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United States Army Corps of Engineers v. Hawkes Co., --- S.Ct. ----, 2016 WL 3041052 (2016).
A determination by the Corps of Engineers that land contains waters covered by the anti-discharge provisions of the Clean Water Act, 33 U. S. C. §§1311(a), 1362(7), constitutes "final agency action" that can be immediately challenged by the landowner without the necessity of seeking a permit or risking possible enforcement action.

Securities and Exchange Commission v. Graham, --- F.3d ----, 2016 WL 3033605 (11th Cir. 2016).
28 U.S.C. § 2462 bars the Securities and Exchange Commission from bringing claims for damages unless brought within five years. However, the limitations provision does not apply to claims for injunctions.

Hewett v. Wells Fargo Bank, N.A., -- So. 3d ----, 2016 WL 3065014 (Fla. 2d DCA 2016).
A debtor in bankruptcy, as the result of the automatic stay, may not file an appeal.

Wells Fargo Bank v. Sawh, --- So. 3d ----, 2016 WL 3065812 (Fla. 3d DCA 2016).
A trial court must hold a trial or evidentiary hearing in order to judicially determine the amounts necessary to redeem a mortgage under Florida Statute section 45.0315.

Segall v. Wachovia Bank, N.A., --- So. 3d ----, 2016 WL 3065599 (Fla 4th DCA 2016).
A party seeking to prove standing as the surviving corporate entity after a merger must offer evidence that all of the prior entity's assets were merged into the surviving entity.

Deutsche Bank National Trust Company v. Baker, --- So. 3d ----, 2016 WL 3087775 (Fla. 4th DCA 2016).
Even if evidence of damages was erroneously admitted, a lender states a prima facie case for foreclosure upon admission of evidence of the default and damages.

Bunin v. Matrixx Initiatives, Inc., --- So. 3d ----, 2016 WL 3090777 (Fla. 4th DCA 2016).
The changes to Florida Statute 90.702 (the adoption of the Daubert standard for expert testimony) are procedural or remedial and are to be applied retroactively.

Syllabus

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

UNITED STATES ARMY CORPS OF ENGINEERS *v.* HAWKES CO., INC., ET AL.

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

No. 15–290. Argued March 30, 2016—Decided May 31, 2016

The Clean Water Act regulates "the discharge of any pollutant" into "the waters of the United States." 33 U. S. C. §§1311(a), 1362(7), (12). When property contains such waters, landowners who discharge pollutants without a permit from the Army Corps of Engineers risk substantial criminal and civil penalties, §§1319(c), (d), while those who do apply for a permit face a process that is often arduous, expensive, and long. It can be difficult to determine in the first place, however, whether "waters of the United States" are present. During the time period relevant to this case, for example, the Corps defined that term to include all wetlands, the "use, degradation or destruction of which could affect interstate or foreign commerce." 33 CFR §328.3(a)(3). Because of that difficulty, the Corps allows property owners to obtain a standalone "jurisdictional determination" (JD) specifying whether a particular property contains "waters of the United States." §331.2. A JD may be either "preliminary," advising a property owner that such waters "may" be present, or "approved," definitively "stating the presence or absence" of such waters. *Ibid.* An "approved" JD is considered an administratively appealable "final agency action," §§320.1(a)(6), 331.2, and is binding for five years on both the Corps and the Environmental Protection Agency, 33 CFR pt. 331, App. C; EPA, Memorandum of Agreement: Exemptions Under Section 404(F) of the Clean Water Act §VI–A.

Respondents, three companies engaged in mining peat, sought a permit from the Corps to discharge material onto wetlands located on property that respondents own and hope to mine. In connection with the permitting process, respondents obtained an approved JD from the Corps stating that the property contained "waters of the United

States" because its wetlands had a "significant nexus" to the Red River of the North, located some 120 miles away. After exhausting administrative remedies, respondents sought review of the approved JD in Federal District Court under the Administrative Procedure Act (APA), but the District Court dismissed for want of jurisdiction, holding that the revised JD was not a "final agency action for which there is no other adequate remedy in a court," 5 U. S. C. §704. The Eighth Circuit reversed.

Held: The Corps' approved JD is a final agency action judicially reviewable under the APA. Pp. 5–10.

(a) In general, two conditions must be satisfied for an agency action to be "final" under the APA: "First, the action must mark the consummation of the agency's decisionmaking process," and "second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett* v. *Spear*, 520 U. S. 154, 177–178. Pp. 5–8.

(1) An approved JD satisfies *Bennett*'s first condition. It clearly "mark[s] the consummation" of the Corps' decisionmaking on the question whether a particular property does or does not contain "waters of the United States." It is issued after extensive factfinding by the Corps regarding the physical and hydrological characteristics of the property, see U. S. Army Corps of Engineers, Jurisdictional Determination Form Instructional Guidebook 47–60, and typically remains valid for a period of five years, see 33 CFR pt. 331, App. C. The Corps itself describes approved JDs as "final agency action." *Id.* §320.1(a)(6). Pp. 5–6.

(2) The definitive nature of approved JDs also gives rise to "direct and appreciable legal consequences," thereby satisfying *Bennett*'s second condition as well. 520 U. S., at 178. A "negative" JD—*i.e.*, an approved JD stating that property does not contain jurisdictional waters—creates a five-year safe harbor from civil enforcement proceedings brought by the Government and limits the potential liability a property owner faces for violating the Clean Water Act. See 33 U. S. C. §§1319, 1365(a). Each of those effects is a legal consequence. It follows that an "affirmative" JD, like the one issued here, also has legal consequences: It deprives property owners of the five-year safe harbor that "negative" JDs afford. This conclusion tracks the "pragmatic" approach the Court has long taken to finality. *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 149. Pp. 6–8.

(b) A "final" agency action is reviewable under the APA only if there are no adequate alternatives to APA review in court. The Corps contends that respondents have two such alternatives: They may proceed without a permit and argue in a Government enforcement action that a permit was not required, or they may complete the

permit process and then seek judicial review, which, the Corps suggests, is what Congress envisioned. Neither alternative is adequate. Parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of "serious criminal and civil penalties." *Abbott*, 387 U. S., at 153. And the permitting process is not only costly and lengthy, but also irrelevant to the finality of the approved JD and its suitability for judicial review. Furthermore, because the Clean Water Act makes no reference to standalone jurisdictional determinations, there is little basis for inferring anything from it concerning their reviewability. Given "the APA's presumption of reviewability for all final agency action," *Sackett* v. *EPA*, 566 U. S. ___, ___, "[t]he mere fact" that permitting decisions are reviewable is insufficient to imply "exclusion as to other[ ]" agency actions, such as approved JDs, *Abbott*, 387 U. S., at 141. Pp. 8–10.

782 F. 3d 994, affirmed.

ROBERTS, C. J., delivered the opinion of the Court, in which KENNEDY, THOMAS, BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. KENNEDY, J., filed a concurring opinion, in which THOMAS and ALITO, JJ., joined. KAGAN, J., filed a concurring opinion. GINSBURG, J., filed an opinion concurring in part and concurring in the judgment.

SUPREME COURT OF THE UNITED STATES

No. 15–290

UNITED STATES ARMY CORPS OF ENGINEERS, PETITIONER *v.* HAWKES CO., INC., ET AL.

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

[May 31, 2016]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Clean Water Act regulates the discharge of pollutants into "the waters of the United States." 33 U. S. C. §§1311(a), 1362(7), (12). Because it can be difficult to determine whether a particular parcel of property contains such waters, the U. S. Army Corps of Engineers will issue to property owners an "approved jurisdictional determination" stating the agency's definitive view on that matter. See 33 CFR §331.2 and pt. 331, App. C (2015). The question presented is whether that determination is final agency action judicially reviewable under the Administrative Procedure Act, 5 U. S. C. §704.

I

A

The Clean Water Act prohibits "the discharge of any pollutant" without a permit into "navigable waters," which it defines, in turn, as "the waters of the United States." 33 U. S. C. §§1311(a), 1362(7), (12). During the time period relevant to this case, the U. S. Army Corps of Engineers defined the waters of the United States to include land

areas occasionally or regularly saturated with water—such as "mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, [and] playa lakes"—the "use, degradation or destruction of which could affect interstate or foreign commerce." 33 CFR §328.3(a)(3) (2012). The Corps has applied that definition to assert jurisdiction over "270-to-300 million acres of swampy lands in the United States—including half of Alaska and an area the size of California in the lower 48 States." *Rapanos* v. *United States*, 547 U. S. 715, 722 (2006) (plurality opinion).[1]

It is often difficult to determine whether a particular piece of property contains waters of the United States, but there are important consequences if it does. The Clean Water Act imposes substantial criminal and civil penalties for discharging any pollutant into waters covered by the Act without a permit from the Corps. See 33 U. S. C. §§1311(a), 1319(c), (d), 1344(a). The costs of obtaining such a permit are significant. For a specialized "individual" permit of the sort at issue in this case, for example, one study found that the average applicant "spends 788 days and $271,596 in completing the process," without "counting costs of mitigation or design changes." *Rapanos*, 547 U. S., at 721. Even more readily available "general" permits took applicants, on average, 313 days and $28,915 to complete. *Ibid.* See generally 33 CFR §323.2(h) (limiting "general" permits to activities that "cause only minimal individual and cumulative environmental impacts").

The Corps specifies whether particular property con-

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[1] In 2015, the Corps adopted a new rule modifying the definition of the scope of waters covered by the Clean Water Act in light of scientific research and decisions of this Court interpreting the Act. See Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054, 37055–37056. That rule is currently stayed nationwide, pending resolution of claims that the rule is arbitrary, capricious, and contrary to law. See *In re EPA*, 803 F. 3d 804, 807–809 (CA6 2015).

tains "waters of the United States" by issuing "jurisdictional determinations" (JDs) on a case-by-case basis. §331.2. JDs come in two varieties: "preliminary" and "approved." *Ibid.* While preliminary JDs merely advise a property owner "that there *may* be waters of the United States on a parcel," approved JDs definitively "stat[e] the presence or absence" of such waters. *Ibid.* (emphasis added). Unlike preliminary JDs, approved JDs can be administratively appealed and are defined by regulation to "constitute a Corps final agency action." §§320.1(a)(6), 331.2. They are binding for five years on both the Corps and the Environmental Protection Agency, which share authority to enforce the Clean Water Act. See 33 U. S. C. §§1319, 1344(s); 33 CFR pt. 331, App. C; EPA, Memorandum of Agreement: Exemptions Under Section 404(F) of the Clean Water Act §VI–A (1989) (Memorandum of Agreement).

B

Respondents are three companies engaged in mining peat in Marshall County, Minnesota. Peat is an organic material that forms in waterlogged grounds, such as wetlands and bogs. See Xuehui & Jinming, Peat and Peatlands, in 2 Coal, Oil Shale, Natural Bitumen, Heavy Oil and Peat 267–272 (G. Jinsheng ed. 2009) (Peat and Peatlands). It is widely used for soil improvement and burned as fuel. *Id.,* at 277. It can also be used to provide structural support and moisture for smooth, stable greens that leave golfers with no one to blame but themselves for errant putts. See Monteith & Welton, Use of Peat and Other Organic Materials on Golf Courses, 13 Bulletin of the United States Golf Association Green Section 90, 95–100 (1933). At the same time, peat mining can have significant environmental and ecological impacts, see Peat and Peatlands 280–281, and therefore is regulated by both federal and state environmental protection agencies, see,

e.g., Minn. Stat. §103G.231 (2014).

Respondents own a 530-acre tract near their existing mining operations. The tract includes wetlands, which respondents believe contain sufficient high quality peat, suitable for use in golf greens, to extend their mining operations for 10 to 15 years. App. 8, 14–15, 31.

In December 2010, respondents applied to the Corps for a Section 404 permit for the property. *Id.*, at 15. A Section 404 permit authorizes "the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U. S. C. §1344(a). Over the course of several communications with respondents, Corps officials signaled that the permitting process would be very expensive and take years to complete. The Corps also advised respondents that, if they wished to pursue their application, they would have to submit numerous assessments of various features of the property, which respondents estimate would cost more than $100,000. App. 16–17, 31–35.

In February 2012, in connection with the permitting process, the Corps issued an approved JD stating that the property contained "water of the United States" because its wetlands had a "significant nexus" to the Red River of the North, located some 120 miles away. *Id.*, at 13, 18, 20. Respondents appealed the JD to the Corps' Mississippi Valley Division Commander, who remanded for further factfinding. On remand, the Corps reaffirmed its original conclusion and issued a revised JD to that effect. *Id.,* at 18–20; App. to Pet. for Cert. 44a–45a.

Respondents then sought judicial review of the revised JD under the Administrative Procedure Act (APA), 5 U. S. C. §500 *et seq*. The District Court dismissed for want of subject matter jurisdiction, holding that the revised JD was not "final agency action for which there is no other adequate remedy in a court," as required by the APA prior to judicial review, 5 U. S. C. §704. 963 F. Supp. 2d 868, 872, 878 (Minn. 2013). The Court of Appeals for the

Eighth Circuit reversed, 782 F. 3d 994, 1002 (2015), and we granted certiorari, 577 U. S. ___ (2015).

II

The Corps contends that the revised JD is not "final agency action" and that, even if it were, there are adequate alternatives for challenging it in court. We disagree at both turns.

A

In *Bennett* v. *Spear*, 520 U. S. 154 (1997), we distilled from our precedents two conditions that generally must be satisfied for agency action to be "final" under the APA. "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.,* at 177–178 (internal quotation marks and citation omitted).[2]

The Corps does not dispute that an approved JD satisfies the first *Bennett* condition. Unlike preliminary JDs—which are "advisory in nature" and simply indicate that "there may be waters of the United States" on a parcel of property, 33 CFR §331.2—an approved JD clearly "mark[s] the consummation" of the Corps' decisionmaking process on that question, *Bennett*, 520 U. S., at 178 (internal quotation marks omitted). It is issued after extensive factfinding by the Corps regarding the physical and hydrological characteristics of the property, see U. S. Army Corps of Engineers, Jurisdictional Determination Form Instructional Guidebook 47–60 (2007), and is typically not

[2] Because we determine that a JD satisfies both prongs of *Bennett*, we need not consider respondents' argument that an agency action that satisfies only the first may also constitute final agency action. See Brief for Respondents 19–20.

revisited if the permitting process moves forward. Indeed, the Corps itself describes approved JDs as "final agency action," see 33 CFR §320.1(a)(6), and specifies that an approved JD "will remain valid for a period of five years," Corps, Regulatory Guidance Letter No. 05–02, §1(a), p. 1 (June 14, 2005) (2005 Guidance Letter); see also 33 CFR pt. 331, App. C.

The Corps may revise an approved JD within the five-year period based on "new information." 2005 Guidance Letter §1(a), at 1. That possibility, however, is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal. See *Sackett* v. *EPA*, 566 U. S. ___, ___ (2012); see also *National Cable & Telecommunications Assn.* v. *Brand X Internet Services*, 545 U. S. 967, 981 (2005). By issuing respondents an approved JD, the Corps for all practical purposes "has ruled definitively" that respondents' property contains jurisdictional waters. *Sackett*, 566 U. S., at ___ (GINSBURG, J., concurring) (slip op., at 1).

The definitive nature of approved JDs also gives rise to "direct and appreciable legal consequences," thereby satisfying the second prong of *Bennett*. 520 U. S., at 178. Consider the effect of an approved JD stating that a party's property does *not* contain jurisdictional waters—a "negative" JD, in Corps parlance. As noted, such a JD will generally bind the Corps for five years. See 33 CFR pt. 331, App. C; 2005 Guidance Letter §1. Under a longstanding memorandum of agreement between the Corps and EPA, it will also be "binding on the Government and represent the Government's position in any subsequent Federal action or litigation concerning that final determination." Memorandum of Agreement §§IV–C–2, VI–A. A negative JD thus binds the two agencies authorized to bring civil enforcement proceedings under the Clean Water Act, see 33 U. S. C. §1319, creating a five-year safe harbor from such proceedings for a property owner. Addi-

tionally, although the property owner may still face a citizen suit under the Act, such a suit—unlike actions brought by the Government—cannot impose civil liability for wholly past violations. See §§1319(d), 1365(a); *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U. S. 49, 58–59 (1987). In other words, a negative JD both narrows the field of potential plaintiffs and limits the potential liability a landowner faces for discharging pollutants without a permit. Each of those effects is a "legal consequence[ ]" satisfying the second *Bennett* prong. 520 U. S., at 178; see also *Sackett*, 566 U. S., at ___.

It follows that affirmative JDs have legal consequences as well: They represent the denial of the safe harbor that negative JDs afford. See 5 U. S. C. §551(13) (defining "agency action" to include an agency "rule, order, license, sanction, relief, or the equivalent," or the "denial thereof"). Because "legal consequences . . . flow" from approved JDs, they constitute final agency action. *Bennett*, 520 U. S., at 178 (internal quotation marks omitted).[3]

This conclusion tracks the "pragmatic" approach we have long taken to finality. *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 149 (1967). For example, in *Frozen Food Express* v. *United States*, 351 U. S. 40 (1956), we considered the finality of an order specifying which commodities the Interstate Commerce Commission believed were exempt by statute from regulation, and which it

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[3]The Corps asserts that the Memorandum of Agreement addresses only "special case" JDs, rather than "mine-run" ones "of the sort at issue here." Reply Brief 12, n. 3. But the memorandum plainly makes binding "[a]ll final determinations," whether in "[s]pecial" or "[n]on-special" cases. Memorandum of Agreement §§IV–C, VI–A; see also Corps, Memorandum of Understanding Geographical Jurisdiction of the Section 404 Program, 45 Fed. Reg. 45019, n. 1 (1980) ("[U]nder this [memorandum], except in special cases previously agreed to, the [Corps] is authorized to make a final determination . . . and such determination shall be binding.").

believed were not. Although the order "had no authority except to give notice of how the Commission interpreted" the relevant statute, and "would have effect only if and when a particular action was brought against a particular carrier," *Abbott*, 387 U. S., at 150, we held that the order was nonetheless immediately reviewable, *Frozen Food*, 351 U. S., at 44–45. The order, we explained, "warns every carrier, who does not have authority from the Commission to transport those commodities, that it does so at the risk of incurring criminal penalties." *Id.*, at 44. So too here, while no administrative or criminal proceeding can be brought for failure to conform to the approved JD itself, that final agency determination not only deprives respondents of a five-year safe harbor from liability under the Act, but warns that if they discharge pollutants onto their property without obtaining a permit from the Corps, they do so at the risk of significant criminal and civil penalties.

B

Even if final, an agency action is reviewable under the APA only if there are no adequate alternatives to APA review in court. 5 U. S. C. §704. The Corps contends that respondents have two such alternatives: either discharge fill material without a permit, risking an EPA enforcement action during which they can argue that no permit was required, or apply for a permit and seek judicial review if dissatisfied with the results. Brief for Petitioner 45–51.

Neither alternative is adequate. As we have long held, parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of "serious criminal and civil penalties." *Abbott*, 387 U. S., at 153. If respondents discharged fill material without a permit, in the mistaken belief that their property did not contain jurisdictional waters, they

would expose themselves to civil penalties of up to $37,500 for each day they violated the Act, to say nothing of potential criminal liability. See 33 U. S. C. §§1319(c), (d); *Sackett*, 566 U. S., at ___, n. 1 (citing 74 Fed. Reg. 626, 627 (2009)). Respondents need not assume such risks while waiting for EPA to "drop the hammer" in order to have their day in court. *Sackett*, 566 U. S., at ___ (slip op., at 6).

Nor is it an adequate alternative to APA review for a landowner to apply for a permit and then seek judicial review in the event of an unfavorable decision. As Corps officials indicated in their discussions with respondents, the permitting process can be arduous, expensive, and long. See *Rapanos*, 547 U. S., at 721 (plurality opinion). On top of the standard permit application that respondents were required to submit, see 33 CFR §325.1(d) (detailing contents of permit application), the Corps demanded that they undertake, among other things, a "hydrogeologic assessment of the rich fen system including the mineral/nutrient composition and pH of the groundwater; groundwater flow spatially and vertically; discharge and recharge areas"; a "functional/resource assessment of the site including a vegetation survey and identification of native fen plan communities across the site"; an "inventory of similar wetlands in the general area (watershed), including some analysis of their quality"; and an "inventory of rich fen plant communities that are within sites of High and Outstanding Biodiversity Significance in the area." App. 33–34. Respondents estimate that undertaking these analyses alone would cost more than $100,000. *Id.,* at 17. And whatever pertinence all this might have to the issuance of a permit, none of it will alter the finality of the approved JD, or affect its suitability for judicial review. The permitting process adds nothing to the JD.

The Corps nevertheless argues that Congress made the "evident[ ]" decision in the Clean Water Act that a coverage determination would be made "as part of the permit-

ting process, and that the property owner would obtain any necessary judicial review of that determination at the conclusion of that process." Brief for Petitioner 46. But as the Corps acknowledges, the Clean Water Act makes no reference to standalone jurisdictional determinations, *ibid.*, so there is little basis for inferring anything from it concerning the reviewability of such distinct final agency action. And given "the APA's presumption of reviewability for all final agency action," *Sackett*, 566 U. S., at ___ (slip op., at 8), "[t]he mere fact" that permitting decisions are "reviewable should not suffice to support an implication of exclusion as to other[ ]" agency actions, such as approved JDs, *Abbott*, 387 U. S., at 141 (internal quotation marks omitted); see also *Sackett*, 566 U. S., at ___ (slip op., at 8) ("[I]f the express provision of judicial review in one section of a long and complicated statute were alone enough to overcome the APA's presumption of reviewability . . . , it would not be much of a presumption at all").

Finally, the Corps emphasizes that seeking review in an enforcement action or at the end of the permitting process would be the only available avenues for obtaining review "[i]f the Corps had never adopted its practice of issuing standalone jurisdictional determinations upon request." Reply Brief 3; see also *id.,* at 4, 23. True enough. But such a "count your blessings" argument is not an adequate rejoinder to the assertion of a right to judicial review under the APA.

The judgment of the Court of Appeals for the Eighth Circuit is affirmed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 15–290

UNITED STATES ARMY CORPS OF ENGINEERS, PETITIONER *v.* HAWKES CO., INC., ET AL.

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

[May 31, 2016]

JUSTICE KENNEDY, with whom JUSTICE THOMAS and JUSTICE ALITO join, concurring.

My join extends to the Court's opinion in full. The following observation seems appropriate not to qualify what the Court says but to point out that, based on the Government's representations in this case, the reach and systemic consequences of the Clean Water Act remain a cause for concern. As JUSTICE ALITO has noted in an earlier case, the Act's reach is "notoriously unclear" and the consequences to landowners even for inadvertent violations can be crushing. See *Sackett* v. *EPA*, 566 U. S. ___, ___ (2012) (concurring opinion) (slip op., at 1).

An approved Jurisdictional Determination (JD) gives a landowner at least some measure of predictability, so long as the agency's declaration can be relied upon. Yet, the Government has represented in this litigation that a JD has no legally binding effect on the Environmental Protection Agency's (EPA) enforcement decisions. It has stated that the memorandum of agreement between the EPA and the Army Corps of Engineers, which today's opinion relies on, does not have binding effect and can be revoked or amended at the Agency's unfettered discretion. Reply Brief 12; Tr. of Oral Arg. 16. If that were correct, the Act's ominous reach would again be unchecked by the limited relief the Court allows today. Even if, in an ordinary case,

an agency's internal agreement with another agency cannot establish that its action is final, the Court is right to construe a JD as binding in light of the fact that in many instances it will have a significant bearing on whether the Clean Water Act comports with due process.

The Act, especially without the JD procedure were the Government permitted to foreclose it, continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation.

SUPREME COURT OF THE UNITED STATES

No. 15–290

UNITED STATES ARMY CORPS OF ENGINEERS, PETITIONER *v.* HAWKES CO., INC., ET AL.

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

[May 31, 2016]

JUSTICE KAGAN, concurring.

I join the Court's opinion in full. I write separately to note that for me, unlike for JUSTICE GINSBURG, see *post,* at 1 (opinion concurring in part and concurring in judgment), the memorandum of agreement between the Army Corps of Engineers and the Environmental Protection Agency is central to the disposition of this case. For an agency action to be final, "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett* v. *Spear*, 520 U. S. 154, 178 (1997). As the Court states, the memorandum of agreement establishes that jurisdictional determinations (JDs) are "binding on the Government and represent the Government's position in any subsequent Federal action or litigation concerning that final determination." Memorandum of Agreement §§IV–C–2, VI–A; *ante*, at 6 (majority opinion). A negative JD thus prevents the Corps and EPA—the two agencies with authority to enforce the Clean Water Act—from bringing a civil action against a property owner for the JD's entire 5-year lifetime. *Ante*, at 6–7, and n. 3. The creation of that safe harbor, which binds the agencies in any subsequent litigation, is a "direct and appreciable legal consequence[ ]" satisfying the second prong of *Bennett*. 520 U. S., at 178.

SUPREME COURT OF THE UNITED STATES

No. 15–290

UNITED STATES ARMY CORPS OF ENGINEERS, PETITIONER *v.* HAWKES CO., INC., ET AL.

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

[May 31, 2016]

JUSTICE GINSBURG, concurring in part and concurring in the judgment.

I join the Court's opinion, save for its reliance upon the Memorandum of Agreement between the Army Corps of Engineers and the Environmental Protection Agency. *Ante*, at 6–7, and n. 3 (construing the memorandum to establish that Corps jurisdictional determinations (JDs) are binding on the Federal Government in litigation for five years). The Court received scant briefing about this memorandum, and the United States does not share the Court's reading of it. See Reply Brief 12, n. 3 (memorandum "does not address mine-run Corps jurisdictional determinations of the sort at issue here"); Tr. of Oral Arg. 7 (same); *id.,* at 9 (reading of the memorandum to establish that JDs have binding effect in litigation does not "reflec[t] current government policy"). But the JD at issue is "definitive," not "informal" or "tentative," *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 151 (1967), and has "an immediate and practical impact," *Frozen Food Express* v. *United States*, 351 U. S. 40, 44 (1956). See also *ante*, at 7–8.* Accordingly, I agree with the Court

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* *Bennett* v. *Spear*, 520 U. S. 154, 178 (1997), contrary to JUSTICE KAGAN's suggestion, *ante,* at 1, (concurring opinion) does not displace or alter the approach to finality established by *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 149–151 (1967), and *Frozen Food Express* v.

that the JD is final.

United States, 351 U. S. 40, 44 (1956). *Bennett* dealt with finality quickly, and did not cite those pathmarking decisions.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-13562

D.C. Docket No. 4:13-cv-10011-JLK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellant,

versus

BARRY J. GRAHAM,
FRED DAVIS CLARK, JR.,
a.k.a. Dave Clark,
CRISTAL R. COLEMAN,
a.k.a. Cristal Clark,
DAVID W. SCHWARZ,
RICKY LYNN STOKES,

Defendants - Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(May 26, 2016)

Before MARCUS, JILL PRYOR and FAY, Circuit Judges.

JILL PRYOR, Circuit Judge:

With few exceptions, 28 U.S.C. § 2462 bars the government from bringing suit to enforce "any civil fine, penalty, or forfeiture" after five years from when the claim first accrued. The Securities and Exchange Commission (the "SEC" or "Commission") waited more than five years to commence an action for declaratory relief, injunctive relief, and disgorgement against the defendants, who allegedly violated federal securities law by selling unregistered securities. The defendants raised the five-year statute of limitations as an affirmative defense in their motions for summary judgment. The district court dismissed the case, ruling that the statute of limitations set out in § 2462 is jurisdictional and that every remedy the SEC requested was outside the court's jurisdiction. The SEC appealed, arguing that § 2462 is nonjurisdictional and that the injunctive and declaratory relief and disgorgement it sought were not subject to § 2462's time bar. After careful consideration of the briefs, and with the benefit of oral argument, we affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND

On January 30, 2013, the SEC filed a civil enforcement action against Barry J. Graham, Fred Davis Clark, Jr., Cristal R. Coleman, David W. Schwarz, and Ricky Lynn Stokes (collectively, the "defendants"). The Second Amended

Complaint (the "complaint") alleged that, from at least November 2004 to July 2008, the defendants violated federal securities law by selling condominiums that were functioning, in reality, as unregistered securities. According to the complaint, the defendants raised more than $300 million from approximately 1,400 investors around the country but failed to pay out the returns they had guaranteed. The Commission requested that the district court (1) declare that the defendants had violated federal securities laws; (2) permanently enjoin the defendants from violating federal securities laws in the future; (3) direct the defendants to disgorge all profits from their illegal ventures, with prejudgment interest; (4) order the defendants to repatriate any funds held outside the district court's jurisdiction; and (5) require three defendants, Coleman, Clark, and Stokes, to pay civil money penalties.

Coleman, Clark, Stokes, and defendant Schwarz filed motions for summary judgment on two main grounds: (1) the sale of their condominiums were not investment contracts, and thus were not governed by securities laws; and (2) the statute of limitations under 28 U.S.C. § 2462 barred all of the SEC's requested forms of relief. The SEC filed a competing motion for summary judgment. The district court held a hearing on the defendants' statute of limitations defense.

Without reaching the merits of the cross-motions for summary judgment, the district court dismissed the SEC's complaint as time-barred. The court held that

§ 2462—which bars any action "for the enforcement of any civil fine, penalty, or forfeiture" if brought more than five years from the date the claim first accrued—is a "jurisdictional" statute of limitations; thus, if it applied, the court lacked subject matter jurisdiction. The court found that the defendants' alleged securities violations took place more than five years before the SEC filed suit. It further determined that § 2462 applied to all of the remedies the SEC sought, not just the civil money penalty. Specifically, the district court concluded that the injunctive and declaratory relief the SEC sought were penalties and that the disgorgement the SEC requested constituted forfeiture, all within the meaning of § 2462. Accordingly, the court dismissed the action with prejudice.

II. DISCUSSION

Although it accepts that § 2462 expressly bars its claim for civil money penalties, the SEC appeals the district court's ruling that § 2462 applies to the remaining remedies it sought: injunctive relief, declaratory relief, and disgorgement.[1] We review *de novo* issues of law, including questions of statutory

[1] The SEC also challenges on appeal the district court's conclusion that § 2462 is jurisdictional in nature. We need not decide for purposes of this appeal whether § 2462's time bar is jurisdictional such that a time-barred § 2462 claim should be dismissed for lack of subject matter jurisdiction. There is no question that we and the district court have jurisdiction to consider and apply § 2462's statute of limitations in this case. Whether § 2462's time bar is a jurisdictional requirement or only an affirmative defense does not impact our analysis here because the parties raise no issue on appeal about whether the defendants waived the statute of limitations, whether the SEC is entitled to equitable tolling, or who bears the burden of proof. *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-34 (2008) (discussing whether time bars are jurisdictional or constitute an affirmative defense). For our purposes and

interpretation. *De Sandoval v. U.S. Att'y Gen.*, 440 F.3d 1276, 1278 (11th Cir. 2006). "[A]ny statute of limitations sought to be applied against the United States must receive a strict construction in favor of the Government." *United States v. Banks*, 115 F.3d 916, 919 (11th Cir. 1997) (internal quotation marks omitted). We consider in turn the applicability of § 2462 to the SEC's request for injunctive relief, declaratory relief, and disgorgement.

A. Injunctive Relief

The district court held that § 2462 applied here because the injunction the SEC requested was "nothing short of a penalty" and therefore covered by § 2462's plain language. *SEC v. Graham*, 21 F. Supp. 3d 1300, 1310 (S.D. Fla. 2014). We cannot agree.

Our precedent forecloses the argument that § 2462 applies to injunctions, which are equitable remedies. *See Nat'l Parks & Conservation Ass'n v. Tenn. Valley Auth.*, 502 F.3d 1316, 1326 (11th Cir. 2007) (noting, where the plaintiffs sought an injunction to enforce EPA standards, "the statute of limitations set forth in 28 U.S.C. § 2462 applies only to claims for legal relief; it does not apply to equitable remedies"); *Banks*, 115 F.3d at 919 ("[S]ection 2462 does not apply to equitable remedies."). In *Banks*, the government obtained an injunction against a

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the parties', it makes no difference in this case whether we treat § 2462's time bar as a jurisdictional requirement or an affirmative defense. Accordingly, we do not reach this issue.

landowner requiring that he stop discharging materials into the wetlands on his property and take steps to restore the wetlands to their undisturbed condition before he began discharging the materials. 115 F.3d at 918. Despite Banks's claim that the action was barred by § 2462, we upheld the injunction, observing that it was an equitable remedy and thus beyond the reach of that statute. *Id.* at 919. An injunction requiring (or forbidding) future conduct is not subject to § 2462's statute of limitations.

Even if we were not bound by *Banks*, still we would conclude that § 2462 does not apply to injunctions like the one in this case. Section 2462 does not define the term "penalty"; we therefore look to the term's ordinary meaning. *See Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2002 (2012) ("When a term goes undefined in a statute, we give the term its ordinary meaning."); *Consol. Bank, N.A. v. U.S. Dep't of Treasury*, 118 F.3d 1461, 1463-66 (11th Cir. 1997). Definitions of the term "penalty" abound. The Supreme Court has defined a penalty as "something imposed in a punitive way for an infraction of a public law." *Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 412, 423 (1915). Similarly, the Oxford English Dictionary says a penalty is "[a] punishment imposed for breach of law, rule, or contract." *Penalty*, Oxford English Dictionary (2d ed. 1989). Black's Law Dictionary defines the term as "[p]unishment imposed on a wrongdoer, [usually] in the form of imprisonment or fine; [especially,] a sum of money

exacted as punishment for either a wrong to the state or a civil wrong (as distinguished from compensation for the injured party's loss)." *Penalty*, Black's Law Dictionary (10th ed. 2014).

Each of these definitions has the common element of looking backward in time. That is, a penalty addresses a wrong done in the past. *See, e.g.*, *Reich v. Occupational Safety & Health Review Comm'n*, 102 F.3d 1200, 1202 (11th Cir. 1997) (noting that "[u]nlike injunctive relief which addresses only ongoing or future violations, civil penalties address past violations").

Injunctions, by contrast, typically look forward in time. *See United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953) ("The purpose of an injunction is to prevent future violations . . . ."); *Strickland v. Alexander*, 772 F.3d 876, 883 (11th Cir. 2014) ("[I]njunctions regulate future conduct only; they do not provide relief for past injuries already incurred and over with."). An injunction therefore is not a penalty within the meaning of § 2462. *See United States v. Or. State Med. Soc'y*, 343 U.S. 326, 333 (1952) ("The sole function of an action for injunction is to forestall future violations. It is so unrelated to punishment or reparations for those past that its pendency or decision does not prevent concurrent or later remedy for past violations by indictment or action for damages by those injured."). If imposed, the injunction in this case would only prevent the defendants from violating securities laws in the future.

Giving the term "penalty" its ordinary meaning, as we must, the purpose and effect of the SEC's claim for injunctive relief are nonpunitive, and § 2462's time bar is inapplicable. Because the ordinary meaning of "penalty" is unambiguous, our analysis ends here. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then, this first canon [of statutory construction] is also the last: judicial inquiry is complete." (internal quotation marks omitted)).

Contrary to the defendants' argument, *Gabelli v. SEC* does not compel a different conclusion. 133 S. Ct. 1216 (2013). Although *Gabelli* cautioned against "leav[ing] defendants exposed to Government enforcement action . . . for an additional uncertain period into the future," in that case the Supreme Court held that for purposes of § 2462 a fraud claim brought by the SEC accrues when the defendant's allegedly fraudulent conduct occurred. 133 S. Ct. at 1221-24. In declining to adopt the discovery rule, which would delay accrual "until the plaintiff has 'discovered' his cause of action," the Court distinguished between a private action brought by "a defrauded victim seeking recompense" and "the Government bringing an enforcement action for civil penalties." *Id.* at 1221 (internal quotation marks omitted). The Court emphasized that, unlike a private action seeking compensatory damages, the SEC enforcement action "involve[d] penalties, which go beyond compensation, are intended to punish, and label defendants

wrongdoers." *Id.* at 1223. But the Court did not hold that all remedies the SEC may seek in an enforcement action are penalties and, in particular, did not address whether an SEC action seeking injunctive relief or disgorgement falls within § 2462's ambit. *Id.* at 1220 n.1. Thus, *Gabelli* does not inform our inquiry as to whether § 2462 governs claims for injunctive relief.

Because injunctions are equitable, forward-looking remedies and not penalties within the meaning of § 2462, we conclude that the five-year statute of limitations is inapplicable to injunctions such as the one the SEC sought in this case.[2]

B. Declaratory Relief

We agree with the district court, however, that the declaratory relief the SEC sought is backward-looking and thus would operate as a penalty under § 2462. On

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[2] We note that the injunction the SEC requested in the operative complaint sought to prevent the defendants from violating federal securities laws, otherwise known as an "obey-the-law" injunction. Repeatedly we have said that, in the context of SEC enforcement actions and otherwise, "obey-the-law" injunctions are unenforceable. *See SEC v. Smyth*, 420 F.3d 1225, 1233 n.14 (11th Cir. 2005); *Fla. Ass'n of Rehab. Facilities v. Fla. Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1222-23 (11th Cir. 2000) (citing cases holding that obey-the-law injunctions are unenforceable). In particular, "an injunction which merely tracks the language of the securities statutes and regulations," as the injunction in this case presently is described, "will not clearly and specifically describe permissible and impermissible conduct" as required by Federal Rule of Civil Procedure 65(d). *SEC v. Goble*, 682 F.3d 934, 952 (11th Cir. 2012). We "condemn these injunctions because they lack specificity and deprive defendants of the procedural protections that would ordinarily accompany a future charge of a violation of the securities laws." *Id.* at 949. The SEC argues, however, and we agree, that it is premature to review the precise nature of the injunction because, at this stage, the district court has issued no injunction for us to evaluate. It is at least possible that the SEC could seek injunctive relief that would be specific and narrow enough that the parties would be afforded sufficient warning to conform their conduct.

this point, *Gabelli* is instructive. There, the Supreme Court recognized that civil penalties "go beyond compensation, are intended to punish, and label defendants wrongdoers." *Id.* at 1223. The declaratory relief at issue here is no different. A declaration of liability goes beyond compensation and is intended to punish because it serves neither a remedial nor a preventative purpose; it is designed to redress previous infractions rather than to stop any ongoing or future harm. *Cf. Green v. Mansour*, 474 U.S. 64, 67 (1985) (characterizing declaratory relief that "related solely to past violations of federal law" as retrospective for purposes of the Eleventh Amendment). A public declaration that the defendants violated the law does little other than label the defendants as wrongdoers.

The SEC urges us to exempt declaratory relief from § 2462 because the SEC may use findings of past violations of securities laws to obtain other remedies. We are unpersuaded. First, some of the remedies the SEC could seek (i.e., civil penalties and, as discussed below, disgorgement) are themselves subject to § 2462 and similarly would be time-barred after five years. Second, declaratory relief that establishes past securities law violations is unnecessary for the SEC to secure an injunction. The SEC need only establish "(1) a prima facie case of previous violations of federal securities laws, and (2) a reasonable likelihood that the wrong will be repeated." *SEC v. Calvo*, 378 F.3d 1211, 1216 (11th Cir. 2004). A prima facie case of previous violations may, but need not, come in the form of

declaratory relief. In fact, the SEC may obtain an injunction when it is impossible to use declaratory relief as a predicate, such as with a defendant who has never before violated securities laws. *See SEC v. Miller*, 744 F. Supp. 2d 1325, 1336 (N.D. Ga. 2010) ("[N]umerous courts have found no requirement that a defendant must have committed violations before the ones at issue. Indeed, the 'previous' violations relied upon by federal courts as a basis for injunctive relief are frequently the same ones just proven in the liability portion of those cases."). Third, nothing in this analysis prevents the SEC from obtaining declaratory relief as a predicate for other remedies as long as the SEC does so before the statute of limitations expires.

Because the declaratory relief the SEC sought here fits the definition of a penalty, we hold that such relief is subject to § 2462's five-year statute of limitations.

C. Disgorgement

The district court concluded that "the disgorgement of all ill-gotten gains realized from the alleged violations of the securities laws—i.e., requiring defendants to relinquish money and property—can truly be regarded as nothing other than a forfeiture (both pecuniary and otherwise), which remedy is expressly covered by § 2462." *Graham*, 21 F. Supp. 3d at 1310-11. We agree with the

district court that for the purposes of § 2462 forfeiture and disgorgement are effectively synonyms; § 2462's statute of limitations applies to disgorgement.

Following the same principles of statutory interpretation as we did with the term "penalty," we look to the ordinary meaning of "forfeiture." Webster's Dictionary defines forfeiture as "the divesting of the ownership of particular property of a person on account of the breach of a legal duty and without any compensation to him." *Forfeiture*, Webster's Third New Int'l Dictionary (2002). The Oxford English Dictionary likewise defines forfeiture as "[t]he fact of losing or becoming liable to deprivation of (an estate, goods, life, an office, right, etc.) in consequence of a crime, offence, or breach of engagement." *Forfeiture*, Oxford English Dictionary (2d ed. 1989). These definitions illustrate that forfeiture occurs when a person is forced to turn over money or property because of a crime or wrongdoing.

We find no meaningful difference in the definitions of disgorgement and forfeiture. For example, Black's Law Dictionary defines disgorgement as "[t]he act of giving up something (such as profits illegally obtained) on demand or by legal compulsion." *Disgorgement*, Black's Law Dictionary (10th ed. 2014). Black's Law Dictionary provides a very similar definition for forfeiture: "[t]he loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty." *Forfeiture*, Black's Law Dictionary (10th ed. 2014). The

Supreme Court, too, has used the terms interchangeably. *See United States v. Ursery*, 518 U.S. 267, 284 (1996) ("Forfeitures serve a variety of purposes, but are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct."). We thus conclude that for the purposes of § 2462 the remedy of disgorgement is a "forfeiture," and § 2462's statute of limitations applies.[3]

The SEC argues that disgorgement cannot be forfeiture because the two terms refer to fundamentally different things: disgorgement only includes direct proceeds from wrongdoing, whereas forfeiture can include both ill-gotten gains and any additional profit earned on those ill-gotten gains (i.e., secondary profits). *Compare SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978) (recognizing that "[t]he court's power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing"),[4] *with United States v. Reed*, 924 F.2d 1014, 1017 (11th Cir. 1991) (requiring defendants to forfeit a building and its subsequent increase in property value between the time the crime began and when the building was sold). But even under the definitions the SEC puts forth, disgorgement is imposed as redress for wrongdoing and can be

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[3] Because we hold that disgorgement is a "forfeiture," 28 U.S.C. § 2462, we need not reach the defendants' alternative argument that disgorgement is a "penalty." *Id.*

[4] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we adopted as binding precedent all Fifth Circuit decisions issued before the close of business on September 30, 1981.

considered a subset of forfeiture. Because forfeiture includes disgorgement, § 2462 applies to disgorgement.

Furthermore, to read the two terms according to the SEC's interpretation would violate the long-settled principle "that words in statutes should be given their ordinary, popular meaning unless Congress clearly meant the words in some more technical sense." *United States v. Nat'l Broiler Mktg. Ass'n*, 550 F.2d 1380, 1386 (5th Cir. 1977), *aff'd*, 436 U.S. 816 (1978). We find no indication that in enacting § 2462's widely applicable statute of limitations, Congress meant to adopt the technical definitions of forfeiture and disgorgement the SEC urges over the words' ordinary meanings. "Had Congress wished unique or specialized meanings to attach to any of these terms, it readily could have taken the obvious and usual step either of including a specialized meaning in the definitions section of the statute or by using clear modifying language in the text of the statute." *Consol. Bank*, 118 F.3d at 1464. Particularly because § 2462 applies to a wide variety of agency actions and contexts, we are loath to adopt the technical definition that the SEC promotes. In sum, § 2462 applies to the declaratory relief and disgorgement the SEC sought, but not to the injunctive relief.

III. CONCLUSION

We conclude that the SEC is time-barred from proceeding with its claims for declaratory relief and disgorgement because, under the plain meaning of 28 U.S.C.

§ 2462, these remedies are a penalty and a forfeiture, respectively. But, because an injunction is not a penalty under § 2462, we remand for further proceedings on that remedy in accordance with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

PHILIP D. HEWETT, Appellant, v. WELLS FARGO BANK, N. A., AS TRUSTEE, Appellee.	))))))))))))	Case No. 2D15-1074

Opinion filed June 1, 2016.

Appeal from the Circuit Court for
Lee County; Franklin Baker, Senior
Judge.

Philip D. Hewett, pro se.

Jason Joseph, Gladstone
Law Group, P. A.,
Boca Raton, for Appellee Wells Fargo
Bank as Trustee.

John R. Chiles and Nicholas S. Agnello,
Burr & Forman, LLP,
Fort Lauderdale, for Appellee
Wells Fargo Bank as Trustee.

LUCAS, Judge.

Wells Fargo has filed a motion to dismiss this appeal of a final judgment of foreclosure, arguing that the homeowner, Philip Hewett, failed to invoke our court's jurisdiction with a properly filed notice of appeal. Specifically, Wells Fargo contends that the only notice of appeal Mr. Hewett ever filed, although admittedly timely, was nevertheless void by virtue of his then-pending bankruptcy petition, which Mr. Hewett had filed seven days before filing his notice of appeal. Although deciding Wells Fargo's motion potentially implicates a number of problematic issues, it is our court's precedent that leads us to conclude that the motion is well taken.

We begin with the procedural context that brings this case before us, which we would note at the outset is a posture perhaps not uncommon in foreclosure litigation. The circuit court's final judgment of foreclosure of Mr. Hewett's home was rendered on February 27, 2015, when the order denying Mr. Hewett's motion for rehearing and new trial was filed with the clerk of the circuit court. See Fla. R. App. P. 9.020(i)(1). On March 2, 2015, Mr. Hewett filed a petition for bankruptcy in the United States Bankruptcy Court for the Middle District of Florida. Then on March 9 Mr. Hewett filed with the clerk of the Lee County circuit court a notice of appeal challenging the foreclosure judgment. Without argument, were it not for the filing of his bankruptcy petition, Mr. Hewett's notice would have been timely filed to invoke our jurisdiction. See Fla. R. App. P. 9.110(b).

However, the federal Bankruptcy Code provides that a filing of a petition in bankruptcy

> operates as a stay, applicable to all entities, of—
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> (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. § 362(a)(1) (2012). In AmMed Surgical Equipment, LLC v. Professional Medical Billing Specialists, LLC, we concluded that "the filing of a notice of appeal in state court should be considered the 'continuation . . . of a judicial . . . proceeding against' the appellant" that would be prohibited by the automatic stay. 162 So. 3d 209, 211 (Fla. 2d DCA 2015) (quoting 11 U.S.C. § 362(a)(1)). We further observed that the filing of a bankruptcy petition by a debtor "prevented AmMed Surgical from filing a notice of appeal" within the thirty-day deadline of rule 9.110(b). Id. at 212.

These two principles we announced in AmMed—that a notice of appeal is a continuation of a judicial proceeding, and that the Bankruptcy Code prohibits the filing of such a notice during an automatic stay—comport with the broader (and broadly held) view that the filing of a notice of appeal during the pendency of a bankruptcy stay should be deemed void as a violation of the automatic stay. See Ellis v. Consol. Diesel Elec. Corp., 894 F.2d 371, 372 (10th Cir. 1990) ("It is well established that any action taken in violation of the stay is void and without effect." (citing Kalb v. Feuerstein, 308 U.S. 433, 438 (1940) (construing a stay provision found in a previous version of the Bankruptcy Code))); accord Bronson v. U.S., 46 F.3d 1573, 1577 (Fed. Cir. 1995) ("A majority of the circuits have held that actions taken in violation of the automatic stay are void."); Onaka v. Onaka, 146 P.3d 89, 95 (Haw. 2006) ("Actions that are void have no legal effect. Applying that definition, the situation wherein two notices of appeal have

been filed without legal effect is the functional equivalent of the situation wherein no notice of appeal has been filed." (citation omitted)); In re Cty. Treasurer & Ex Officio Cty. Collector of Cook Cty., 719 N.E.2d 143, 150-51 (Ill. App. Ct. 1999) ("Because Cambridge's motion to reconsider and its notice of appeal were filed in violation of the [automatic] stay, they were void."); Burrhus v. M & S Mach. & Supply Co., 897 S.W.2d 871, 873 (Tex. App. 1995) ("[W]e hold that all actions relating to judicial proceedings taken while the stay is in effect are void. The prosecution of an appeal is a judicial proceeding."). Consistent with AmMed, we agree with these holdings.[1] Therefore, since the only notice of appeal Mr. Hewett ever filed was a nullity, we are without jurisdiction to consider his appeal.

We are not without some reservations about this conclusion. That the Bankruptcy Code stays the continuation of a judicial proceeding in state court, including the filing of a notice of appeal, once a bankruptcy petition has been filed is relatively

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[1]To hold otherwise—that is, to construe the notice of appeal as merely voidable, or something which effectuates a kind of "placeholder" status for an appellant while its appeal is stayed pending bankruptcy—raises difficult conceptual problems. Such a construction would effectively condone a continuation of a state court proceeding that section 362(a)(1) of the Bankruptcy Code plainly prohibits. It would, in essence, give some effect to a filing that cannot have effect. The "exception" articulated by some federal circuit courts, that an automatic stay could be deemed voidable because a bankruptcy court is empowered to retroactively annul an automatic stay, while an interesting point of contention, has no application here. See In re Siciliano, 13 F.3d 748, 751 (3d Cir. 1994) (noting that 11 U.S.C. § 362(d) affords bankruptcy courts power to grant relief, including "annulling" a previously entered automatic stay). Simply put, our state's courts do not enjoy a concomitant power to annul an automatic stay in bankruptcy. We also note, not incidentally, that Mr. Hewett failed to avail himself either of this retroactive remedy or of his ability to move the bankruptcy court to lift the stay before he filed his notice of appeal. See 11 U.S.C. § 362(d); cf. also Constitution Bank v. Tubbs, 68 F.3d 685, 694 (3d Cir. 1995) ("No party has submitted any evidence that the bankruptcy court has granted such relief in order to permit [appellant] to pursue its present appeal . . . .").

clear. That such a filing would be void necessarily flows from this interpretation of the Bankruptcy Code. However, the Bankruptcy Code may not, in itself, resolve the very pragmatic concern of how to then measure the jurisdictional deadlines set forth in our rules of appellate procedure once an automatic stay ceases.

To be sure, the Bankruptcy Code provides extended, substitute deadlines for "continuing a civil action" after an automatic stay has expired or been terminated. See 11 U.S.C. § 108(c).[2] Were we in a position to simply engraft that section of the federal Bankruptcy Code into our State's rules of appellate procedure, then the dismissal of Mr. Hewett's appeal, and what appellants in Mr. Hewett's circumstance ought to do to invoke our court's jurisdiction after their bankruptcy cases have concluded, could be easily resolved.[3] But we do not have that power. See Fla. Const.

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[2]This statutory subsection provides:

> Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor . . . and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of—
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> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
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> (2) 30 days after notice of the termination or expiration of the stay under section 362 . . . of this title . . . with respect to such claim.

[3]Interestingly, the Supreme Court of Hawaii appears to have adopted this very approach by promulgating an appellate rule consistent with 11 U.S.C. 108(c)(2). See Haw. R. App. P. 54(a). We recognize that in AmMed, 162 So. 3d at 212, we held that a notice of appeal filed seventy days after an order's rendition could confer jurisdiction in our court because the notice's timely filing had been prohibited by a bankruptcy automatic stay, which was later lifted. We find that portion of the holding in

art. V, § 2(a) ("The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review . . . ."); Jenne v. Maranto, 825 So. 2d 409, 414 (Fla. 4th DCA 2002) ("But we are not the supreme court and lack the power to make jurisdictional changes in the Rules of Appellate Procedure."). And it is not entirely clear whether Congress has that power either.

Although Congress may exercise plenary power under the Constitution to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States," art. I, § 8, cl. 4, U.S. Const.; see also Kalb v. Feuerstein, 308 U.S. 433, 439 (1940) ("The Constitution grants Congress exclusive power to regulate bankruptcy and under this power Congress can limit that jurisdiction which courts, State or Federal, can exercise over the person and property of a debtor who duly invokes the bankruptcy law."), the reach of that power might not extend so far as to alter state judicial *procedures* within state court proceedings:

> Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law.

John v. Paullin, 231 U.S. 583, 585 (1913); see also Sun Oil Co. v. Wortman, 486 U.S. 717, 728 (1988) ("[M]atters generally treated as procedural under conflicts law [are] . . . generally regarded as within the forum State's legislative jurisdiction."); Suesz v. Med-1 Sols., LLC, 757 F.3d 636, 651 (7th Cir. 2014) (Sykes, J., concurring) (noting that "[i]t's an open question whether Congress has the power to prescribe procedural rules for

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AmMed distinguishable because, unlike the appellant in AmMed, Mr. Hewett never filed a notice of appeal following the discharge of his bankruptcy.

state-law claims in state court") (emphasis omitted), cert. denied, 135 S. Ct. 756 (2014); Anthony J. Bellia Jr., Federal Regulation of State Court Procedures, 110 Yale L.J. 947, 980 (2001) (arguing under conflict-of-laws principles that states remain sovereign over their courts' procedures: "If a state court enforces federal law in the same manner as it would the law of another state or a foreign government, it follows that a state has exclusive control over court 'procedure' even as against the federal government."). Thus, the kind of pragmatic question our dismissal of this appeal could raise—whether or to what extent 11 U.S.C. § 108(c) may, of its own force, affect the procedural filing deadline of rule 9.110(b) following the expiration or termination of an automatic stay—appears to be one that has never been squarely decided by any federal court. Suesz, 757 F.3d at 651; see also Jinks v. Richland Cty., S.C., 538 U.S. 456, 464 (2003) (holding that statute of limitations tolling period under 28 U.S.C. § 1367(d) was a proper exercise of congressional power within a state court proceeding, but observing that "if the substance-procedure dichotomy posited by respondent is valid—the tolling of limitations periods falls on the 'substantive' side of the line. To sustain § 1367(d) in this case, we need not (and do not) hold that Congress has unlimited power to regulate practice and procedure in state courts.").

So we are left with an appellate rule that does not speak about bankruptcy and a bankruptcy statute that may not be able to speak to our appellate rules. While we recognize this potential conundrum, we cannot attempt to resolve it. See, e.g., State v. Turner, 224 So. 2d 290, 291 (Fla. 1969) (reaffirming that "[c]ourts are not to consider a question of constitutionality which has not been raised by the pleadings . . . ."); Allen v. State, 873 So. 2d 576, 579 (Fla. 2d DCA 2004) ("However, this issue is presently not

before us and we therefore do not address it at this time."); Anheuser-Busch Cos. v. Staples, 125 So. 3d 309, 312 (Fla. 1st DCA 2013) (noting that appellate courts are "not at liberty to address issues that were not raised by the parties."). In light of these concerns, though, we would commend this issue for the Appellate Court Rules Committee's consideration of whether a new or amended rule of appellate procedure would be appropriate to incorporate the tolling provisions of 11 U.S.C. § 108(c) or another period that explicitly addresses the effect of an automatic stay in bankruptcy on the filing of a notice of appeal.

Motion to dismiss granted; appeal dismissed.

NORTHCUTT and KELLY, JJ., Concur.

Third District Court of Appeal

State of Florida

Opinion filed June 1, 2016.
Not final until disposition of timely filed motion for rehearing.

No. 3D14-2782
Consolidated: 3D14-2707
Lower Tribunal No. 13-31175

Wells Fargo Bank, National Association, as Trustee for Structured Asset Mortgage Investments II Inc., Bear Stearns Mortgage Funding Trust 2006-AR3, Mortgage Pass Through Certificates, Series 2006-AR3,
Appellant,

vs.

Sally N. Sawh, et al.,
Appellees.

Appeals from the Circuit Court for Miami-Dade County, Diane V. Ward, Judge.

Kula & Associates, Elliot B. Kula, W. Aaron Daniel and William D. Mueller, for appellant.

Roniel Rodriguez, IV, for appellee, Credo LLC.

Before WELLS, LAGOA and SCALES, JJ.

WELLS, Judge.

Wells Fargo Bank, National Association, appeals from a final order dismissing this mortgage foreclosure action following entry of a redemption order, claiming that because the redemption order improperly liquidated unliquidated amounts due, it is entitled to relief as a matter of law.[1] Because we agree with

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[1] We earlier consolidated this appeal with an appeal from an order denying both reconsideration—which the trial court mischaracterized as an order denying a rule 1.530 motion for rehearing—and alternatively, as an order denying rule 1.540 relief from a redemption order. We now dismiss that appeal because (1) a redemption order is a non-final order to which neither rule 1.530 nor rule 1.540 applies; (2) while motions for reconsideration of non-final orders are authorized, such motions will not toll the time for prosecuting a non-final appeal under rule 9.130; and, (3) orders denying reconsideration of a non-final order are not independently reviewable under rule 9.130. Riley v. Grissett, 556 So. 2d 473, 474 n.1 (Fla. 1st DCA 1990) (confirming that redemption orders are non-final orders subject to review under rule Florida Rule of Appellate Procedure 9.130(a)(3)(C)(ii)); Fla. R. Civ. P. 1.530(a) (authorizing motions for rehearing "of matters heard without a jury, including summary judgments"); see Deal v. Deal, 783 So. 3d 319, 321 (Fla. 5th DCA 2001) ("Rule 1.530 has been consistently construed to authorize rehearings only of orders and judgments which are final in nature."); Hialeah Hotel, Inc. v. Woods, 778 So. 2d 314, 315 (Fla. 3d DCA 2000) (confirming that "Rule 1.540 applies only to final judgments, not to interlocutory orders"); Fla. R. App. P. 9.130(b) (stating that jurisdiction to review non-final orders in district courts of appeal may be invoked by filing a notice of appeal within thirty days of rendition of the order to be reviewed); Fla. R. App. P. 9.020(i) (providing that rendition occurs upon the filing of a signed, written order with the clerk of the lower tribunal "unless another applicable rule of procedure specifically provides to the contrary, if a final order has been entered and there has been filed in the lower tribunal an authorized and timely motion for new trial, for rehearing, for certification, to alter or amend, for judgment in accordance with prior motion for directed verdict, for arrest of judgment, to challenge the verdict, to correct a sentence or order of probation . . . , or to vacate an order based upon the recommendations of a hearing officer"); see also Agere Sys. Inc. v. All Am. Crating, Inc., 931 So. 2d 244, 244-45 (Fla. 5th DCA 2006) (confirming that "motions [for rehearing or reconsideration] addressed to *non-final* orders are not

Wells Fargo that the amount due to redeem the mortgage at issue was unliquidated and required evidentiary support, we reverse the final order of dismissal, vacate the redemption order, and remand for an evidentiary hearing to determine the amount that must be paid to redeem this mortgage.

This action commenced in October 2013, when Wells Fargo filed suit to foreclose a mortgage securing an adjustable rate note executed by Sally N. Sawh. Along with a number of lienholders, Credo, LLC was named as a party and joined as "the current owner[] of the property which is the subject of the Mortgage." The verified complaint alleged that principal in the amount of $3,331,190.81 was due, as well as additional amounts not specified in the complaint for interest, taxes, insurance, escrow advances, the cost of inspections and property preservation, and the expenses, including attorneys' fees incurred in pursuing the instant action:

'authorized' within the meaning of Rule 9.020[i] . . . and thus do not postpone rendition," and that "an order that simply denies a motion for reconsideration or rehearing of an underlying *non-final* order . . . is not in itself an appealable order").

This does not, however, preclude consideration of the redemption order at issue here. See Fla. R. App. P. 9.130(h) (providing that the right to immediate appeal of non-final orders "shall not preclude initial review of a non-final order on appeal from the final order in the cause"); Auto Owners, Ins. Co. v. Hillsborough Cty. Aviation Auth., 153 So. 2d 722, 724 (Fla. 1963) ("The appeal from the final judgment brings up for review all interlocutory orders entered as a necessary step in the proceeding."); Deal, 783 So. 2d at 320 (concluding that while a notice of appeal from a non-final order was untimely because "a motion for rehearing directed to a non-final order . . . is not authorized under the rules and does not toll the time for filing the notice of appeal" it would not bar appellate review "after final disposition of the case in the trial court").

> 10. There is now due and owing the principal sum of $3,331,190.81, together with all sums that may be due for interest, taxes, insurance, escrow advances and/or fees for inspections, property preservations or other expenses incurred to protect the property, and expenses and costs of suit including but not limited to filing fees, recording fees, title search and examination fees, fees due for service of process and such other costs as may be allowed by this Court.

In accordance with section 28.241 of the Florida Statutes governing filing fees, Wells Fargo also filed an unsworn estimate of the amount in controversy. See § 28.241(1)(a)2.a., Fla. Stat. (2013) (requiring parties instituting civil actions in circuit court relating to real property or mortgage foreclosures to pay a graduated filing fee based on the estimated value of their claims). That estimate stated, as did the verified complaint, the "Principal due on the note" was $3,331,190.81, an amount which alone exceeded the $250,000 minimum threshold stated in section 28.241 for payment of the maximum filing fee allowed. See § 28.241(1)(a)2.d.(III), Fla. Stat. (2013) (requiring the payment of a filing fee in real property and mortgage foreclosure actions in the amount of "[o]ne thousand nine hundred dollars in all cases in which the value of the claim is $250,000 or more").

On February 26, 2014, five months after this action was filed, Credo, as owner of the property securing the mortgage, filed two motions: a motion for summary judgment claiming that Wells Fargo lacked standing to pursue foreclosure and a motion to redeem the mortgage. The motion to redeem asked the

trial court to determine the amount that had to be paid to redeem the mortgage, stating only the principal balance as alleged in the complaint as the amount due:

> **COMES NOW**, the Defendant, Credo LLC, by and through its undersigned attorney, and hereby moves this Honorable Court for an order determining the sums required to redeem the mortgage alleged to be held by the Plaintiff, and as grounds thereof would state:
>
> 1. That the Movant is the owner of the real property subject to the instant action seeking to foreclose a mortgage allegedly owned and held by the Plaintiff.
>
> 2. That the Movant has an equitable and legal right to redeem the first mortgage in this matter in order to protect its real property and is ready willing and able to redeem the first mortgage sued upon herein upon a determination as to the redemption amount. The Plaintiff's complaint alleges a principal sum due and owing of $3,331,190.81 on a $3,000,000 note.
>
> **WHEREFORE**, it is respectfully requested that this Honorable Court set the redemption amount of the Plaintiff's mortgage, to be paid on or before May 1, 2014, thereby allowing the Movant the opportunity to redeem the mortgage and removing it as a lien on the Movant's real property.

The same day this motion was filed, February 26, it was set by Credo's counsel to be heard only twelve days later for a non-evidentiary hearing on the trial court's five-minute motion calendar. When this motion was filed and notice provided to counsel, Wells Fargo was represented solely by Choice Legal Group, P.A. out of Ft. Lauderdale. At the time, Choice's cases were being transferred to the Albertelli law firm in Tampa. On March 5, the notice of hearing on the motion

to redeem was e-mailed by Choice to Albertelli Law, but inadvertently not forwarded to an Albertelli attorney to handle.

Twelve days after the motion to redeem and the notice of hearing thereon were filed, the motion to redeem was heard. An attorney from Choice appeared, but no attorney from the Albertelli firm appeared. The hearing was not transcribed, thus, no record of it exists other than the trial court's order. That order recites the basis for its determination that Credo need pay $3,347,233.21—only $16,042.40 more than the principal amount alleged in the complaint—to redeem the mortgage, as: Credo's unsworn motion, the verified complaint (which stated only the principal amount then due on the loan), and argument of counsel:

> **ORDER ON CREDO'S MOTION TO REDEEM MORTGAGE**
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> **THIS CAUSE** came on before the Court for hearing on March 10, 2014, upon Credo LLC's Motion to Redeem Mortgage, and the Court having reviewed the Motion, the Verified Complaint, argument of counsel, Fl. Stat. 45.0315, and being otherwise fully advised in the premises therein, it is hereby,
>
> **ORDERED and ADJUDGED**: That the Motion is *GRANTED*. Pursuant to Section 45.0315, Florida Statute, the Defendant may tender to the Plaintiff, on or before May 1, 2014, the total sum of $3,347,233.21, which upon tender shall constitute redemption of the mortgage in Miami-Dade County, Florida, Official Records Book 24869 at Page 4530, on the property legally described as Lot26 [sic], Block 16, Bay Point, according to the Plat thereof, recorded in plat book 40, page 63, of the public records of Miami-Dade County, Florida, commonly known as 4575 Sabal Palm Road, Miami, Florida 33134. Upon redemption, this Order shall constitute a satisfaction of said mortgage, extinguishing the mortgage of record. The tender shall be made by wire transfer to JPMorgan Chase Bank,

> N.A., Account . . . , ABA Routing Number . . ., Attention: Payoff Processing, Loan # 15891468; or by Mail to Chase, 3415 Vision Drive, Mail Code: OH4-7126, Columbus, OH 43219.
>
> **DONE and ORDERED** in Chambers at Miami, Miami-Dade County, Florida on March 10, 2104[.]

Over a month later, on April 15, Albertelli Law filed a response to Credo's motion for summary judgment on the issue of standing. Two weeks later, on April 29, the court below entered an order approving an agreement between Credo and another party named in the foreclosure complaint as having an interest in the property at issue. The following day, Credo tendered the amount stated in the redemption order. Credo then conveyed the property to a third party.

On May 22, Wells Fargo moved for reconsideration of the March 10 redemption order or alternatively for an order vacating that order under rule 1.540.[2] That motion claimed, in pertinent part, that the amount due to redeem was unliquidated; that Wells Fargo was entitled to adequate notice; and that an evidentiary hearing was necessary to liquidate the amount due to redeem the

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[2] See Helmich v. Wells Fargo Bank, N.A., 136 So. 3d 763, 765 (Fla. 1st DCA 2014) (recognizing that trial courts have the inherent authority to reconsider non-final, interlocutory orders rendered prior to final judgment); Hunter v. Dennies Contracting Co., Inc., 693 So. 2d 615, 616 (Fla. 2d DCA 1997) ("At all times prior to entry of the final order terminating an action, the trial court has inherent authority to reconsider any of its nonfinal rulings, and, if it deems it appropriate, to alter or retract them."); Bettez v. City of Miami, 510 So. 2d 1242, 1243 (Fla. 3d DCA 1987) ("It is well settled in this state that a trial court has inherent authority to reconsider, as here, any of its interlocutory rulings prior to the entry of a final judgment or final order in the cause.").

mortgage. That motion was accompanied by an affidavit—the only sworn testimony in the record with regard to the amount due—that demonstrated that the redemption amount was $4,624,169.03, or $1,276,935.82 more than the amount set by the trial court:

Principal Balance	$3,331,190.81
Interest Due from 02/01/09 through 04/30/14 at Variable %	$ 724,534.04
. . . .	
Pre-Acceleration Late Charges	$ 3,747.98
Escrow	
Escrow Deficiency-Real Estate Taxes for the year 2013 $66,907.70	
Escrow Deficiency-Real Estate Taxes for the year 2012 $55,239.88	
Escrow Deficiency-Real Estate Taxes for the year 2011 $46,243.78	
Escrow Deficiency-Real Estate Taxes for the year 2010 $43,311.10	
Escrow Deficiency-Real Estate Taxes for the year 2009 $44,017.17	
Escrow Deficiency-Real Estate	

Taxes for the year 2008
$75,144.97

Escrow Deficiency-Real Estate
Taxes for the year 2007
$121,614.22

Hazard Insurance
$187,407.72

. . . .

Credits
$(75,797.34)

Total Escrow	$ 564,089.20
Broker's Price Opinion/Appraisal	$ 250.00
. . . .	
Property Inspections	$ 357.00
. . . .	
TOTAL:	$4,624,169.03

On June 20, the same trial judge who signed the redemption order issued an order setting Wells Fargo's mortgage foreclosure action for trial on September 8. On September 4, that same judge continued the non-jury foreclosure trial until December 1. It was not until September 29 that Credo responded to Wells Fargo's motion for reconsideration or to vacate the redemption order.

On October 9, the trial court denied Wells Fargo's motion for reconsideration or alternatively to vacate the March 10 redemption order, finding

that the motion was untimely; that Wells Fargo failed to demonstrate excusable neglect; that Wells Fargo failed to comply with rule 1.530[3]; that damages were liquidated; that Wells Fargo did not appeal because damages were liquidated; and that section 45.0315 does not require a trial to redeem a mortgage. On November 6, Wells Fargo appealed from that order.

On November 7, the court below dismissed the foreclosure action in an order expressly recognizing that Wells Fargo had reserved "all appellate rights" and finding that "nothing in this Order shall constitute a waiver of those rights." On November 13, Wells Fargo timely filed a notice of appeal from that order.

Our standard of review on this appeal is de novo. See Aills v. Boemi, 29 So. 3d 1105, 1108 (Fla. 2010) (confirming generally that questions of law arising from undisputed facts are reviewed de novo); Talbot v. Rosenbaum, 142 So. 3d 965, 967 (Fla. 4th DCA 2014) ("Whether damages alleged are liquidated or unliquidated is a question of law subject to de novo review."). Applying that standard here, we find that both the notice and the evidence presented below were insufficient as a matter of law to support the redemption order on appeal.

"Damages are liquidated when the proper amount to be awarded can be determined with exactness from the cause of action as pleaded, i.e., from a pleaded

[3] The record reflects that Wells Fargo did not move for rehearing under rule 1.530 but, citing to the trial court's inherent authority to reconsider interlocutory orders before entry of final judgment, moved instead for reconsideration of the redemption order.

agreement between the parties, by an arithmetical calculation or by application of definite rules of law. . . . However, damages are not liquidated if the ascertainment of their exact sum requires the taking of testimony to ascertain facts upon which to base a value judgment." Ciprian-Escapa v. City of Orlando, 172 So. 3d 485, 489 (Fla. 2d DCA 2015) (quoting Bowman v. Kingsland Dev., Inc., 432 So. 2d 660, 662-63 (Fla. 5th DCA 1983)). Thus, as our sister court in Ciprian-Escapa recently confirmed, while specific damages alleged in a complaint may be considered in some circumstances as liquidated, where, as here, the specific sum stated is claimed to be the amount due "to date" or the minimum amount due or even the amount due exclusive of interest, attorney's fees, and costs, the amount alleged is not liquidated. Id. at 489-90.

It is well established that where damages are unliquidated, due process requires meaningful notice of a trial or hearing at which evidence will be adduced to determine the amount due:

> It is well settled that a . . . party "has a due process entitlement to notice and opportunity to be heard as to the presentation and evaluation of evidence necessary to a judicial determination of the amount of unliquidated damages." Bowman v. Kingsland Development, Inc., 432 So. 2d 660, 663 (Fla. 5th DCA 1983); accord Watson v. Internet Billing Co., Ltd., 882 So. 2d 533 (Fla. 4th DCA 2004); Pierce v. Anglin, 721 So. 2d 781 (Fla. 1st DCA 1998). Indeed, "[t]he setting of unliquidated damages without the required notice and without proof is regarded as fundamental error." Security Bank, N.A. v. BellSouth Adver. & Publ'g Corp., 679 So. 2d 795, 800 (Fla. 3d DCA 1996), approved, 698 So. 2d 254, 256 (Fla. 1997); see also

> Williams v. Direct Dispensing, Inc., 630 So. 2d 1195 (Fla. 3d DCA 1994); Buffington v. Torcise, 504 So. 2d 490 (Fla. 3d DCA 1987).

Cellular Warehouse, Inc. v. GH Cellular, LLC, 957 So. 2d 662, 666 (Fla. 3d DCA 2007); see also Rutshaw v. Arakas, 549 So. 2d 769, 770 (Fla. 3d DCA 1989) (finding that the trial court's order setting a trial on damages with just one-day notice was "insufficient as a matter of law" and curable on direct appeal).

Generally, in actions in which damages are not liquidated, the trial court must enter an order fixing a trial or hearing date to liquidate damages, providing at least thirty-days notice thereof. See Fla. R. Civ. P. 1.440(c). In this case, the trial court did not enter an order noticing either a trial or an evidentiary hearing on Credo's request to liquidate the amount due to Wells Fargo. Rather, Credo gave Wells Fargo twelve-days notice of a non-evidentiary hearing on the trial court's motion calendar on its request to redeem the mortgage. This, as our earlier decision in Rutshaw confirms, was legally insufficient and in our view entitles Wells Fargo to a reversal of the redemption order.

Since this matter was set on the trial court's five-minute motion calendar where no evidence is entertained, no court reporter was present. Neither party suggests that any evidence was adduced at that hearing to support liquidating all of the sums due to Wells Fargo under section 45.0315 of the Florida statutes governing redemptions. See § 45.0315, Fla. Stat. (2013) (authorizing redemption before judgment, but only upon payment of all of the following: the amount due

because of the exercise of a right to accelerate, reasonable expenses and costs, and attorney's fees incurred by the creditor).[4] Nor do they argue that Wells Fargo stipulated to the amounts due. In fact, no stipulation appears in the record nor is one mentioned in the court's redemption order which cites the sole basis for its ruling as "[Credo's unverified] Motion, the Verified Complaint, and argument of counsel." Rather, Credo claims here that because ***it*** did not dispute the principal amount alleged to be due when the action was filed ($3,331,190.81) and that because that amount was repeated in Wells Fargo's unsworn section 28.241 estimate of claim value, there was no need for an evidentiary hearing to liquidate the amount due to redeem the Wells Fargo mortgage. This is baseless.

The fact that the amount of principal alleged to be due in the complaint ($3,331,190.81) at the time the action was filed was more than the face amount of the loan stated in the note and mortgage ($3,000,000), does not establish the amounts that had to be paid to Wells Fargo under section 45.0315 to redeem—that

[4] Section 45.0315 provides:

> **Right of redemption** . . . [I]f no judgment, order, or decree of foreclosure has been rendered, [any subordinate interest may cure the mortgagor's indebtedness and prevent a foreclosure sale] by tendering the performance due under the security agreement, including any amounts due because of the exercise of a right to accelerate, plus the reasonable expenses of proceeding to foreclosure incurred to the time of tender, including reasonable attorney's fees of the creditor. Otherwise, there is no right of redemption.

§45.0315, Fla. Stat. (2013).

is, those amounts due to Wells Fargo "because of the exercise of [the] right to accelerate, plus the reasonable expenses of proceeding to foreclosure incurred to the time of tender, including reasonable attorney's fees." Id.[5] And, Wells Fargo's section 28.241 unsworn estimate of value filing does nothing to cure this evidentiary deficiency so as to obviate the necessity for an evidentiary hearing and evidence as to the amounts due under section 45.0315 to redeem.

Section 28.241 (which is included in that part of the Florida Statutes governing the clerks of Florida's circuit courts) sets a sliding scale for the payment of circuit court filing fees pegged to the amount in controversy. To determine the amount of the fee that must be paid, this provision requires claimants to "estimate" the amount in controversy. Where a mortgage foreclosure is involved, the estimate must include an estimate of the amount of principal claimed to be due; any amounts due for interest; moneys advanced for taxes, insurance, and other advances secured by the mortgage; and the value of any tax certificates. § 28.241(1)(a)2.a.-2.b., Fla. Stat. (2013).

An estimate required by this provision need not be verified, and the only "penalty" for failure to fully comply with the provision's estimate requirements is the obligation to pay the correct filing fee when the matter is resolved:

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[5] Viewed another way, Wells Fargo certainly could not have secured a summary judgment on no more than this pleading and its attachment.

> In its order providing for the final disposition of the [foreclosure] matter, the court shall identify the actual value of the claim. The clerk shall adjust the filing fee if there is a difference between the estimated amount in controversy and the actual value of the claim and collect any additional filing fee owed or provide a refund of excess filing fee paid.

§ 28.241(1)(a).2.c., Fla. Stat. (2013).

Here, the section 28.241(1)(a)2.b. estimate filed by Choice, Wells Fargo's then legal representative, consistent with the verified complaint, states the principal amount due as $3,331,190.81. While it does not list in the spaces provided any amounts due for the payment of interest, advances on the note, property taxes, insurance, tax certificates, or otherwise, the failure is meaningless because the estimated amount stated as due for principal alone, $3,331,190.81, by far exceeds the threshold amount needed to trigger application of the maximum filing fee authorized by law:

> d. The party shall pay a filing fee of:
>
> . . . .
>
> (III) One thousand nine hundred dollars in all cases in which the value of the claim is $250,000 or more . . . .

§ 28.241(1)(a)2.d.(III), Fla. Stat. (2013).

In short, Wells Fargo's section 28.241 "estimate" of the value of its claim confirms only what the verified complaint alleges, that the "[p]rincipal" amount due at the time of filing was $3,331,190.81. Neither it, nor the verified complaint,

whether considered alone or together, constitute evidence of, or otherwise establish, the total amount that Credo was obligated to pay to redeem as expressly required by section 45.0315.

We therefore find the amounts due to Wells Fargo under section 45.0315 were not liquidated when the motion to redeem was filed, at the time that motion was heard, or at any subsequent time. See Bodygear Activewear, Inc. v. Counter Intelligence Servs., 946 So. 2d 1148, 1150 (Fla. 4th DCA 2006) (confirming that damages are liquidated when they may be determined with exactness from the cause of action pled, that is, "from a pleaded agreement between the parties, by an arithmetical calculation or by application of definite rules of law") (quoting Pierce v. Anglin, 721 So. 2d 781, 783 (Fla. 1st DCA 1998) (quoting Bowman, 432 So. 2d at 662)). Indeed, the only evidence of record in this case with regard to the precise amounts due for those costs and expenses incurred by Wells Fargo, which must be paid under section 45.0315, come from the affidavit filed by Wells Fargo in support of its motion for reconsideration of the March 10 order. That affidavit shows that in addition to the $3,331,190.81 in principal claimed to be due, $724,534.04 in interest, $3,747.98 in pre-acceleration late charges, $564,089.20 in real estate taxes and insurance, and $607 in other expenses for a total of $4,624,169.03—without consideration of any attorney's fees—had to be paid to allow Credo to redeem.

In sum, because Wells Fargo's damages were not liquidated when Credo moved to redeem, the burden fell on Credo as the moving party to set or to have set an evidentiary hearing on its motion to redeem and to adduce evidence or to spread a stipulation on the record to prove the amounts that it was obligated to pay under section 45.0315 to redeem. Otherwise, and as section 45.0315 expressly states, "there [wa]s no right of redemption."

We therefore reverse the final order dismissing the instant foreclosure action, vacate the March 10 redemption order, and remand for an evidentiary hearing to determine the amount that must be paid to redeem this mortgage. In light of this determination, we order Wells Fargo to reimburse Credo any sums paid by it in compliance with the March 10 order.

Reversed and remanded with instructions.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

ABRAHAM SEGALL,
Appellant,

v.

WACHOVIA BANK, N.A., as Trustee for
J.P. MORGAN MORTGAGE TRUST 2005-A8,
Appellee.

No. 4D14-4424

[June 1, 2016]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Lynn Rosenthal, Judge; L.T. Case No. CACE 09004020(11).

Brian Korte, Scott J. Wortman and Daniel Bialczak of Korte & Wortman, P.A., West Palm Beach, for appellant.

Sarah T. Weitz of Weitz & Schwartz, P.A., Fort Lauderdale, for appellee.

KLINGENSMITH, J.

Abraham Segall appeals from a final judgment of foreclosure in favor of Wachovia Bank, N.A. as trustee for J.P. Morgan Mortgage Trust 2005-A8. Among several issues raised on appeal, we write solely to address Segall's claim that Wachovia failed to prove its standing to foreclose. We agree and reverse.

Segall and his wife signed a promissory note and mortgage with J.P. Morgan Chase Bank, N.A. ("Chase Bank"). Chase Bank later transferred the original note to Chase Home Finance, LLC ("Chase Home"), as evidenced by an allonge attached to the note reflecting a specific endorsement from Chase Bank to Chase Home. Chase Home subsequently merged into Chase Bank.

On the same day that Wachovia filed its foreclosure complaint against Segall, it acquired the note and mortgage by way of an assignment of

mortgage from Chase Bank. In the initial complaint, Wachovia asserted that it was entitled to enforce the note as a holder of the instrument.

Segall contested Wachovia's standing, arguing that the chain of ownership of the note belied Wachovia's status as holder because the special endorsement indicated that Chase Home, not Chase Bank, was the most recent holder. Therefore, Segall argued that because Chase Home was the true owner of the note and mortgage, Chase Bank could not have assigned its ownership rights to Wachovia.

Wachovia's witness testified that while the note was specially endorsed from Chase Bank to Chase Home, the two companies merged in 2007 to become one entity. When Wachovia's counsel moved to offer the assignment into evidence, defense counsel objected based on best evidence, speculation, and lack of predicate, arguing that "[t]here's been no documentation evidence showing that there was a merger between [Chase Home] and [Chase Bank]," and that the special endorsement indicated they were separate entities. The trial court overruled the objection, and later denied Segall's motion for involuntary dismissal, in which he argued that Wachovia lacked standing to foreclose. The trial court ultimately rendered final judgment of foreclosure in favor of Wachovia.

"We review the sufficiency of the evidence to prove standing to bring a foreclosure action *de novo*." *Jelic v. LaSalle Bank, Nat'l Ass'n*, 160 So. 3d 127, 129 (Fla. 4th DCA 2015) (*quoting Lacombe v. Deutsche Bank Nat'l Trust Co.*, 149 So. 3d 152, 153 (Fla. 1st DCA 2014)). "[S]tanding must be established as of the time of filing the foreclosure complaint." *Jarvis v. Deutsche Bank Nat'l Trust Co.*, 169 So. 3d 194, 196 (Fla. 4th DCA 2015) (alteration in original) (quoting *Focht v. Wells Fargo Bank, N.A.*, 124 So. 3d 308, 310 (Fla. 2d DCA 2013)). Additionally, "[o]nce a defendant contests the plaintiff's standing as the proper party to enforce a note via foreclosure, the plaintiff's right to bring suit on the note at the requisite time becomes a disputed issue the plaintiff must prove." *Ham v. Nationstar Mortg., LLC*, 164 So. 3d 714, 719 n.1 (Fla. 1st DCA 2015).

When a note is specially endorsed, as the note is in this case, it "becomes payable to the identified person and may be negotiated only by the indorsement of that person." *Lamb v. Nationstar Mortg., LLC*, 174 So. 3d 1039, 1040 (Fla. 4th DCA 2015) (quoting § 673.2051(1), Fla. Stat. (2013)); *see also Guzman v. Deutsche Bank Nat'l Trust Co.*, 179 So. 3d 543, 545 (Fla. 4th DCA 2015) ("For a plaintiff to qualify as a holder of a promissory note, the note must either list the plaintiff as the payee, or it

'must bear a special endorsement in favor of the plaintiff or a blank endorsement.'" (quoting *McLean v. JP Morgan Chase Bank Nat'l Ass'n*, 79 So. 3d 170, 173 (Fla. 4th DCA 2012))). "Where a bank is seeking to enforce a note which is specially indorsed to another, it may prove standing 'through evidence of a valid assignment, proof of purchase of the debt, or evidence of an effective transfer.'" *Lamb*, 174 So. 3d at 1040 (quoting *Stone v. BankUnited*, 115 So. 3d 411, 413 (Fla. 2d DCA 2013)). One type of such an "effective transfer" is a corporate merger, whereby a surviving entity may enforce the note and mortgage of the predecessor.

Section 607.1106 provides that in the event of a merger between corporations, "[e]very other corporation party to the merger merges into the surviving corporation and the separate existence of every corporation except the surviving corporation ceases." § 607.1106(1)(a), Fla. Stat. (2007). Additionally, the title to or any interest in property "owned by each corporation party to the merger is vested in the surviving corporation without reversion or impairment." § 607.1106(1)(b). The surviving corporation becomes "responsible and liable for all the liabilities and obligations of each corporation party to the merger," and "[a]ny claim existing or action or proceeding pending by or against any corporation party to the merger may be continued as if the merger did not occur or the surviving corporation may be substituted in the proceeding for the corporation which ceased existence." § 607.1106 (1)(c)–(d). In short, the surviving corporation succeeds to all of the rights, privileges, immunities, and property of the other entities party to the merger by operation of law, without the necessity of either a bill of sale or other assignment.

Section 655.417(1), which concerns the effect of merger, consolidation, conversion, or acquisition, provides:

> Even though the charter of a participating or converting financial entity has been terminated, the resulting financial entity is deemed to be a continuation of the participating or converting financial entity such that all property of the participating or converting financial entity, including rights, titles, and interests in and to all property of whatsoever kind, whether real, personal, or mixed, and things in action, and all rights, privileges, interests, and assets of any conceivable value or benefit which are then existing, or pertaining to it, or which would inure to it, are immediately vested in and continue to be the property of the resulting financial entity, by act of law and without any conveyance or transfer and

> without further act or deed; and such financial entity has, holds, and enjoys the same in its own right as fully and to the same extent as the same was possessed, held, and enjoyed by the participating or converting financial entity; and, at the time of the taking effect of such merger, consolidation, conversion, or acquisition, the resulting financial entity has and succeeds to all the rights, obligations, and relations of the participating or converting financial entity.

§ 655.417(1), Fla. Stat. (2007).

Therefore, if Wachovia presented sufficient evidence proving that the alleged merger occurred, then Chase Bank, as the surviving corporation, would have succeeded to Chase Home's status as owner and holder of the promissory note by operation of law, and would have had the authority to transfer the note to Wachovia via assignment of the mortgage. *See, e.g.*, *Tilus v. AS Michai LLC*, 161 So. 3d 1284, 1286 (Fla. 4th DCA 2015) (stating that a party can prove standing to foreclose via an assignment of mortgage executed prior to the inception of the lawsuit, so long as the assignment reflects an intention to transfer both the note and the mortgage).

The analogous federal law applicable specifically to the merger of banks provides:

> The corporate existence of each of the merging banks or banking associations participating in such merger shall be merged into and continued in the receiving association and such receiving association shall be deemed to be the same corporation as each bank or banking association participating in the merger. All rights, franchises and interests of the individual merging banks or banking associations in and to every type of property (real, personal, and mixed) and choses in action shall be transferred to and vested in the receiving association by virtue of such merger without any deed or other transfer. The receiving association, upon the merger and without any order or other action on the part of any court or otherwise, shall hold and enjoy all rights of property, franchises, and interests, including appointments, designations, and nominations, and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of

> estates, assignee, receiver and committee of estates of lunatics, and in every other fiduciary capacity, in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any one of the merging banks or banking associations at the time of the merger, subject to the conditions hereinafter provided.

12 U.S.C. § 215a(e) (2006).

These statutes make it clear that a foreclosing party can establish standing to foreclose based upon a merger. However, achieving standing via merger also requires that the surviving entity prove that it "acquired all of [the absorbed entity's] assets, including [the] note and mortgage, by virtue of the merger." *Fiorito v. JP Morgan Chase Bank, Nat'l Ass'n*, 174 So. 3d 519, 521 (Fla. 4th DCA 2015).

In *Fiorito*, the plaintiff attempted to prove its standing to foreclose based upon its ownership and possession of a note containing an undated, blank endorsement, which it acquired by way of a merger with the bank that originated the loan. *Id.* at 520–21. While the plaintiff's witness testified that a merger had taken place, the witness did not establish that the successor bank acquired the subject note and mortgage by virtue of the merger. *Id.* at 521. Accordingly, we held that evidence of standing was lacking:

> While Chase also could have established standing through its merger with [Washington Mutual Bank, FA ("WAMU")], the officer's testimony fell short of establishing that Chase acquired all of WAMU's assets, including Appellant's note and mortgage, by virtue of the merger. The officer only testified that Chase merged with, and "took over," WAMU on September 25, 2008. The officer never testified that Chase acquired all or any of WAMU's assets, nor did he testify as to when Chase became the owner of the note. *Cf. Stone*, 115 So. 3d at 413 (bank employee specifically testified that the plaintiff bank acquired all of the prior bank's assets pursuant to a purchase assumption agreement). Thus, because Chase failed to establish when it became the owner of the note, the trial court erred in finding that Chase had standing to initiate the foreclosure action.

Id. at 521–22.

Similarly in *Lamb*, which involved a corporate acquisition as opposed to a merger, we found that despite the witness's testimony that the plaintiff acquired the entity to which the subject note was specially endorsed, standing was not established because there was no evidence that the foreclosing party "acquired [the] particular note which [bore the] special indorsement" to the subsumed entity. 174 So. 3d at 1041.

Other than the bare assertion by Wachovia's witness at trial, there are no documents in the record indicating that the merger of Chase Home and Chase Bank took place. While the term "merger" is used in common parlance to describe the combination of two corporate entities, it has specific legal meaning for corporations generally, and in the banking industry specifically. A lay witness's mere use of the term "merger" to describe two companies combining into one entity, without more, could imply a true merger as defined under sections 655.417(1) or 215a(e), but could also imply some other form of corporate consolidation, including but not limited to a purchase and sale of select liabilities and assets.

The consolidation of two distinct financial institutions can be an extraordinarily complex transaction, which may include numerous limitations on the transfer and assumption of assets and liabilities relating to transfers of title, exceptions to what is being transferred, recourse between parties to the deal, and other qualifications in both public and confidential business documents. The intricacies of these details can tax the imagination. It would have been a simple matter for Wachovia to present evidence of a true merger if one had in fact occurred. Wachovia could have readily obtained documentation that may have provided sufficient evidence of the merger, and proved that Chase Bank had the authority to assign the mortgage.

Here, Wachovia did not provide sufficient evidence to enable the trial court to discern the extent of any assets transferred between Chase Bank and Chase Home, or that a merger in accordance with sections 655.417(1) or 215a(e) had taken place. Testimony that a merger had occurred, without more, is insufficient to prove the extent of the consolidation, or that the transfer of the asset in question was included as part of the purported transaction. *See Shores v. First Fla. Res. Corp.*, 267 So. 2d 696, 696 (Fla. 2d DCA 1972) (holding that when a corporation admitted to transferring "some mortgages" to various entities, corporate officers' "bare affirmation" that the subject note was not assigned along with the other mortgages, without more, failed to establish the claimed nonoccurrence).

Because Wachovia failed to sufficiently prove that Chase Home merged with Chase Bank, and that Chase Bank thus acquired the note, there was no evidence that Chase Bank had the authority to further transfer the note by assigning the mortgage to Wachovia. As such, Wachovia failed to prove that it had standing to foreclose. We therefore reverse and remand this case for entry of an order of involuntary dismissal. *Lamb*, 174 So. 3d at 1041.

Reversed and Remanded.

CIKLIN, C.J., and WARNER J., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR GSAMP TRUST 2007-HSBC1 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-HSBC1,
Appellant,

v.

COLIN F. BAKER, DEBBYTA BAKER, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR IRWIN UNION BANK AND TRUST COMPANY, UNKNOWN TENANT IN POSSESSION 1 and **UNKNOWN TENANT IN POSSESSION 2,**
Appellees.

No. 4D15-1293

[June 1, 2016]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Barry J. Stone, Judge; L.T. Case No. CACE14005201.

Charles P. Gufford of McCalla Raymer, LLC, Orlando, for appellant.

Matthew D. Bavaro and Chase E. Jenkins of Loan Lawyers, LLC, Fort Lauderdale, for Appellees Colin F. Baker and Debbyta Baker.

PER CURIAM.

Deutsche Bank, the plaintiff in this foreclosure action, appeals a final order of involuntary dismissal. Because Deutsche Bank presented a prima facie case—albeit one based upon erroneously admitted evidence of damages—the trial court erred in granting an involuntary dismissal.[1] We

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[1] We find that Deutsche Bank's other arguments for reversal are based upon mischaracterizations of the record. For example, Deutsche Bank argues that the trial court erred in sustaining the defense objection to evidence of the prior servicer's payment history, but the record shows that the trial court never ruled on the objection; instead, before the trial court made a final determination on the objection, Deutsche Bank's counsel explicitly elected to proceed without introducing evidence of the prior loan servicer's payment history. Likewise, Deutsche Bank argues that the trial court abused its discretion in dismissing the action based upon an alleged discovery violation, but this claim of error rests

therefore reverse for a new trial on damages.

The standard of review for a trial court's ruling on a motion for involuntary dismissal is de novo. *Deutsche Bank Nat'l Trust Co. v. Huber*, 137 So. 3d 562, 563 (Fla. 4th DCA 2014).

Where a foreclosure plaintiff presents evidence of the amount of damages under the loan, there is sufficient prima facie evidence of damages to preclude an involuntary dismissal, even if the evidence of damages was based on inadmissible hearsay that was erroneously admitted at trial. *See Beauchamp v. Bank of New York*, 150 So. 3d 827, 829 n.2 (Fla. 4th DCA 2014) (reversing and remanding for further proceedings to determine the amount due under the note, rather than reversing for a dismissal, where "the Bank established the amount of indebtedness through witness testimony, even though that testimony concededly was inadmissible hearsay"); *Peuguero v. Bank of Am., N.A.*, 169 So. 3d 1198, 1203–04 (Fla. 4th DCA 2015) (reversing for a determination of the correct amount owed, rather than reversing for a dismissal, where the Bank's loan payment history reflected the amount of principal, but the only evidence of the amount of interest came from a witness who merely testified that the amount written on an unadmitted proposed final judgment was correct); *but compare Wolkoff v. Am. Home Mortg. Servicing, Inc.*, 153 So. 3d 280, 281–82 (Fla. 2d DCA 2014) (reversing for dismissal where the plaintiff failed to produce any evidence, admissible or not, supporting the amount of indebtedness).

Here, the trial court dismissed the action because it found that Deutsche Bank failed to present reliable evidence of damages. However, we conclude that Deutsche Bank did present a prima facie case, albeit one based upon erroneously admitted evidence of damages.

Deutsche Bank established the principal balance of the loan—the only amount on which Deutsche Bank was seeking a judgment—through the current servicer's loan payment history, which was admitted into evidence over the defense objection to the portion of the exhibit listing the starting principal balance. The starting principal balance contained in the current servicer's payment history was purportedly taken from the prior servicer's records, which were not admitted into evidence. The court admitted the

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upon a false premise. The record shows that the court did not dismiss the action based upon the alleged discovery violation, but rather dismissed the action based upon its conclusion that Deutsche Bank failed to present reliable evidence of damages.

current servicer's loan history into evidence "without prejudice" to defense counsel arguing the issue concerning the starting principal balance. However, the court later allowed Deutsche Bank's witness to testify that the unpaid principal balance was $362,216.30.

We have reviewed the trial testimony, and we find that Deutsche Bank did not lay a foundation for admitting, as a business record, the starting principal balance in the current servicer's payment history.[2] *See generally Bank of New York v. Calloway*, 157 So. 3d 1064, 1071–72 (Fla. 4th DCA 2015). Nonetheless, Deutsche Bank presented a prima facie case, even though its evidence of damages was erroneously admitted without a proper foundation. Having admitted into evidence Deutsche Bank's proof of damages, the trial court should not have granted an involuntary dismissal.

Accordingly, we reverse the involuntary dismissal and remand for a new trial on damages. Of course, at the new trial on remand, Deutsche Bank may introduce evidence of the prior servicer's business records, or the entry on the current servicer's records concerning the starting principal balance, if it lays the proper foundation.

Reversed and Remanded.

CIKLIN, C.J., TAYLOR and MAY, JJ., concur.

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[2] To be sure, the reason Deutsche Bank did not lay the proper foundation can be traced to a defense objection to testimony about the boarding process, which prompted a long discussion culminating in Deutsche Bank abandoning its attempt to introduce such evidence. The defendants objected "to any testimony regarding the boarding process," arguing in essence that Deutsche Bank had committed a discovery violation when Deutsche Bank refused to answer the defendants' interrogatory about the boarding process. Deutsche Bank had raised a boilerplate objection to the interrogatory, claiming, among other things, that it was not reasonably calculated to lead to the discovery of admissible evidence. However, by proceeding to trial without obtaining a ruling on Deutsche Bank's objection to their interrogatory, the defendants waived any objection to Deutsche Bank's failure to answer. *See* Fla. R. Civ. P. 1.340 (Committee Note to 1972 Amendment) ("If objections are made, the interrogating party has the responsibility of setting a hearing if that party wants an answer."); *see also Pac. Sun Pub. Co. v. Chronicle Pub. Co.*, 31 Fed. R. Serv. 2d 1243, 1981 WL 380709 at *1 (N.D. Cal. 1981) ("When plaintiffs failed to pursue an answer to the interrogatory by a motion to compel, they in essence waived their ability to require supplementation . . . .").

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

SIMONA BUNIN,
Appellant,

v.

MATRIXX INITIATIVES, INC., a Delaware corporation f/k/a **GUMTECH INTERNATIONAL, INC.,** a foreign corporation, and **ZICAM, LLC,** a limited liability corporation f/k/a **GEL TECH, LLC,** an Arizona limited liability company, and **PUBLIX SUPER MARKETS, INC.,** a Florida corporation,
Appellees.

Nos. 4D14-3579 & 4D15-86

[June 1, 2016]

Consolidated appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Patti Englander Henning, Judge; L.T. Case No. 09-056853 (26).

Keith Chasin of the Law Office of Keith Chasin, Miami, for appellant.

Barry L. Davis and Daniel R. Lever of Thornton Davis Fein, Miami, and Alan J. Lazarus and Jaime D. Walter of Drinker Biddle & Reath, LLP, San Francisco, CA, for appellees.

TAYLOR, J.

In this products liability action, the plaintiff alleged she lost her sense of smell, a condition known as anosmia, after she used a Zicam nasal spray. The defendants moved to exclude the opinion of the plaintiff's causation expert, based on the recent change to section 90.702, Florida Statutes (2013), which now requires trial courts to apply the standard of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), in ruling on the admissibility of expert testimony. The trial court granted the defendants' motion and entered summary judgment in favor of the defendants. We affirm the summary judgment, concluding that the trial court did not abuse its discretion in excluding the causation testimony under section 90.702, Florida Statutes (2013). However, we reverse the cost judgment to the extent it awarded attorney travel expenses, and

expert fees that were not for a deposition, trial testimony, or a court-ordered report.

An order on a motion to exclude expert testimony is reviewed for an abuse of discretion. *Booker v. Sumter Cty. Sheriff's Office*, 166 So. 3d 189, 194 n.2 (Fla. 1st DCA 2015). But the issue of whether a statute applies retroactively is a question of law reviewed de novo. *Bionetics Corp. v. Kenniasty*, 69 So. 3d 943, 947 (Fla. 2011).

In 2013, the Florida Legislature amended section 90.702 with the intent to adopt the federal *Daubert* standard for the admission of expert testimony. *See* Ch. 2013–107, § 1, Laws of Fla. (2013). On appeal, the plaintiff's primary argument is that the 2013 amendments to section 90.702 are substantive in nature and should not be applied retroactively to her case, which was filed in 2009. We disagree.

It is well-settled that "[p]rocedural or remedial statutes . . . are to be applied retrospectively and are to be applied to pending cases." *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994). A statute that merely "relates to the admission of evidence" is generally considered procedural. *Windom v. State*, 656 So. 2d 432, 439 (Fla. 1995). Accordingly, as the Third District has explained, "section 90.702 of the Florida Evidence Code indisputably applies retrospectively." *Perez v. Bell South Telecomms., Inc.*, 138 So. 3d 492, 498 (Fla. 3rd DCA 2014).[1]

Having carefully reviewed the record, we conclude that the trial court did not abuse its discretion in excluding the plaintiff's expert's causation opinion under *Daubert*, even though the expert's opinion would have been admissible under the "pure opinion" rule of *Marsh v. Valyou*, 977 So. 2d 543, 548–50 (Fla. 2007). Because the plaintiff's case depended upon her expert's excluded causation testimony, the summary judgment in favor of the defendants must stand.

Turning to the plaintiff's appeal of the cost judgment, we reverse the award of costs to the extent it awarded attorney travel expenses and the fees of the defense expert, Dr. Brent. These costs were not costs that "should be" or "may be" taxed under the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions, and the trial court failed to make any

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[1] In deciding that the amendments apply retrospectively, we note that the plaintiff did not raise the argument that the 2013 amendments to section 90.702 violated the separation of powers doctrine by encroaching upon the Florida Supreme Court's authority to adopt procedural rules in Florida courts. See Art. V, § 2(a), Fla. Const.

specific findings in the cost judgment as to the unique and extraordinary circumstances that would justify a deviation from the guidelines. *See Rodrigo v. State Farm Fla. Ins. Co.*, 166 So. 3d 933, 934 (Fla. 4th DCA 2015) (When deviating from the guidelines, the trial court is "required to make specific findings as to the unique and extraordinary circumstances justifying such an award.").

From the face of the cost judgment (including the exhibit incorporated by reference), it is clear that the defendants' counsel's travel expenses should not have been awarded. *See Citizens Prop. Ins. Corp. v. Pulloquinga*, 183 So. 3d 1134, 1138 (Fla. 3d DCA 2015) (holding that the trial court improperly awarded counsel's travel time and travel expenses as costs in contravention to the guidelines). Likewise, under the guidelines, Dr. Brent's time did not qualify as a cost that "should be taxed," because his fees were not for a deposition, trial testimony, or a court-ordered report. Nor did his fees fall under the category of costs that "may be taxed" under the guidelines. Therefore, we reverse the award of costs for attorney travel expenses and for Dr. Brent's fees, and remand for the trial court to eliminate those expenses from the cost judgment.

Affirmed in case no. 4D14-3579; Reversed and Remanded in case no. 4D15-86.

CIKLIN, C.J., and MAY, J., concur.

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Not final until disposition of timely filed motion for rehearing.