

**RECENT CASES OF INTEREST TO CH. 13 PRACTITIONERS: 04/30/15-04/22/16)**  
**WD OF VA. BANKRUPTCY CONFERENCE, ROANOKE, 05/06/16**

**BANKRUPTCY COURT AND DISTRICT COURT**

B170. **In re Michael Ingalls**, Bankr. W.D. Va., #14 62427, 6/5/15 (Connelly). **Upon conversion of Chapter 13 case to Chapter 7, Court cannot order the Trustee to disburse to debtor's counsel funds on hand from the debtor's post-petition wages.** 5/27/15: debtor's counsel applies for fees in an unconfirmed Chapter 13 case; 6/2/15: attorney filed to convert the case to Chapter 7 before any order on the fees had been entered. *Issue:* Does the Court have the authority to grant the application for attorney fees to be paid from funds held by the Chapter 13 Trustee in light of the conversion to Chapter 7? *Held:* Citing Harris v. Viegelahn, Court says that upon conversion the Chapter 13 Trustee is no longer authorized to disburse funds held for the benefit of the debtor's creditors, including counsel for the debtor. Code sec. 348(e). The Trustee must return all funds still held by him post-conversion to the debtor. Court therefore may not now order the Chapter 13 Trustee to disburse the debtor's post-petition wages to the attorney, as that would be inconsistent with Harris.

B171. **In re Philip Groggins**, Bankr. W.D. Va., # 14 71033, 6/24/15 opinion (Black). **Grounds existed to convert pro se debtor's case to Chapter 7 on Chapter 13 Trustee's motion.** Pro se debtor filed case on 7/23/14; it was dismissed 8/14/14, with a 180 day bar from refiling; upon reconsideration on 9/9/14, the Court reinstated the case. It was continued multiple times to track the status of the debtor's criminal case pending in the District Court; it was still unconfirmed when the Trustee filed a motion to convert to Chap. 7 on 5/29/15 b/c the debtor was sentenced to 27 mos. in prison for unpaid taxes and bankruptcy fraud. Trustee alleged multiple non-disclosed assets and income in his motion. Debtor said he had set aside funds, his daughter has a POA, and he wanted to play a role in any subdivision of his long-time property. *Held:* (1) It's been 10 mos. since the case was filed; it is unlikely that the debtor will be able to obtain a confirmable plan at this time; no plan has been filed, only a one page statement about how payments will be made, and no provision has been made for the \$832,175 secured and unsecured claim filed by the bank. (2) There exists cause to convert the case to Chap.7 b/c the debtor's inability to file a confirmable plan constitutes an unreasonable delay that's prejudicial to creditors, 1307(c)(1). (3) Conversion is in the best interests of creditors and the estate, b/c there may be equity in the real estate, and since he's proceeding pro se, appointment of a Chap. 7 Trustee will facilitate final resolution of the case. (4) Case shall be converted to Chapter 7.

B172. **Goodman v. Gorman**, 2015 WL 4496245 (E.D. Va. July 21, 2015). **Court's approval of Trustee's 1329 motion for debtor to turn over all of her post-confirmation inheritance to make the plan 100% is affirmed by the District Court.** District Court recently affirmed a bankruptcy court ruling that a Chapter 13 Debtor's inheritance could be used to pay creditors and ordered the debtor to turn over the inheritance for distribution to her creditors. Under the confirmed plan, her unsecured creditors received a 0% dividend. Two years later, shortly after Ms. Goodman's mother died, she filed an Amended Schedule B notifying the trustee and creditors of her interests in a post-petition inheritance of \$36,000. In response, the Chapter 13 Trustee moved to modify the debtor's confirmed plan and capture the entire amount of Ms. Goodman's inheritance for the benefit of her unsecured creditors. Ms.

Goodman proposed a plan modification in which she proposed to contribute 40% of her inheritance over the remaining 20 months of her Chapter 13 Plan, generating a 30% dividend to unsecured creditors. The Chapter 13 Trustee objected, and the Bankruptcy Court granted the trustee's motion to modify, denying the confirmation of Ms. Goodman's modified plan, and ordered her to turn over the inheritance for distribution to creditors. Ms. Goodman appealed.

On appeal, the District Court affirmed the decision for four reasons. Property of the Estate: First, the Court agreed that the property of the estate did not vest in the debtor upon the confirmation of her Chapter 13 Plan because, under *Carroll v. Logan*, 735 F.3d 147 (4th Cir. 2013), an inheritance received before the Chapter 13 case is closed, dismissed, or converted to a case under Chapter 7, 11, or 12 is property of the bankruptcy estate pursuant to 11. U.S.C. § 1306(a) and should thus be used to repay a debtor's compromised creditors. Substantial Change to Debtor's Financial Circumstances: The District Court affirmed the Bankruptcy Court's finding that the inheritance "substantially" changed Ms. Goodman's financial circumstances under § 1329 such that a modification was warranted. The Court noted that the doctrine of *res judicata* prevented the modification of a confirmed plan under § 1329(a)(1) or (a)(2) unless the party seeking modification demonstrated that the debtor experienced a "substantial" and "unanticipated" post-confirmation change to his or her financial condition. In *re* *Murphy*, 474 F.3d 143 (4th Cir. 2007)(citing *In re Arnold*, 869 F.2d 240, 243 (4th Cir. 1989)). Ms. Goodman argued that she had increased living expenses and her inheritance was not a substantial change in financial circumstances making her case distinguishable from that of the debtor in the *Murphy* case. The District Court in *Goodman* found that the Trustee demonstrated that Ms. Goodman's post-confirmation inheritance was a substantial change to her financial condition. The Court further found that the Bankruptcy Court's denial of Ms. Goodman's modified plan was not an abuse of its discretion under § 1329 because she failed to show any hardship or need to retain any portion of the \$36,000 inheritance to support her modified plan. Trustee May Capture the Entirety of Inheritance: The District Court relied on the *Carroll* decision again finding that the denial of Ms. Goodman's proposed, modified plan was justified as her living expenses did not constitute a substantial and unanticipated change that would make any portion of the inheritance necessary to support to support her modified plan. Ms. Goodman pointed to language in *Carroll*, noting that is said creditors should share "some" of the wealth. The District Court agreed that *Carroll* "left the door open to courts deciding how much of an inheritance should come into a bankruptcy Plan," but found that "the Bankruptcy Court did not err when it found, based on the totality of the circumstances, that the Trustee's Motion to Modify may capture the entirety" of the inheritance for the benefit of compromised creditors. [from NACTT Website]

**B173. In re Paul M. Lerner, Bankr. E.D. Va., # 15 11968 BFK, 9/4/15 (Kenney). Car payment for below-median debtor's 19 year old college-attending son cannot be deducted from disposable income.**

Trustee objected to this below-median, 12% plan because it was paying \$7,000 (36 mos. x \$195/mo.) for a car as the son's transportation from college, and because the debtor was the only income earner on the budget. *Issue: is this payment in an amount reasonably necessary for the support / maintenance of the debtor's son?* Son is 19, lives 19 miles from college, and works part time but does not contribute to the household expenses. *Held:* (1) Not an issue of good faith; it's an issue of disposable income: when can one debtor be allowed expenses for two cars? (2) This is not a reasonable and necessary expense for the son's maintenance: "it is not unreasonable to require debtor's son to contribute the payments for this vehicle,," (3) Trustee's objection on disposable income grounds is sustained; debtor shall have 21 days to file an amended plan.

B174. **In re Cynthia Harris**, Bankr. Ct., WD VA, # 15 61016, 9/8/15 Order (Connelly). **Motion to avoid judgment lien filed within 90 days under Code sec. 547 is denied.** Debtor and Trustee sought avoidance of a judgment lien filed by Discover Bank within 90 days of the filing of this case. Discover did not respond to the motion. The motion is *denied*: (1) Insufficient facts were pled upon which to base relief under Code sec. 547; (2) no facts pled to show that the creditor would have received more than it would have under a Chapter 7 liquidation; (3) judgment liens docketed within the 90 day period “are not *per se* preferences”; (4) actions to avoid liens under grounds other than 522(f) are governed by Part VII of the FRBC, and should be filed by an adversary proceeding, not a motion.

B174A. **In re Timothy and Amy Alther**, Bankr. W.D. Va., # 14 62429, 9/11/15 opinion (Connelly). **[Chapter 7 case.] Motion to dismiss for abuse under 707(b)(2): special circumstances, 401-k loans, potential Chapter 13 dividend, etc.** The UST brought a motion to dismiss this Chapter 7 case as presumptively abusive; Court held that the debtors had failed to prove special circumstances, and the case was dismissed under sec. 707(b)(2) unless the debtors convert to Chapter 13 within 21 days. Their current income was \$182,154/yr gross, but their line 56 claimed additional expenses totaled \$2,252/mo., which caused their sixty-month disposable income to become negative. **Held**: (1) To rebut a presumption of abuse under sec. 707(b)(2), debtors must demonstrate “special circumstances,” which must be “unusual, yet necessary.” (2) A 401-k loan “is not a secured debt, so payments on it are not “secured debt monthly payments” under sec. 707(b)(2). (3) Court declines to address the issue of whether the debtors can claim a “clunker expense” on line 56. (4) Voluntary 401-k contributions are not “special circumstances” under sec. 707(b)(2) because they are not unusual and there is a reasonable alternative of not making them; whether the debtors can claim this expense as a deduction in a Chapter 13 case does not alter this conclusion. (5) The alleged income reduction will not be allowed because it is not based on fact, and debtors are required to provide documentation and explanation of any such income adjustments. (6) The dividend that the debtors could pay in a Chapter 13 case is not a “special circumstance” or grounds to rebut the presumption of abuse under sec. 707(b)(2). The Koonts opinion by Judge Anderson (1/12/10, 08 61880) only applied to abuse under sec. 707(b)(3)

B175. **In re Sandra Colston**, Bankr., WD VA, # 15 70654, 10/14/15 opinion (Black). **Court analyzes good faith requirements under 1325(a)(3), 1325(a)(7), and 1307(c).** Creditor filed an objection to confirmation, alleging undue influence, fraud, and willful and malicious injury to property by the Debtor. Trustee recommended confirmation. The objection was sustained by the Court, and the case dismissed. (1) The Debtor “preyed upon ...[Ms. A’s] weakness of mind and clear affection for her...”, received over \$414,000 in money transfers from Ms. A, and charged over \$39,000 on Ms. A’s credit card. (2) This case was filed two weeks before a state court trial seeking judgment for fraud, undue influence, etc., was scheduled to begin; that Court entered a judgment for \$225,000 and \$167,000 in attorney fees against the Debtor. (3) The Debtor’s proposed plan would have required her mother to make a contribution of \$433/mo. toward the plan payments. (4) Pre-petition misconduct is but one factor to consider in evaluating the good faith requirement under Neufeld v. Freeman (4<sup>th</sup> Cir.). (5) “The technical sufficiency of a chapter 13 plan does not necessarily satisfy good faith in filing a bankruptcy petition.” In re Tomer, Dist. Ct., WD VA, 7/14/09, # 4:09CV008, 2009 WL 2029798. (6) Under Code sec. 1325(a)(3), the Debtor bears the burden of proving by a preponderance of the evidence that the plan was proposed in good faith. That burden has not been met here: the estimated 33% distribution was actually 4%; there would only be a nominal payment on a potentially non-dischargeable claim; the case was filed solely to impede Ms. A from recovering the assets taken by the Debtor; there’s a substantial likelihood that this debt would be declared non-dischargeable in a Chapter 7 case; the Debtor was unremorseful about this debt

in her testimony; and the Debtor failed to disclose in her schedules a last-minute transfer to her mother of a \$10,000 home generator. (7) The Court does not reach the issue of feasibility in this case, but notes that a family member's gratuitous payments to a Debtor may not constitute "regular income" under Code sec. 109(e). (8) Under Code sec. 1325(a)(7), the Debtor bears the burden of proving by a preponderance of the evidence that the petition was filed in good faith. Ultimately, the inquiry is whether the filing is "fundamentally fair to creditors... and fundamentally fair in a manner that complies with the Bankruptcy Code." Looking to the standards used in evaluating motions under 1307(a) is helpful. The last minute filing and de minimis repayment on a highly likely non-dischargeable claim support a finding of lack of good faith. (9) As to the proper remedy: authorizing additional time to file a second amended plan is not in the best interests of creditors, as it would be "fruitless." The petition is dismissed under Code sec. 1307(c)(5). Conversion to Chapter 7 is not in the best interests of the creditors because there are no significant assets or avoidable transfers. (10) The Debtor can refile in the future if her situation changes and she can "file a more meaningful plan."

B176. **In re Charisse Vaughan**, Bankr. WD Va., # 12 61986 & 15 62035, 12/18/15 order (Connelly). **Debtor can, under certain circumstances, file a Chapter 13 case while her prior Chapter 7 case is still pending and the case will not be dismissed under Local Rule 1017-2.** Debtor received a discharge in her Chapter 7 case on 12/20/12. Trustee then filed an asset report. The Trustee and the debtor agreed that she would pay the Trustee six monthly installments to prevent the Trustee from trying to collect an avoidable transfer. The debtor defaulted on the payments, and the Trustee obtained a default judgment on 6/17/13. While that case was still pending, the debtor filed a Chapter 13 case on 10/28/15, so that she had two cases pending at the same time, in violation of Local Rule 1017-2. Debtor amended her proposed plan to pay the avoidable transfer claim to the Chapter 7 Trustee as an administrative claim, and acknowledged she was not eligible for a Chapter 13 discharge and was not seeking to satisfy debts that were discharged in the Chapter 7 case. At a hearing, all parties urged the Court to allow the Chapter 13 case to proceed. *Held:* Citing In re Brown, 399 BR 162 (Bankr. WD Va. 2009, Judge Krumm), the Court stated that the bar of LR 1017-2 is limited to cases where the petition seeks to discharge the same debts, or to materially hinder the administration of the earlier case. The debtor in this case is not seeking to do either, so the LR does not require dismissal of the Chapter 13 petition. Both cases will remain open pending further order of the Court.

B177. **In re Yolanda Mosley-Ridley**, Bankr. Ct. W.D. Va., # 14 60323, 12/23/15 opinion (Connelly). **[Chapter 7 case.] In reviewing the reasonableness of debtor attorney fees, the Court may consider the attorney's unethical conduct in scheduling, and failing to amend, property value he knew to be incorrect.** UST sought review of attorney fees paid to debtor's counsel (\$1,500) based on alleged violations of the Va. Rules of Professional Conduct [Rules 3.3 and 4.1: ethical obligation not to make false statements to a tribunal] and on excessiveness. Property was listed in debtor's schedules as being worth \$117,500 based on a BPO; the mortgagee later submitted a reaffirmation agreement that stated a value of \$218,200. Chapter 7 Trustee has noticed the case as an asset case. *Held:* (1) In reviewing fees under Rule 2017(a), the Court may impose sanctions for violations of the rules of professional conduct, and may under Code sec. 329 use unethical conduct as a factor in analyzing the reasonableness of fees paid by a debtor. (2) The duty of candor requires professional conduct analogous to conduct required under FRBP 9011, which substantially conforms to FRCP 11. (3) The Court notes the discrepancies between the property value set forth in the schedules and the position taken by the attorney in these proceedings on the one hand, and the content of some intra-office memos on the other, and finds it "troubling" that no one in the attorney's office believed the property to be worth the value set forth in

the schedules. (4) Under Code 707(b)(4)(D) the attorney has a duty to verify that the information disclosed in the schedules is “accurate and substantiated.” (5) The attorney knew the true value of the property exceeded the amount scheduled, and should have amended the schedules. He therefore “has violated his ethical duties under the Va. Rules of Professional Conduct of candor toward the Court and truthfulness to others.” (6) Previous reprimands of this attorney did not remedy the misconduct, so the Court will hold a hearing on the imposition of sanctions. (7) The Court declines the UST’s request to reduce the attorney fee “at this point in the case.” [4/22/16: Follow up hearings on possible sanctions are in process.]

--Dist. Ct., W.D. Va., #3:16-MC-00001, 2/17/16 opinion (Conrad). **Attorney’s interlocutory appeal is not appropriate in this case.** The Bankruptcy Court’s 12/23/15 order was not a final order and did not finally dispose of the dispute between the parties, as the Court had not yet ruled on any sanctions.

B178. **In re Phillip and Brandy Robertson**, Bankr. Ct. W.D. Va., # 13 71986, 12/30/15 opinion (Black). **Debtors may provide that Rule 3002.1 post-petition charges be paid by the Trustee, but they must add additional funds to the plan to cover these charges; they should not be paid from funds earmarked for the unsecured creditors.** Chapter 13 Trustee filed a motion to pay Rule 3002.1 post-petition fees, expenses, and charges in 9 separate cases, both already-sought fees and future fees, in these cases and in other cases. The Trustee proposed that the fees were to be paid subject to certain conditions: (1) there would be no impact on Chapter 7 test requirement; (2) all of the debtors’ disposable income has been committed to the plan; (3) payment of the charges would not reduce any noticed 100% dividend; and (4) due process would be satisfied by the use of standard notice language to be put in paragraph 11 [advising the unsecured creditors that the actual percentage payout may vary from the noticed percentage because the Trustee will pay 3002.1 charges from the general unsecured creditors pool; if you object to this proposal, you must object before confirmation]. The Trustee referred to the process in Kansas, where such notices are treated as an amendment to the creditor’s claim and the debtor’s plan, and all delinquent mortgages must be paid through the plan.

The Court stated that this district does not follow that procedure; the other Chapter 13 Trustee does not “buy in” to what is being proposed; this process would make this part of the District an outlier to the other part of the District and to the ED of VA.; only 1 of the 9 cases here is a conduit case; and most of the fees sought are relatively small. The Court quoted from the ED VA Sheppard case as to the history and purposes of Rule 3002.1. Held: (i) The Court will allow the payment of these fees by increasing the Chapter 13 plan payments without having to file a modified plan, but not from the unsecured pool; (ii) the request to pre-approve language in future cases is denied. A rift between Courts need not be caused by this issue. Trustee can alert counsel, and counsel can alert the debtors, about any such fees, and a simple motion to increase plan payments (not an amended plan) could be filed; the Court is not opposed to considering a modification to Standing Order 15-1 to address such a motion. Increasing the plan payments to cover these charges over the remaining life of the plan should not be overly burdensome to the Trustee, the debtors, or debtors’ counsel. This will provide the paper trail to show that the debtors are current on the mortgage at plan completion. Because the Court believes that the cost of maintaining the debtors’ principal residence should be shouldered by the debtors, it will not pre-sanction a provision which takes the funds to pay additional charges “from the pockets of the unsecured creditors.” In this case, the Court will grant the debtors’ request to pay \$200 to cover certain 3002.1 charges, but the debtors will have to increase their plan payment by that amount, plus the Trustee’s

commission. The Trustee and debtors' counsel may bring additional motions to increase plan payments should future charges be incurred and noticed.

B178A. **In re Jeffrey and Nancy Livingston**, Dist. Ct., W.D. Va., # 1:15CV00036, 1/4/16 opinion (Jones). **[Chapter 7 case.] Is a debt non-dischargeable because of the debtor's failure to serve a creditor at a correct address; proper test to use.** Issue: Did the Bankruptcy Court apply the correct test to determine whether a debt owed to a creditor is non-dischargeable due to the debtor's listing of an incorrect address for the creditor on the schedule of debts? Held: Because the debtor's reason for listing the wrong address is a question of fact, the case will be remanded for further proceedings. ... Debtor filed a Chapter 7 bankruptcy while the creditor's suit in state court was pending. In the bankruptcy case the debtor noticed the creditor at the mailing address of his state court suit counsel, and the creditor did not receive notice of the bankruptcy case prior to the deadline for filing a claim. The creditor filed a claim after the bar date but before the Chapter 7 Trustee had finished collecting assets. The Bankruptcy Court held that the creditor had a non-dischargeable debt. (1) The Fourth Circuit has not spoken on this issue. (2) A mechanical application of sec. 523(a)(3)(A) "produces a result that is contrary to the unequivocally expressed intent of the legislature." (3) The equitable approach of the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, and 11<sup>th</sup> Circuits applies the appropriate balancing test. (4) On remand the Bankruptcy Court should apply the 3-part test articulated in Stone v. Caplan, 10 F.3d 285 (5<sup>th</sup> Cir. 1994) and consider (i) the reasons the debtor failed to list the creditor, (ii) the amount of disruption that would likely occur, and (iii) and prejudice suffered by the listed creditors and the unlisted creditor in question. (5) Sec. 726(a)(2)(C) analyzed.

B179. **In re Marlene Evans**, Bankr. Ct., ED VA, 543 B.R. 213, 1/5/16 opinion (St. John). **Debtor is not entitled to a discharge if she fails to make all direct post-petition mortgage payments.** Chapter 13 Trustee brought a motion to either convert the case, or close it without a discharge, because the debtor had failed to make all required post-petition mortgage payments during the plan. Debtor had obtained a loan mod, but was \$6,344 behind in post-petition payments at the end of the case, and more than \$14,000 behind on her HOA fees, because of reductions in income and having to assist displaced relatives. Held: (1) Under Code 1307, the only remedies available to the Trustee were conversion or dismissal, because closure without discharge is a remedy unavailable under the Code; the Trustee is instructed to file an amended motion seeking either conversion or dismissal, and notify all parties. (2) "Completion by the debtor of all payments under the plan" in Code sec. 1328(a) includes all payments "contemplated by a Chapter 13 plan," including "payments made directly to creditors as provided for in a Chapter 13 plan." (3) The application of 1328(a) in this fashion does not produce a harsh result, and a review of relevant decisions on this issue "finds universal support" for this position, including language in Rake v. Wade. (4) Because this debtor has not completed all of the payments under her plan, she is not eligible to receive her Chapter 13 discharge. (5) Rule 3002.1(f) does not estop the Trustee's position. (6) Debtor's argument that a long term debt such as this is not encompassed by the Chapter 13 discharge and therefore payments on it cannot be payments under the plan also fails. (7) There is no sufficient statutory authorization to simply close a case where the discharge has not been entered because of the debtor's failure to complete all payments required under the confirmed plan. *[this ruling will probably be appealed]*

B180. **In re Earl Addison**, Dist. Ct., W.D. Va., # 1:15CV00041, 1/19/16 opinion (Jones). [Chap. 7 case] **Automatic stay prevents the IRS from setting off a pre-petition non-tax debt against an income tax refund for a return filed after the bankruptcy case was filed.** Debtor owed USDA \$80,989 from a home foreclosure deficiency when he filed his Chapter 7 case, and was due federal tax refunds of \$8,957 for 2011 and 2012, which returns he filed after he filed his bankruptcy case. He homesteaded \$2,319 under Va. Code 34-4. Two months after his case was filed the IRS notified the debtor that it was applying his refunds to a “non-tax federal debt.” The debtor filed an adversary proceeding to have the money refunded to him and to the Chapter 7 Trustee. The Bankruptcy Court held that the government had violated the automatic stay and entered judgment against the government for the full \$8,957 amount of the offset. On appeal is the issue of whether summary judgment was appropriate for the debtor’s \$2,319 claim (the Trustee’s claim was settled with the IRS). Held: (1) Code sec. 541 does not create or confer property interests; such interests are created by non-bankruptcy law. (2) IRC sec. 6402 is the operative provision here. (3) There is a split in authority as to whether a bankruptcy stay prevents the government from offsetting tax refunds. (4) In 2005, the Bankruptcy Code was amended to add sec. 362(b)(26) to allow a setoff of an income tax refund for a pre-petition taxable period against an income tax liability. The fact that this exception to the stay only applies to income tax liabilities “suggests that Congress intended for the automatic stay to preclude the offset of non-income tax liabilities” such as this one. (5) Court rejects the government’s argument that “whenever a tax payer overpays, the overpaid funds belong to the government until it decides to issue a refund...Absent the IRS effectuating a sec. 6402 offset, the overpaid funds belong to the taxpayer.” The funds do not belong to the government until a federal agency has provided notice, and an offset has taken place. If the stay occurs first, the funds are protected by the stay. (6) Nothing in sec. 6402 suggests that the power to make credits or refunds using overpaid tax funds trumps the automatic stay. (7) Bankruptcy Court judgment is affirmed.

B181. **In re David and Candace Morris**, Dist. Ct., WD Va., # 3:15-CV-00021, 2/8/16 opinion (Conrad). [CHAPTER 7 CASE.] **Claiming one year’s tax refunds in a Homestead Deed will not protect refunds for a different year.** Debtors filed a Homestead Deed on 2/4/15 exempting \$375 in projected 2015 tax refunds; on Sch. C they exempted “other liquidated debts including tax refunds” of \$1.00. The creditors meeting occurred on 2/20/15. On 3/2/15 the Debtors filed an amended Homestead Deed exempting \$8,100 in 2014 tax refunds and increased the Sch. C exemption to \$8,147. The Trustee objected to the exemption as untimely filed and filed a turnover motion. The Bankruptcy Judge found that the amended Deed was not timely filed and disallowed the 2014 tax refund exemptions. Held: The decision of the Bankruptcy Court is affirmed. (1) Debtors’ reliance on Sharkey v. Leake, 715 F.2d 859 (4<sup>th</sup> Cir. 1983) [date of the tax return exempted was “immaterial” and Court would not add this requirement, because only one year’s tax refunds were involved] is misplaced. Here there are two tax refunds at issue, and the Debtors are seeking to exempt additional refunds beyond those “explicitly listed” in the original Deed. (2) The Bankruptcy Court believed it could not construe the 2014 and 2015 refunds as anything but refunds for those specific years; there was no clear error in this finding by that Court. (3) Va Code sec. 34-17 [Homestead Deed must be filed within 5 days of the creditors’ meeting] “must be accorded strict interpretation,” and the failure to comply with it precludes an exemption in bankruptcy. (3) Using de novo review, Court concludes that the Bankruptcy Court correctly applied Virginia law in this case. Debtors can’t rely on Sharkey to say that they could amend their Deed after the five day limit, because this was not a “clarifying amendment” or the correction of a “scrivener’s error”; an amendment may not set apart additional items not included in the original Deed. (4) There was no evidence in the record that the Deed was timely filed because its recording was delayed solely by the inaction of the state court

clerk's office, as in In re Nguyen, 211 F.3d 105 (4<sup>th</sup> Cir. 2000). There was no clear error in the Bankruptcy Court's finding as to timeliness. **[THIS DECISION HAS BEEN APPEALED TO THE FOURTH CIRCUIT.]**

B182. **In re Lloyd Robinson, Jr.**, Bankr. WD VA, # 15 71689, 2/4/16 opinion (Black). **Automatic stay in second Chap. 13 case filed while prior Ch. 13 case is still pending voids a foreclosure sale that took place after the second case was filed.** Debtor moved to vacate the Court's dismissal order and reinstate his Chapter 13 case; the motion was granted and the case reinstated. *Facts*: Debtor filed a Chapter 13 case at a time when his prior Chapter 13 case was still pending. The stay had been lifted against the mortgagee in the pending case, and it had begun the foreclosure process. The debtor had completed his (100%) plan payments under the pending plan, but the Trustee could not file his report of completion because money was still being deducted from the debtor's wages, so the debtor had not received his discharge as of the scheduled foreclosure date. Two hours before the scheduled sale, the debtor filed the second Chapter 13 case. It is unclear whether the mortgagee knew of the second filing. The sale was held, the property sold, and a trustee's deed was later recorded. When the second case was referred to chambers, because of Local Rule 1017-2 [a debtor can only maintain one case at a time], the second case was dismissed *sua sponte* and without a hearing; the debtor failed to disclose any prior cases on the second petition. *Analysis*: (1) Judge Connelly's ruling in In re Vaughan, #12 61986, 12/18/15 opinion [Ch. 13 case was filed while a pending Ch. 7 case was still being administered; the bar of LR 1017-2 is limited to cases where the later petition seeks to discharge the same debts or materially hinder the administration of the earlier case] and Judge Krumm's decision in In re Brown, 399 B.R. 162, must be considered here. (2) There is no *per se* rule that prohibits multiple bankruptcy filings; the real issue is whether the second case was filed in good faith in light of the pendency of the first case. (3) Generally, courts look to two tests: the "single estate rule"—the same property can't be the asset of two bankruptcy estates at the same time—and the Freshman v. Atkins, 269 US 121 (1925), principle that a debtor cannot treat the same debt in simultaneous cases. Under the former test, since the bankruptcy estate consisted of only such earnings as were necessary to make his payments, and since he had made all his payments, there was no need to replenish his estate, and the second filing is not a problem. Under the latter test, discharge has been delayed through no fault of the debtor and the same debts do not have to be dealt with at the same time. (4) The Court has now issued its notice of impending discharge absent objections, so the first case is close to discharge and closing. (5) The Court makes no ruling on the "omnipresent requirement of good faith"; the mortgagee can pursue that if it chooses, and the Court reserves ruling on the motion to dismiss pending further hearing. (6) The automatic stay of the second case was in effect when the foreclosure sale was conducted, so the foreclosure was void. That ruling is not changed by the fact that the case was later dismissed and reinstated. (7) Simultaneous filings are disfavored and ought to be permitted "only in exceptional circumstances, but this case fits within the exception.

B183. **In re Clifton Ervin**, Bankr. W.D. Va., # 15 70467, 2/23/16 opinion (Black). **(Chap. 7 case). Rulings on several items in the means test in an above-median case: expenses of non-filing spouse, medical expenses, and vehicle operating expense.** Court issued a number of rulings regarding items on the above-median means test for disposable income: (1) Line 3c: debtor failed to substantiate wife's alleged monthly payment to her employer, its actual payment during the six months, and evidence as to the ramifications of non-payment, so the deduction will not be allowed; (2) the burden of proof as to deductions that would negate the presumption of abuse [Code sec. 707(b)(2)] is on the debtor; (3) Line 25: only contributions to a Health Savings Account may be claimed here, not contributions to a Flexible Spending Account; (4) debtor failed to prove on Line 22 that an amount for medical expenses greater

than the amount on Line 3 was justified; (5) debtor will be allowed to claim on Line 12 a vehicle operating expense for two vehicles where the daughter drives one to and from work, since both are necessary for the “care and support of the debtor and his daughter.” (Court found that a presumption of abuse did arise in this case, and the case would be dismissed unless the debtor converted the case to Chapter 13 within 21 days.)

B184. **In re Todd Webber**, W.D. Bankr., # 15 70705, 4/7/16 opinion (Black). **Court dismissed a motion to sell real estate and abstained from determining debtor’s rights in the property; such matters should be resolved in the state court.** Debtor sought permission to sell real estate. The property owners association objected, arguing that the attached boat slip and easement had been improperly conveyed to the debtor. Concerned that its ruling might affect other landowners with similar interests who were not parties to this suit, the Court denied the sale without prejudice, abstained via sec. 1334(c)(1) from determining the rights of the parties involved, and allowed the litigation to proceed in state court. (1) In the Fourth Circuit, Courts follow the 12-factor test of In re Republic Reader’s Service, Inc., 81 B.R. 422 (Bankr. S.D. Tex. 1987), in deciding when to exercise permissive abstention. (2) The Court reviewed all twelve factors and found, inter alia, that the underlying issues involving property rights are issues of state law that are best resolved by state courts that regularly handle such matters; while this is technically a “core” proceeding, it primarily involves potential property rights of non-debtor third parties who have not had the opportunity to assert their interests; the parties may want a jury trial; and the debtor is free to renew its motion once this matter has been resolved in state court.

#### **FOURTH CIRCUIT**

F53. **In re Matthew Jenkins**, #14 1385, 4/27/15 opinion. **Requirements for concluding a 341 meeting.** To conclude a 341 meeting it is not enough that the Trustee intended to conclude the meeting, nor is it enough to say on the record that the meeting is not concluded and that will be continued. Rule 2003 requires that it be continued to a time and date certain and that a notice of a continued meeting be filed with the Court. Since that wasn’t done in this case, the Chapter 7 Trustee’s objection to discharge was not timely filed within 60 days of the conclusion of the creditors’ meeting as set forth in the Court’s order extending the time for the Trustee to file his complaint.

#### **U.S. SUPREME COURT**

S49. **Bullard v. Blue Hills Bank**, # 14-116, 5/5/15 opinion, \_\_\_\_ U.S. \_\_\_\_\_. **A Bankruptcy Court order denying confirmation is not a final order which can be immediately appealed.** Bankruptcy Court sustained creditor bank’s objection to confirmation and declined to confirm the plan. First Circuit BAP and First Circuit both concluded that the order denying confirmation was not a final order as long as the debtor remained free to propose another plan, and the First Circuit therefore dismissed the appeal for lack of jurisdiction. **Held:** A Bankruptcy Court’s order denying confirmation of a proposed plan is a not a final order that the debtor can immediately appeal. (1) Only plan confirmation or case dismissal alters the status quo and fixes the parties’ rights and obligations; here the relevant proceeding is the entire process culminating in confirmation or dismissal. (2) The fact that the debtor may have to choose between two untenable options (proposing an unwanted plan and appealing its confirmation, or accepting dismissal) does not change the result.

S50. **Harris v. Viegelahn**, #14 400, 5/15/15 opinion (Ginsburg, 9-0). **Debtor payments received, and still held, by the Trustee prior to conversion to Chapter 7 must be returned to the debtor, not disbursed by the Trustee pursuant to the confirmed plan.** In a case with a confirmed plan that had the Trustee curing the debtor's mortgage arrearage, the debtor fell behind on the mortgage and Chase foreclosed on his home. Funds earmarked for the mortgage arrearage continued to accumulate in the Trustee's account. A year after the foreclosure the debtor converted his case to Chapter 7; ten days later the Trustee distributed \$5,519 of his withheld wages mainly to his creditors. Debtor sought an order directing the Trustee to refund to the debtor the accumulated wages that she had distributed to his creditors. The Bankruptcy Court granted the debtor's motion; the District Court affirmed; and the Fifth Circuit reversed, holding that the Trustee must distribute such accumulated post-petition wages to the debtor's creditors pursuant to the confirmed plan. Held: (1) A debtor who converts to Chapter 7 is entitled to the return of any post-petition wages not yet distributed by the Chapter 13 Trustee. (2) Absent a bad faith conversion, Code sec. 348(f) limits a converted Chapter 7 estate to property belonging to the debtor as of the original filing date; post-petition wages collected by the Chapter 13 Trustee do not become part of that estate. (3) This exclusion removes those earnings from the pool of assets that may be liquidated and distributed to creditors; allowing a terminated Chapter 13 Trustee to disburse those earnings would be incompatible with the statutory design. (4) Sec. 348(e) terminates the services of the Chapter 13 Trustee upon conversion, so the moment a case is converted the Chapter 13 Trustee is stripped of authority to provide the "service" of disbursing payments to creditors. (5) Sec. 1327(a) and 1326(a)(2) ceased to apply once the case was converted, and continuing to distribute funds to creditors is not one of the Trustee's post-conversion responsibilities specified in the FRBP. (6) The refund of these monies to the debtor is not a windfall because if he had filed a Chapter 7 case he would have kept these wages in the first place, and Chapter 13 is a voluntary alternative to Chapter 7. Creditors can gain protection against the risk of excess accumulation of funds with the Trustee by seeking to have the plan include a schedule for regular disbursements of collected funds.

S51. **Wellness International Network v. Sharif**, # 13 935, 5/26/15 opinion (Sotomayor, 6-3). **Bankruptcy judges can adjudicate Stern claims with the parties' knowing and voluntary consent.** Sharif tried to discharge a debt owed to Wellness in his Chapter 7 case. Wellness sought a declaratory judgment that a trust he was administrator of was in fact his alter ego, so that its assets were property of his bankruptcy estate. The Bankruptcy Court ruled against Sharif, but while his appeal was pending the Stern v. Marshall decision [Article III forbids a Bankruptcy Court from entering a final judgment on claims that seek only to augment the bankruptcy estate and would otherwise exist without regard to any bankruptcy proceeding] was handed down. The District Court denied Sharif's request to file a supplemental brief raising Stern issues. The 7<sup>th</sup> Cir. ruled that his Stern claims could not be waived, and that the Bankruptcy Court lacked constitutional authority to enter final judgment on that claim. Held: Article III permits bankruptcy judges to adjudicate Stern claims with the parties' knowing and voluntary consent. Stern turned on the fact that the litigant did not truly consent to resolution of the claim against it in a non-Article III forum, so it doesn't govern the issue here. Sec. 157(c)(2) requires that consent to adjudication "need not be express, but it must be knowing and voluntary." The entitlement to an Article III adjudication is a personal right and thus ordinarily subject to waiver; "allowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process." The consent can be either express or implied—it can be based on "actions rather than words"—and the implied consent standard set forth in Roell v. Withrow, 538 U.S. 580, 589 [interpreting Sec. 63(c)] "supplies the appropriate rule for bankruptcy court adjudications." On remand, the 7<sup>th</sup> Circuit should decide if Sharif's actions evinced the requisite knowing and voluntary consent and whether he forfeited his Stern argument below. [*"The principal dissent warns*

*darkly of the consequences of today's decision. To hear the principal dissent tell it, the world will end not in fire, or ice but in a bankruptcy court.”]*

S52. **Bank of America v. Caulkett**, # 13 1421, 6/1/15 Opinion (Thomas, 9-0); consolidated Chapter 7 cases. **In a Chap. 7 case, debtor cannot void (“strip off”) a junior mortgage lien where the senior lien is greater than the property’s value if the creditor’s claim is both secured by a lien and is allowed under sec. 502.** Chapter 7 debtor owned a house encumbered with a senior and junior lien held by BOA. The senior mortgage amount was greater than the value of the house, so the junior lien was “wholly underwater.” Debtor sought to avoid (“strip off”) the junior lien under sec. 506(d). Bankruptcy Court granted the motion; Dist. Ct. and 11<sup>th</sup> Cir. affirmed. **Held:** (1) In a Chap. 7 case, can’t void a junior mortgage lien where the senior lien is greater than the property’s value if the creditor’s claim is both secured by a lien and is allowed under sec. 502. (2) Debtors argued under 506(a)(1) that the claim was not “secured,” but Dewsnup v. Timm [a “strip down” case in which declined to use the definition of “secured claim” in 506(a) for purposes of 506(d)] forecloses that argument: a “secured claim is a claim supported by a security interest in property, regardless of whether the value of the property would be sufficient to cover the claim.” (3) The Court declines to limit Dewsnup to partially underwater liens. The definition there did not depend on such a distinction. (The Court noted that the debtors were not asking the Court to overrule Dewsnup.) (4) Nobelman also does not support that distinction; it was applying 506(a) as it interacts with sec. 1322(b)(2). (The Court is reluctant to give the term “secured claim” in 506(d) a different definition depending on the value of the collateral; it is worried about allowing the difference of \$1 in always shifting property value to be the difference between the lien being paid in full or being fully avoided: that kind of lien-drawing should to be done by Congress.)

S53. **Baker Botts v. ASARCO, LLC**, # 14-103, 6/15/15 opinion, 576 U.S. \_\_\_\_\_. **No attorney fees for litigation over attorney fees.** Justice Thomas (6-3): “Our basic point of reference when considering the award of attorney’s fees is the bedrock principle known as the American Rule: Each litigant pays his own attorney’s fees, win or lose, unless a statute or contract provides otherwise.” The dispute in this case involves fees for defending a fee application in bankruptcy. Law firms that work for the estate are appointed by the court and get paid only after the court approves fee applications, in a process that contemplates notice and a hearing to all involved in the case. The attorneys in this case (petitioners Baker Botts and Jordan, Hyden, Womble, Culbreth & Holzer) did extraordinary work for respondent ASARCO in its bankruptcy; among other things, they recovered a judgment against ASARCO’s parent for more than \$7 billion. The attorneys sought fees of \$120 million, which the court awarded after an extended dispute. The court also awarded \$5 million in fees for the time that the firms spent defending their fee applications, challenged by the ungrateful ASARCO (now under control of the company that the firms successfully sued). The Fifth Circuit did not doubt that the \$5 million was a reasonable fee for the time spent, but it held that the Bankruptcy Code does not authorize the award of those fees. The statute in question (Bankruptcy Code § 330) authorizes “reasonable compensation for actual, necessary services rendered.” Obviously the phrase contemplates compensation of law firms for the services they render. But it is easy for the Court to say that the statute “neither specifically nor explicitly authorizes courts to shift the costs of adversarial litigation from one side to the other.” End of story. Citing 1930s dictionaries – because the phrase was added to the bankruptcy statute in 1934 – the Court reasons that “services” are labor performed for another, that defending a fee application is labor performed for the firm, and thus that defending a fee application is not a service. The Court notes other places in the Bankruptcy Code that displace the American Rule more explicitly. [from Scotusblog]