment in that legal action, as occurred here, is plainly a "continuation" of the legal action against the debtor. See Pa. Ins. Guar. Ass'n v. Sikes, 590 So. 2d 1051, 1052 (Fla. 3d DCA 1991) ("An appeal is not a new action; it is a continuation of the original proceeding.").

Despite reciting the text of the Act's automatic stay provision, Shop in the Grove's conclusion is not based on the provision's text, but, rather, on two policy-based reasons: (i) the purpose of the automatic stay's "shield" is actually thwarted when the debtor uses the stay as a "sword" to indefinitely suspend the debtor's own efforts to be relieved of an adverse judgment; and (ii) to control this Court's docket, the debtor should be required to "fish or cut bait" and either appeal the adverse judgment or submit the judgment to the bankruptcy court for such relief as the bankruptcy court deems appropriate. Shop in the Grove, Ltd., 425 So. 2d at 1139.

While Shop in the Grove's stated policy rationale may seem reasonable, we find the opinion's conclusion to be without support in the clear and unambiguous text of the Act's automatic stay provision. We leave bankruptcy policy to the United States Congress, and will, henceforth, follow the clear Congressional mandate manifested in the text of the automatic stay provision. Guardian Ad Litem v. ViajeHoy, LLC, 299 So. 3d 1130, 1136 (Fla. 3d DCA 2020) (recognizing that "State public policy concerns could not override the express language of the federal statutes and regulations").

B. Precedent from other Jurisdictions Compels Receding from Shop in the Grove and Granting the Stay Motion

1. Florida Precedent

There were no Florida cases addressing the Act's automatic stay provision prior to Shop in the Grove.[3] Over time, this Court's conclusion that an appeal initiated by a debtor-defendant is not subject to the automatic stay made it an outlier in the state.

The Fourth District initially followed Shop in the Grove. See Marine Charter & Storage, Ltd. v. All Underwriters at Lloyds of London Subscribing to Cover Notes 2H04/1291, 568 So. 2d 944, 946 (Fla. 4th DCA 1990) ("We do not believe a stay is appropriate and adopt in toto the opinion of Chief Judge Schwartz in [Shop in the Grove]."). Four years later, though, based on burgeoning case law from the federal circuit courts, the Fourth District, in a unanimous *en banc* opinion, receded from Marine Charter & Storage and held that the automatic stay provision applies "on appeal, regardless of whether the debtor is an appellant or appellee, where the original proceedings were against the debtor." Fla. E. Dev. Co., Inc. of Hollywood v. Len-Hal Realty, Inc., 636 So. 2d 756, 758 (Fla. 4th DCA 1994). Following in the

[3] The United States Court of Appeals for the Third Circuit had, however, recently determined that the automatic stay provision applied to appeals brought by debtor-defendant. See Ass'n of St. Croix Condo. Owners v. St. Croix Hotel Corp., 682 F.2d 446, 449 (3d Cir. 1982) ("In our view, section 362 should be read to stay all appeals in proceedings that were originally brought against the debtor, regardless of whether the debtor is the appellant or appellee. Thus, whether a case is subject to the automatic stay must be determined at its inception. That determination should not change depending on the particular stage of the litigation at which the filing of the petition in bankruptcy occurs.") (decided July 6, 1982).

steps of the Fourth District, both the Second District[4] and then the First District[5] explicitly rejected Shop in the Grove.[6]

2. Federal Precedent

Not only is Shop in the Grove now an outlier within Florida, but, at the federal level, there now appears to be unanimous agreement among the circuit courts that the automatic stay provision applies to appellate proceedings where a debtor-defendant has filed an appeal. See, e.g., Simon v. Navon, 116 F.3d 1, 4 (1st Cir. 1997); Commerzanstalt v. Telewide Sys., Inc., 790 F.2d 206, 207 (2d Cir. 1986); Ass'n of St. Croix Condo. Owners, 682 F.2d at 449 (decision by federal third circuit); In re Byrd, 357 F.3d 433, 439 (4th Cir. 2004); Marcus, Stowell & Beye Gov't Sec., Inc. v. Jefferson Inv. Corp., 797 F.2d 227, 230 n.4 (5th Cir. 1986); Cathey v. Johns–Manville Sales Corp., 711 F.2d 60, 62 (6th Cir. 1983); Sheldon v. Munford, Inc., 902 F.2d 7 (7th Cir. 1990); Farley v. Henson, 2 F.3d 273, 275 (8th

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[4] Crowe Grp., Inc. v. Garner, 691 So. 2d 1089, 1089 (Fla. 2d DCA 1993) (recognizing the decision "expressly and directly conflicts with" Shop in the Grove").

[5] Taylor v. Barnett Bank of N. Cent. Fla., N.A., 737 So. 2d 1105, 1106 (Fla. 1st DCA 1998) (rejecting Shop in the Grove and aligning "with the decisions in Florida Eastern Development and Crowe Group on the issue of the effect of the filing of a suggestion of bankruptcy").

[6] It does not appear that the Fifth District has, in a published opinion, addressed the issue of whether the Act's automatic stay applies when a debtor-defendant initiates the appeal.

Cir.1993); Ingersoll–Rand Fin. Corp. v. Miller Mining Co., 817 F.2d 1424, 1426 (9th Cir. 1987); Ellison v. Nw. Eng'g Co., 707 F.2d 1310, 1311 (11th Cir. 1983); Carley Cap. Grp. v. Fireman's Fund Ins. Co., 889 F.2d 1126, 1127 (D.C. Cir. 1989) (agreeing with Third Circuit's opinion in Ass'n of St. Croix Condo. Owners but holding that the stay did not apply because the underlying action was not *against* the debtor); Seiko Epson Corp. v. Nu-Kote Int'l, Inc., 190 F.3d 1360, 1365 (Fed. Cir. 1999).

Until 2011, the Tenth Circuit held to the minority position that the Act's automatic stay provision does not apply when a debtor-defendant initiates an appeal. However, in an opinion authored by then-Circuit Court Judge Neil Gorsuch, the court overruled its prior interpretation and followed the other circuits in holding that section 362 stays "all appeals in proceedings that were *originally brought* against the debtor, regardless of whether the debtor is the appellant or appellee." TW Telecom Holdings Inc. v. Carolina Internet Ltd., 661 F.3d 495, 497 (10th Cir. 2011) (quoting Ass'n of St. Croix Condo. Owners, 682 F.2d at 449).[7]

It should be noted that early Tenth Circuit decisions relied on the leading bankruptcy law treatise in support of the minority position. See Autoskill Inc. v.

[7] TW Telecom was a panel decision that was circulated to, and approved, *en banc* by the Tenth Circuit, which is a permissible practice in that jurisdiction. See United States v. Payne, 644 F.3d 1111, 1113 n.2 (10th Cir. 2011).

Nat'l Educ. Support Sys., Inc., 994 F.2d 1476, 1486 (10th Cir. 1993) (citing Collier on Bankruptcy). But as the court in TW Telecom explained:

> Collier on Bankruptcy has explicitly rejected our reliance on it to support our minority position. 10 Collier on Bankruptcy ¶ 6009.04 n. 5 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2011) ("Both [In re Lyngholm and Autoskill Inc.] relied upon an earlier edition of this treatise to support this minority position. However, the reference in the prior edition to 'continued prosecution of actions' was a reference only to actions in which the debtor was the plaintiff, actions not governed by Code section 362(a)(1). Because the reference was not to appeals of cases in which the debtor was a defendant, the Tenth Circuit's reliance on this treatise was inappropriate.").

661 F.3d at 497.

3. Summary of Precedent

In summary, the approach in Shop in Grove is inconsistent with all other Florida District Courts of Appeal and all federal circuit courts that have addressed the issue. Shop in the Grove's holding is also at odds with the leading treatise on bankruptcy law. With respect to the reasoning underlying Shop in the Grove, the unanimous consensus seems to be that an appeal initiated by a debtor-defendant is a "continuation . . . of a judicial, administrative, or other action or proceeding against the debtor" as set forth by the plain language in section 362. See, e.g., Nat'l Med. Imaging, LLC, 2020 WL 5228979, at *1 ("[T]he federal bankruptcy code's automatic stay provision is clear: the debtor's filing of a bankruptcy petition stays any action or proceeding, including the 'continuation' of an 'action or proceeding against the debtor.' 11 U.S.C. § 362(a)(1) (2020). When the debtor is a defendant in

an action, it seems to us that the debtor-defendant's appeal of an adverse judgment in that action is plainly a 'continuation' of a 'proceeding' against the debtor-defendant."); see also Parker v. Bain, 68 F.3d 1131, 1135-36 (9th Cir. 1995) ("We need not spill a great deal of ink discussing the assertion . . . that an appeal *by* the debtor cannot constitute the continuation of an action *against* the debtor. This Court, as well as seven other courts of appeals, has concluded that the automatic stay can operate to prevent an appeal by a debtor when the action or proceeding below was against the debtor. . . . This rule finds its source in the language of section 362, which extends the automatic stay to the *continuation*, as well as the *commencement*, of an action against the debtor.") (footnote omitted).

C. Practical Considerations Compel Receding from Shop in the Grove and Granting the Stay Motion

As mentioned in the panel opinion, this Court's adherence to Shop in the Grove presented significant practical, if not ethical, problems for practitioners, especially multi-jurisdictional practitioners. Nat'l Med. Imaging, LLC, 2020 WL 5228979, at *2. While appellate practitioners could generally rely upon a debtor's filing a petition for bankruptcy protection automatically staying appellate proceedings, the rules were different in Florida's Third District. Here, Shop in the Grove compelled the parties to continue to litigate the appeal, even when the bankruptcy proceedings were occurring in a jurisdiction that had definitively determined that continuation of the appeal violated the automatic stay.

Consequently, Shop in the Grove put practitioners, and their clients, in the unenviable position of having to choose whether to violate either (i) the automatic stay imposed by the Act or, alternatively, (ii) orders from this Court denying stay relief.

Lest one think such a dilemma is merely academic, this case presented that very Hobson's choice. After Appellants initiated this appeal, Appellants filed for bankruptcy protection in the Bankruptcy Court, a jurisdiction where a debtor-appellant's bankruptcy filing automatically stays all appellate proceedings, irrespective of whether the appellant is the debtor or the creditor. See Ass'n of St. Croix Condo. Owners, 682 F.2d at 449. In reliance upon Shop in the Grove, though, we issued the panel opinion that denied Appellee's stay motion and required Appellee to file its answer brief. The Bankruptcy Court made short shrift of our panel opinion, and, notwithstanding same, affirmatively enjoined the parties from filing anything in our Court, except for, of course, a copy of the Bankruptcy Court's injunction order.

Upon our review of the Bankruptcy Court's injunction order, and, in appreciation of the dilemma that our continued adherence to Shop in the Grove has caused, we take the hint.

IV. CONCLUSION

We conclude that the issue adjudicated in Shop in the Grove is of exceptional importance, requiring rehearing *en banc* of the panel opinion. We recede from Shop in the Grove because its principal conclusion – that an appeal initiated by the debtor-defendant is not subject to Section 362(a)'s automatic stay provision – is not supported by the text of the stay provision, is contrary to virtually all precedent from all other jurisdictions, and because it sometimes forces parties and their counsel into untenable positions.

We, therefore, also recede from panel opinion's denial of the stay motion. We grant the stay motion, and stay proceedings in this appeal pending further order of the Bankruptcy Court.

Stay motion granted.[8]

EMAS, C.J., and FERNANDEZ, LOGUE, LINDSEY, HENDON, MILLER, GORDO, and LOBREE, JJ., concur.

[8] Because this *en banc* opinion adjudicates an interlocutory, procedural issue, upon this opinion becoming final, the *en banc* Court will no longer exercise jurisdiction to adjudicate further matters in this appeal. Such jurisdiction will be relinquished to, as appropriate, a temporary panel or a merits panel.

LOGUE, J. (concurring).

I concur in the majority opinion receding from Shop in the Grove, Ltd. v. Union Fed. Sav. & Loan Ass'n of Miami, 425 So. 2d 1138 (Fla. 3d DCA 1982). I write only to point out that we are adopting almost word-for-word the legal interpretation of section 362(a)(1) of the United States Bankruptcy Code put forward some forty years ago by Judge Wilkie D. Ferguson, Jr. of our Court in his dissent.

Shop in the Grove concerned the issue of whether an appeal by a debtor of an adverse judgment qualified as a "continuation . . . of a judicial . . . proceeding against the debtor" under the Bankruptcy Code and therefore automatically stayed. The majority in Shop in the Grove held it was not. Judge Ferguson dissented, writing:

> . . . The requirement imposed upon an appellant-debtor by the majority to "fish or cut bait" translates into a Hobson's choice between waiver of bankruptcy for the purpose of an appeal from the adverse judgment or conceding the contested debt in order to seek relief in the bankruptcy court. I am aware of no rule of bankruptcy law or federal procedure that would require such an election. In my opinion the appeal by the appellant-debtor from a judgment against it is a continuation of the judicial proceeding against debtor, clearly within the purview of the Act's automatic stay provision.

Id. at 1140 (Ferguson, J. dissenting).

When Judge Ferguson issued his dissent in 1982, the "new" form of the Bankruptcy Code was only four years old. Over the ensuing decades, as the majority

points out, every state and federal court that considered the issue reached the interpretation first put forward by Judge Ferguson. The judgment of this soft spoken, scholarly, and insightful jurist has stood the test of time on this highly technical issue of commercial law, as it has in so many matters reaching to civil rights and constitutional law.[9] Although known for his gracious good will and punctilious courtesy, Judge Ferguson did not hesitate to chide lawyers and even colleagues for indulging in cant[10] or legal obscurities.[11]

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[9] See, e.g., Cramer v. Chiles, 33 F. Supp. 2d 1342, 1352 (S.D. Fla. 1999) (upholding constitutional and statutory rights of disabled persons to home and community-based treatment in a decision that caused the State of Florida to substantially increase its funding of these programs).

[10] See, e.g., Allstate Ins. Co. v. Metro. Dade Cnty., 436 So. 2d 976, 980 (Fla. 3d DCA 1983) (Ferguson, J., concurring) ("I write only to express disapproval of the attempt to distinguish and salvage our earlier opinion in Fireman's Fund Insurance Co. v. Rojas, 409 So. 2d 1166 (Fla. 3d DCA 1982). Rojas blurred the differences between indemnification and subrogation to an incorrect conclusion and should be revisited solely for the purpose of giving it a decent burial.").

[11] See, e.g., Cramer, 33 F. Supp. 2d at 1352, n.4 ("In discussing the notice issue the parties have used the term 'procedural due process' which I shun because it is, as one commentator observed, redundant. John Hart Ely, Democracy and Distrust 18 (1980). The word following 'Due' in the Fourteenth Amendment is 'Process' the writer notes, which is the same as procedure. Process is defined as a 'normal course of procedure.' Black's Law Dictionary 1205 (6th Ed. 1992). By the same token, he continues, 'substantive due process' is a contradiction in terms. A right in the constitutional sense, generally, is either substantive or procedural. Writers who use substantive or procedural to describe due process appear trapped and the work product may lack clarity. There is no doubt that this discourse on advance notice and opportunity to be heard is about procedural fairness. Saying it twice is unnecessary.").

Judge Ferguson was born in 1938 to Bahamian immigrants and was raised in Miami's Liberty Square public housing project. He joined the U.S. Army and rose to the rank of captain. He obtained his B.A. from Florida A&M University and his J.D. from Howard University School of Law. He served on this Court from 1980 to 1993 until he was appointed to the federal district court for the Southern District of Florida where he served with distinction until shortly before his death in 2003. The Congress of the United States named the federal courthouse in Miami in his honor.

As this case comes full circle, and we adopt the position first advocated by Judge Ferguson almost forty years ago, I think it is fit and proper to bear in mind we are following in the footsteps of this distinguished, past member of our conference.

Third District Court of Appeal
State of Florida

Opinion filed January 13, 2021.
Not final until disposition of timely filed motion for rehearing.

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No. 3D20-1649
Lower Tribunal No. 16-20463

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Rafael Antonio Olvera Amezcua,
Appellant,

vs.

Hector Armando Vejar Cortez,
Appellee.

An appeal from a nonfinal order from the Circuit Court for Miami-Dade County, Beatrice Butchko, Judge.

GrayRobinson, P.A., and Frank A. Shepherd, and Juan C. Martinez, for appellant.

Andreu, Palma, Lavin & Solis, PLLC, and Yulexy Solis, for appellee.

Before HENDON, MILLER, and BOKOR, JJ.

MILLER, J.

Appellant, Rafael Antonio Olvera Amezcua ("Olvera"), challenges a nonfinal order denying a motion to dismiss, or, alternatively, dissolve a temporary injunction entered in favor of Hector Armando Vejar Cortez ("Vejar"). We have jurisdiction. Fla. R. Civ. P. 9.130(a)(3)(B). After receiving a formal request for assistance from a Mexican tribunal, the lower court recognized and enforced a foreign embargo order, prohibiting the alienation of a condominium unit located in Aventura, Florida. Olvera sought dismissal or, in the alternative, dissolution of the domestic order. Although a hearing was afforded, relief was denied. On appeal, Olvera assigns error in the continuation of the injunction in the absence of service of process.[1] We affirm.

BACKGROUND

In mid-2014, Vejar deposited the sum of ten million Mexican pesos in Ficrea, S.A. & C.V., S.F.D., a banking institution organized and headquartered in Mexico. Shortly thereafter, the National Banking and Securities Commission of Mexico ("NBSC") involuntarily dissolved and liquidated the bank, citing investor fraud.

Vejar filed suit in Mexico against Olvera, Ficrea's majority shareholder, seeking to hold him personally liable for the loss of his deposit. The Mexican

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[1] We summarily reject the further contention that changed circumstances necessitate dissolution. See Tettamanti v. Opcion Sociedad Anonima, 67 So. 3d 356, 357 (Fla. 3d DCA 2011) ("[A] post-recognition collateral attack on the [decree] ordinarily should be directed to the foreign court rather than the Florida court.").

tribunal issued a preliminary embargo, enjoining Olvera from transferring certain assets, including a condominium unit located in Aventura, Florida.

The Attorney General of Mexico issued an arrest warrant for Olvera, and, as the warrant remained unserved, the International Criminal Police Organization ("Interpol") published a Red Notice alert. The alert notified cooperating countries of the existence of the warrant and sought the apprehension of Olvera.

Seeking assistance in enforcing the embargo in the United States, the Mexican court issued a letter rogatory directed to the Clerk of Courts of Miami-Dade County. In the document, the Mexican tribunal identified the need to enjoin any transfer of the Aventura property and termed Olvera a "fugitive of [j]ustice."

Vejar also filed suit in Miami-Dade County, seeking to effectuate the letter rogatory by invoking the ancillary jurisdiction of the court for the purpose of issuing a temporary injunction prohibiting the transfer of title of the Aventura condominium. After Vejar made several unfruitful attempts to serve Olvera at two separate residential locations, including the address identified on the embargo, he discovered the condominium was listed for sale. Vejar then sought entry of the injunction without notice.

The lower tribunal scheduled a hearing, and Vejar unsuccessfully attempted to provide Olvera notice of the hearing date. Ultimately, the court, issued the injunction, and, some four years later, Olvera filed a motion to dismiss the case, or,

alternatively, to dissolve the injunction, citing a failure to effect service of process and changed circumstances. Following a hearing, the trial court denied relief, concluding that, absent dissolution of the foreign decree, relief was improvident. The instant appeal ensued.

STANDARD OF REVIEW

"The standard of review in determining whether a trial court properly refuses to dissolve a temporary injunction is abuse of discretion." Sea Tow Servs. Int'l, Inc. v. Pontin, 973 So. 2d 531, 532 (Fla. 3d DCA 2007) (citations omitted). However, appurtenant legal matters are reviewed de novo. Price v. Taylor, 298 So. 3d 654, 656 (Fla. 4th DCA 2020) (citation omitted).

LEGAL ANALYSIS

The extraterritorial effect of a foreign decree "depends upon what our greatest jurists have been content to call 'the comity of nations.'" Hilton v. Guyot, 159 U.S. 113, 163, 16 S. Ct. 139, 143, 40 L. Ed. 95 (1895). Comity is meant to solve the dilemma that "[n]o law has any effect of its own force, beyond the limits of the sovereignty from which its authority derived." Id. at 163, 16 S. Ct. at 143.

Although comity "has been fertile in suggesting a discretion unregulated by general principles," in Hilton the Supreme Court "articulated clear rules for the enforcement of foreign judgments in the United States:"

> [W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular

> proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh.

William S. Dodge, International Comity in American Law, 115 Colum. L. Rev. 2071, 2075-90 (2015) (quoting Hilton, 159 U.S. at 202-03, 16 S. Ct. at 158). These rules have evolved slightly over the years, and, today, most state courts adhere to the standard promulgated under the Restatement (Second) of Conflict of Law.[2] Under the Restatement,

> a decree rendered in a foreign nation which orders or enjoins the doing of an act will be enforced in this country provided that such enforcement is necessary to effectuate the decree and will not impose an undue burden upon the American court and provided further that in the view of the American court the decree is consistent with fundamental principles of justice and of good morals.

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[2] "The federal doctrine of comity is applicable under Hilton only when a foreign-nation judgment is presented to a federal court having 28 U.S.C. § 1331 federal question jurisdiction. While the opposite result has been urged, Hilton-style federal comity, unlike federal full faith and credit, does not preempt a state's version of comity either in an Erie [Railroad Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)]-based federal diversity case, or in a state court case." Robert Laurence, The Role, If any, for the Federal Courts in the Cross-Boundary Enforcement of Federal, State and Tribal Money Judgments, 35 Tulsa L.J. 1, 25 (1999).

Restatement (Second) of Conflict of Law § 102 cmt. g (Am. Law Inst. 1971); see also Nahar v. Nahar, 656 So. 2d 225, 229 (Fla. 3d DCA 1995) ("[A]ny foreign decree should be recognized as a valid judgment, and thus be entitled to comity, where the parties have been given notice and the opportunity to be heard, where the foreign court had original jurisdiction and where the foreign decree does not offend the public policy of the State of Florida.").

In Florida, recognition of international final foreign judgments is governed by statute, while general principles of comity allow for the discretionary enforcement of certain interlocutory rulings. See § 55.604, Fla. Stat. As is relevant to this case, courts have "repeatedly approved the enforcement in Florida of temporary injunctions issued by foreign courts." Cermesoni v. Maneiro, 144 So. 3d 627, 629 (Fla. 3d DCA 2014).

Here, it is uncontroverted Olvera was afforded due process in Mexico and the foreign tribunal possessed original jurisdiction. Further, given the preliminary finding by the NBSC of creditor fraud and the resultant weighty need to preserve assets, along with the pervasive sentiment that debtors ought "not be able to walk away from their foreign court-imposed obligations by spiriting away their money or assets" in the United States, the foreign decree neither offends the public policy of our State nor emburdens our courts. de Pacanins v. Pacanins, 650 So. 2d 1028, 1029-30 (Fla. 3d DCA 1995) (citation omitted).

Olvera, however, assails the failure to perfect service of process in the Miami-Dade County proceedings as fatal to the continuing vitality of the injunction. Undoubtedly, a judge "has the power to issue a temporary injunction prior to service of process upon a defendant." Pascul v. George Davis & Co., 170 So. 2d 466, 467 (Fla. 3d DCA 1965) (citing Smith v. Hous. Auth. of Daytona Beach, 3 So. 2d 880 (Fla. 1941); Thebaut v. Canova, 11 Fla. 143 (1866); 28 Am. Jur. Injunctions § 246). Moreover, here, Vejar strictly complied with the narrow requirements of Florida Rule of Civil Procedure 1.610(a) in seeking relief without notice. See Fla. High Sch. Activities Ass'n, Inc. v. Benitez, 748 So. 2d 358, 359 (Fla. 5th DCA 1999) ("A party seeking injunction may, under certain narrow circumstances, be entitled to receive an *ex parte* hearing on his request provided that he complies with the procedure set forth in Florida Rule of Civil Procedure 1.610."). Thus, the entry of the injunction does not offend any traditional notion of due process.

Further, as Vejar persuasively argues, the role of the lower court, serving in an ancillary capacity to the Mexican tribunal, "was confined to the[] in rem matter[]" of recognizing and enforcing the embargo. Cermesoni, 144 So. 3d at 629. Hence, the court "merely carried out the cross-border request for assistance by recognizing the [Mexican] Court's ruling and entering the injunction directed to specific Florida asset[]." Id. Given the due process afforded in Mexico and the limited role of the court below, while the failure to effect service within the four-year time span is

hardly ideal, the lack of personal jurisdiction cannot be deemed, in and of itself, an insurmountable hurdle to the continuation of the injunction. See Archer v. U.S. Bank Nat'l Ass'n, 220 So. 3d 477, 478-79 (Fla. 5th DCA 2017) ("[P]ersonal jurisdiction is not required to initiate a . . . proceeding[] instituted against the subject property [because it is an] in rem proceeding[].") (citations omitted); Cooper v. Gibson, 208 So. 2d 117, 118 (Fla. 4th DCA 1968) ("As a general proposition jurisdiction is either in rem, quasi in rem, or in personam. The former two are based on the location of property within the jurisdiction of the state."); Harris & Co. Advert., Inc. v. Republic of Cuba, 127 So. 2d 687, 693 (Fla. 3d DCA 1961) ("[A] judgment in rem may be entered in the absence of personal jurisdiction in actions on a debt due and owing."). Compare Hamilton v. Hamilton, 142 So. 3d 969, 973 (Fla. 4th DCA 2014) (reversing the denial of a motion to dissolve injunction for lack of personal jurisdiction on breach of contract claim where defendant "had notice, and specially appeared to contest personal jurisdiction") with Smith v. Knight, 679 So. 2d 359, 361 (Fla. 4th DCA 1996) ("A request for a temporary injunction often accompanies the original complaint and service of both are typically accomplished simultaneously. One ground for an ex parte temporary injunction is that to give notice would be to accelerate the injury. Personal jurisdiction is thus not required for a temporary injunction to *issue*.") (citations omitted).

Finally, here, after the letter rogatory issued, despite expending reasonably diligent efforts, Vejar and the Mexican government were unable to ascertain Olvera's whereabouts. Moreover, despite having knowledge of the Mexican embargo, Olvera waited four years to seek dissolution of the injunction. Hence, we decline to lay the blame for the delay in service solely at the feet of Vejar. Instead, we echo the sage words of a court convened long ago,

> for a court ought on motion to dissolve an injunction simply because the plaintiff is grossly negligent in progressing the cause, by permitting it to be continued at rules an unreasonable length of time, whenever such motion is made with reasonable promptness on the part of the defendant. But, if such motion also be unreasonably delayed by the defendant, the court ought not, except under peculiar circumstances, to dissolve the injunction on motion, though the plaintiff has been guilty of gross negligence in progressing his suit.

McCoy v. McCoy, 2 S.E. 809, 824-25 (W. Va. 1887) (citations omitted).

Finding no procedural error, we reject the contention that the refusal to dissolve the injunction was "arbitrary, fanciful, or unreasonable [or that] . . . no reasonable man [or woman] would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980) (citation omitted).

Affirmed.