

Bankruptcy Judges Panel: Case Law, Amended Rules, and New Procedures

Friday, May 6, 2016

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Materials Outline:

- I. Recent and Pending Case Law from the Supreme Court and Fourth Circuit
- II. Recent Amendments to the Federal Rules of Civil Procedure Effective December 1, 2015
- III. Pending Amendments to the Federal Rules of Civil Procedure Which Will (Most Likely) Become Effective December 1, 2016
- IV. Pending Amendments to the Federal Rules of Bankruptcy Procedure Which Will (Most Likely) Become Effective December 1, 2016
- V. Don't Be *THAT* Lawyer: Courtroom Decorum and Procedure; Other Concerns
- VI. New Procedures in the Western District

I. Recent and Pending Case Law from the Supreme Court of the United States and the U.S. Court of Appeals for the Fourth Circuit

Decisions of the Supreme Court of the United States

Case: *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158 (2015).

Date Decided: June 15, 2015

Code Sections: 11 U.S.C. §§ 327, 330(a)

Background: ASARCO LLC reorganized under chapter 11; the reorganized entity is controlled by a parent company. ASARCO's bankruptcy counsel, Baker Botts, exposed the parent company's attempts to defraud ASARCO. Subsequently, the reorganized ASARCO objected to Baker Botts's fees. Baker Botts spent over five million dollars to defend their fee applications. Each objection by the reorganized ASARCO was overruled and none were appealed.

Procedural Posture: The bankruptcy court awarded Baker Botts compensation for its defense costs, none of which would be borne by the creditors. The district court affirmed. The U.S. Court of Appeals for the Fifth Circuit affirmed in part and reversed in part, holding that 11 U.S.C. § 330(a) never authorizes compensation for defense of fee applications.

Issue: Whether § 330(a) grants bankruptcy judges discretion to award compensation for the defense of a fee application.

Holding: The Supreme Court held that the Bankruptcy Code does not permit bankruptcy courts to award attorney fees to counsel or other professionals employed by the bankruptcy estate for work performed in defending a fee application in court.

Case: *Bank of Am., N.A. v. Caulkett*, 135 S. Ct. 1995 (2015).

Date Decided: June 1, 2015

Code Sections: 11 U.S.C. §§ 502, 506(d)

Background: Debtors in separate cases had two mortgages on their houses, and the outstanding balances on the first mortgages exceeded the houses' current market value. The debtors moved to strip off the junior lien under 11 U.S.C. § 506(d).

Procedural Posture: The bankruptcy court granted each debtor's motion to strip off the junior lien. The district court affirmed. The U.S. Court of Appeals for the Eleventh Circuit affirmed.

Issue: Whether § 506(d) permits a chapter 7 debtor to "strip off" a junior mortgage lien in its entirety when the outstanding debt owed to a senior lienholder exceeds the current value of the collateral.

Holding: The Supreme Court held that debtors cannot strip off junior mortgage liens that are wholly unsecured using the language of 506(d) because the junior mortgagees had allowed secured claims in the mortgaged properties.

Case: *Wellness Int'l Network Ltd. v. Sharif*, 135 S. Ct. 1932 (2015).

Date Decided: May 26, 2015

Code Section and Constitutional Article: 28 U.S.C. § 157; U.S. Const. art. III

Background/Procedural Posture: The United States Court of Appeals for the Seventh Circuit held that the bankruptcy court lacked constitutional authority to decide, in an action against the debtor, whether property in the debtor's possession was property of the bankruptcy estate under 11 U.S.C. § 541 because the determination required resolution of state-law issues. The Seventh Circuit also held that Article III did not permit a bankruptcy court to exercise the judicial power

of the United States to determine an action against a debtor who had consented to the exercise of that power by filing his petition in bankruptcy court.

Issue: Whether Article III permits the bankruptcy court to exercise the judicial power of the United States where the debtor has consented to the exercise of such power.

Holding: The Supreme Court held that Article III permits bankruptcy courts to adjudicate *Stern* claims with the parties' knowing and voluntary consent.

Case: *Harris v. Viegelahn*, 135 S. Ct. 1829 (2015).

Date Decided: May 18, 2015

Code Sections: 11 U.S.C. §§ 348, 541(a), 1307(a)

Background: Chapter 13 debtor, under plan, would pay the mortgage directly. The debtor, however, failed to keep up with mortgage payments, and the mortgagee obtained relief from stay to initiate foreclosure proceedings. The debtor then filed a notice of conversion to chapter 7. At the time of conversion, the chapter 13 trustee held \$4,319.22 of the debtor's post-petition wages, which she distributed to the debtor's creditors instead of returning to the debtor. The debtor moved to have those funds refunded to him as having been distributed without authority.

Procedural Posture: The bankruptcy court granted the debtor's motion. The district court affirmed. The U.S. Court of Appeals for the Fifth Circuit reversed, holding that the funds were appropriately distributed.

Issue: Whether, when a debtor in good faith converts a bankruptcy case to chapter 7 after confirmation of a chapter 13 plan, undistributed funds held by the chapter 13 trustee are refunded to the debtor or distributed to creditors.

Holding: The Supreme Court held that undistributed payments made by the debtor from his wages and held by the chapter 13 trustee at time of the conversion to chapter 7 must not be distributed to creditors and must be returned to the debtor.

Case: *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686 (2015).

Date Decided: May 4, 2015

Code Section: 28 U.S.C. § 158(a)(1), (a)(3), (d)(1)

Background: The debtor proposed a "hybrid" chapter 13 plan, which divided debt owed to Blue Hills Bank, formerly known as Hyde Park Savings Bank, for a mortgage into a secured claim and an unsecured claim based on the value of the property. The bankruptcy court rejected the plan, because it determined that such a hybrid plan was inconsistent with the Bankruptcy Code. The bankruptcy appellate panel affirmed, but ruled that the bankruptcy court's order was not final under 28 U.S.C. § 158(a)(1) because the debtor could still file an alternative plan. The BAP, however, granted debtor leave to appeal under § 158(a)(3). The debtor then appealed to the First Circuit, which dismissed the appeal for lack of jurisdiction under § 158(d)(1) holding that an order denying confirmation is not final and appealable.

Issue: Whether an order denying confirmation of a bankruptcy plan is appealable.

Holding: The Supreme Court held that a bankruptcy court's order denying confirmation with leave to amend is not a "final" order that debtor can immediately appeal.

Pending Decisions of the Supreme Court of the United States

Case: *Puerto Rico v. Cal. Tax-Free Trust*

Oral Argument: March 22, 2016

Code Section: 11 U.S.C. § 903(1)

Background: Puerto Rico’s three major public utilities, which provide electricity, water, and roads, have a combined debt of approximately twenty billion dollars. It is undisputed that Puerto Rico cannot use chapter 9 of the Bankruptcy Code to restructure its debt, but Puerto Rico asserts it may enact its own laws under which it may restructure its debt. Puerto Rico enacted the Recovery Act to provide such a mechanism. The respondents filed suits challenging the validity of the Recovery Act.

Procedural Posture: The district court denied the petitioner’s motion to dismiss, granted summary judgment to the respondents who requested it, and permanently enjoined the petitioners from enforcing the Recovery Act. The First Circuit affirmed, agreeing with the district court in holding that 11 U.S.C. § 903(1) preempts the Recovery Act.

Issue: Whether chapter 9 of the Bankruptcy Code, which does not apply to Puerto Rico, preempts a Puerto Rico statute which creates a mechanism for its public utilities to restructure their debt.

Case: *Husky Int’l Elecs., Inc. v. Ritz*

Oral Argument: March 1, 2016

Code Section: 11 U.S.C. § 523(a)(2)(A)

Background: Respondent Ritz was a partial owner of Chrysalis Manufacturing Corporation, which under Ritz’s control made a series of purchases from petitioner, Husky International Electronics, Inc. Husky delivered the goods, but Chrysalis never paid the debt of \$163,999.38. While this debt was outstanding, Ritz transferred over one million dollars from Chrysalis to at least seven other entities that he owned and controlled. At the time of the transfers, Chrysalis was insolvent, not paying its debts as they became due, and did not receive reasonably equivalent value in exchange. After Husky sued Ritz in federal court to hold him personally liable, Ritz filed a chapter 7 bankruptcy petition seeking to discharge the personal liability on the debt to Husky. Husky filed an adversary proceeding arguing that the debt to Husky was nondischargeable under the actual fraud exception of section 523(a)(2)(A).

Procedural Posture: The bankruptcy court held that the conduct did not constitute “actual fraud” because Ritz did not make any “false representation” to Husky in the course of the fraudulent-transfer scheme. The district court agreed with the bankruptcy court, noting the failure of Husky to allege misrepresentation by Ritz. The Fifth Circuit affirmed.

Issue: Whether the “actual fraud” bar to discharge under section 523(a)(2)(A) applies only when the debtor has made a false representation or whether the bar also applies when the debtor has deliberately obtained money through a fraudulent-transfer scheme that was actually intended to cheat a creditor.

Decisions of the United States Court of Appeals for the Fourth Circuit

Case: *Anderson v. Hancock*, No. 15-1505, 2016 WL 1660178, 2016 U.S. App. LEXIS 7634 (4th Cir. Apr. 27, 2016).

Date Decided: April 27, 2016

Code Section: 11 U.S.C. § 1322(b)

Background: The debtors borrowed money from the Hancocks to purchase a home in North Carolina. In exchange, the debtors granted the Hancocks a deed of trust and executed a note requiring monthly payments based on an interest rate of 5% over thirty years. The note also provided that upon a default of being past due for 30 days, the interest rate would increase to 7%.

The debtors defaulted, and the Hancocks noticed that the default rate had gone into effect. Subsequently, the Hancocks initiated foreclosure proceedings and the debtors filed bankruptcy. The chapter 13 plan proposed to pay both the mortgage arrears and the monthly payment at the original 5% rate.

Procedural History: The Hancocks objected to confirmation of the plan, arguing that the arrears and monthly payment should be paid at the 7% default rate of interest. The bankruptcy court sustained the objection. The debtors appealed and the district court affirmed. The debtors appealed.

Issue: Whether a “cure” under section 1322(b) allows a chapter 13 plan to bring post-petition payments on debtors’ residential mortgage loan back down to the initial rate of interest in a case in which the rate of interest was increased upon default.

Holding: The Bankruptcy Code allows debtors to cure default without modifying the contractual terms. A change to the interest rate on a residential mortgage is a “modification” barred by the terms of section 1322(b). The Fourth Circuit disagreed with the debtors that a cure under the Bankruptcy Code may bring the loan back to its initial rate of interest, noting that the cure lies in decelerating the loan and allowing the debtors to avoid foreclosure by continuing to make payments under the contractually stipulated rate of interest.

Case: *Providence Hall Assocs. LP v. Wells Fargo, N.A.*, 816 F.3d 273 (4th Cir. 2016).

Date Decided: March 11, 2016

Code Sections: 11 U.S.C. §§ 363, 1107(a), 1109(b)

Background: Providence, which owed money to Wells Fargo, filed under chapter 11. A chapter 11 trustee was appointed. The trustee filed, and the bankruptcy court granted, two motions to sell pursuant to section 363. These sales paid off the obligation owed to Wells Fargo. Subsequently, the debtor asked for dismissal of its case and the court dismissed. The ex-debtor then filed a complaint, alleging among other items lender liability, against Wells Fargo. Wells Fargo removed action to federal court. Wells Fargo asked the district court to dismiss based on res judicata.

Procedural History: District court dismissed action; ex-debtor appealed.

Issue: Whether the district court erroneously gave res judicata effect to various sale orders issued during the ex-debtor’s chapter 11 bankruptcy case.

Holding: Affirmed. The Fourth Circuit determined that the doctrine of res judicata barred the litigation initiated by the ex-debtor, because the three-element test was satisfied in that (1) the 363 sale orders were final judgments on the merits; (2) the sale orders arose out of the same nucleus of facts; i.e., reinforcing the “transactional” approach; and (3) the chapter 11 trustee was in privity with the debtor when the sale orders were entered.

Case: *Stubbs & Perdue, P.A. v. Angell (In re Anderson)*, 811 F.3d 166 (4th Cir. 2016).

Date Decided: January 26, 2016

Code Sections: 11 U.S.C. §§ 507(a), 724(b)(2)

Background: Stubbs & Perdue represented the debtor in a chapter 11 bankruptcy, racking up fees of approximately \$200,000. The debtor was also subject to nearly one million dollars in secured tax claims. The case converted to chapter 7. There was not enough money to pay both claims, and the parties disagreed over which claim took priority. After filing but prior to conversion, Congress amended section 724(b)(2). The amended version clarified that the tax claim had a

higher priority. The firm argued that the version of the Bankruptcy Code in effect at the time of the filing of the case, which would give the firm a higher priority, should govern the case.

Procedural History: The bankruptcy court ruled that the current version of the code governed and that the tax claim took priority over the firm's claim. The district court affirmed.

Issue: Whether the legal fees, which were treated as a chapter 11 administrative claim under 507(a)(2), were subordinated to the secured tax claim under 724(b)(2) when the section at the time of filing the case had not yet been corrected to exclude such fees.

Holding: The Fourth Circuit affirmed, holding that the bankruptcy court properly applied the version of section 724(b)(2) in effect at the time of its decision.

Case: *Biltmore Invs. Ltd. v. TD Bank, N.A.*, 626 F. App'x 390 (4th Cir. 2015).

Date Decided: October 1, 2015

Code Sections: 11 U.S.C. §§ 362, 1141

Background: TD Bank had obtained a state court judgment against an individual who owned all of the common stock of the debtor, Biltmore Investments Ltd.

Procedural History: After plan confirmation, TD Bank attempted to execute on the individual's stock in the debtor. For this purpose, TD Bank filed a motion for relief from the automatic stay, which the bankruptcy court granted. The district court reversed and stayed TD Bank from taking action against the stock, relying on the standard articulated in *A.H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986), to conclude that these were unusual circumstances to extend the stay to a non-debtor.

Issue: Whether the circumstances merited extending the stay to the non-debtor individual.

Holding: The Fourth Circuit vacated and remanded the district court decision, noting that the underlying decisions were predicated on the erroneous belief that the automatic stay was in effect. The Fourth Circuit pointed out that the confirmation of the plan had terminated the automatic stay and thus the district court erred in extending and invoking the stay.

Case: *Houck v. Substitute Tr. Servs., Inc.*, 791 F.3d 473 (4th Cir. 2015).

Date Decided: July 1, 2015

Code Sections: 11 U.S.C. § 362(k); 28 U.S.C. § 157

Background: The debtor filed *pro se* a chapter 13 petition facing foreclosure. Her case was dismissed. When the foreclosure process started anew, she filed a second case, also *pro se*. The bankruptcy court issued a show cause to the debtor why her second case should not be dismissed. Two days later the debtor's homestead was sold at a foreclosure sale. On the day after the sale the bankruptcy court dismissed the debtor's case. The debtor obtained counsel and filed an action for violation of the automatic stay under section 362(k) alleging that defendants sold her home in violation of the stay in her second case.

Procedural History: The district court granted a motion to dismiss concluding that the debtor had failed to allege facts that plausibly supported that the violation of the automatic stay was willful, a necessary element of the 362(k) action.

Issues: (1) Whether the debtor's appeal was from a final order; (2) whether the district court had subject matter jurisdiction over the automatic stay violation action; and (3) whether the district court erred in dismissing for failure to state a claim.

Holding: The Fourth Circuit held that it had jurisdiction over the appeal under the doctrine of cumulative finality and that the district court always had subject matter jurisdiction over any bankruptcy matter. The Fourth Circuit also held that the debtor "must merely advance her claim

‘across the line from conceivable to plausible’” and that “the district court’s inquiry into whether another explanation was more probable undermined the well-established plausibility standard.” The Court determined that the debtor stated a plausible claim for relief under section 362(k), vacated and reversed in part the district court’s decision, and remanded back to the district court.

Case: *Williams v. Lynch (In re Lewis)*, 611 F. App’x 134 (4th Cir. 2015).

Date Decided: June 9, 2015

Code Section: 11 U.S.C. § 105(a)

Background: The Bankruptcy Administrator moved for sanctions against debtor’s counsel for violating the requirement of full disclosure of fees in bankruptcy cases, continuing to represent the debtor without court approval after conversion to chapter 11, violating the rule against ghost writing appeal documents for the debtor, and failure to maintain copies of filed documents that contain an original signature.

Procedural History: The bankruptcy court entered an order suspending the attorney from filing new cases in the district, requiring monthly reports on existing cases, disgorging the undisclosed fees, and imposing a \$2500 monetary sanction. The bankruptcy court also ordered his reinstatement conditioned on full compliance with the sanctions order and continuing heightened reporting requirements. Counsel appealed both orders. The district court affirmed, and counsel again appealed.

Issue: Whether the bankruptcy court lacks the authority to suspend the bar privileges of attorneys who practice in that court.

Holding: Affirmed. The Fourth Circuit found no reversible error with either the bankruptcy court or the district court, concluding that the sanctions imposed on debtor’s counsel were both within the bankruptcy court’s authority and properly imposed.

II. Select Amendments to the Federal Rules of Civil Procedure Effective December 1, 2015

N.B.: Strike-through text represents deletions and italicized text represents new additions.

Rule 1. Scope and Purpose

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, ~~and~~ administered, *and employed by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding.

Rule 4. Summons

* * * *

(m) Time Limit for Service. If a defendant is not served within ~~120~~90 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the

action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1) *or to service of a notice under Rule 71.1(d)(3)(A)*.

Rule 16. Pretrial Conferences; Scheduling; Management

* * * *

(b) Scheduling.

(1) Scheduling Order. Except in categories of actions exempted by local rule, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference ~~by telephone, mail, or other means~~.

(2) Time to Issue. The judge must issue the scheduling order as soon as practicable, but ~~in any event~~ *unless the judge finds good cause for delay, the judge must issue it* within the earlier of ~~120~~90 days after any defendant has been served with the complaint or ~~90~~60 days after any defendant has appeared.

(3) Contents of the Order.

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(B) Permitted Contents. The scheduling order may:

* * * *

(iii) provide for disclosure, ~~or~~ discovery, *or preservation* of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, *including agreements reached under Federal Rule of Evidence 502*;

(v) *direct that before moving for an order relating to discovery, the movant must request a conference with the court*;

(~~v~~vi) set dates for pretrial conferences and for trial; and

(~~v~~vii) include other appropriate matters.

* * * *

Rule 26. Duty to Disclose; General Provisions Governing Discovery

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(b) Discovery Scope and Limits.

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense *and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.* ~~Information within this scope of discovery need not be admissible in evidence to be discoverable.—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~

(2) Limitations on Frequency and Extent.

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(C) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

* * * *

~~(iii) the burden or expense of the proposed discovery is outside the scope permitted by Rule 26(b)(1) outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.~~

* * * *

(c) Protective Orders.

(1) In General. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending — or as an alternative on matters

relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

* * * *

(B) specifying terms, including time and place *or the allocation of expenses*, for the disclosure or discovery;

* * * *

(d) Timing and Sequence of Discovery.

* * * *

(2) Early Rule 34 Requests.

(A) *Time to Deliver.* More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(B) *When Considered Served.* The request is considered to have been served at the first Rule 26(f) conference.

(23) Sequence. Unless, ~~on motion,~~ the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

* * * *

(f) Conference of the Parties; Planning for Discovery.

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(3) Discovery Plan. A discovery plan must state the parties' views and proposals on:

* * * *

(C) any issues about disclosure, ~~or~~ discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production

— whether to ask the court to include their agreement in an order *under Federal Rule of Evidence 502*;

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Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

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(b) Procedure.

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(2) Responses and Objections.

(A) Time to Respond. The party to whom the request is directed must respond in writing within 30 days after being served *or — if the request was delivered under Rule 26(d)(2) — within 30 days after the parties’ first Rule 26(f) conference*. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) Responding to Each Item. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state ~~an objection~~ *with specificity the grounds for objecting* to the request, including the reasons. *The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.*

(C) Objections. *An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.*

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Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(a) Motion for an Order Compelling Disclosure or Discovery.

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(3) Specific Motions.

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(B) To Compel a Discovery Response. A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

* * * *

(iv) a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34.

* * * *

(e) Failure to Provide/Preserve Electronically Stored Information. ~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.~~ *If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:*

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

* * * *

Rule 55. Default; Default Judgment

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(c) Setting Aside a Default or a Default Judgment. The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b).

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III. Select Pending Amendments to the Federal Rules of Civil Procedure Which Will (Most Likely) Become Effective December 1, 2016

N.B.: Strike-through text represents deletions and italicized text represents new additions.

Rule 6. Computing and Extending Time; Time for Motion Papers

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(d) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after ~~service~~*being served* and service is made under Rule 5(b)(2)(C) (*mail*), (D) (*leaving with the clerk*), ~~(E)~~, or (F) (*other means consented to*), 3 days are added after the period would otherwise expire under Rule 6(a).

* * * *

IV. Select Pending Amendments to the Federal Rules of Bankruptcy Procedure Which Will (Most Likely) Become Effective December 1, 2016

N.B.: Strike-through text represents deletions and italicized text represents new additions.

Rule 3002.1. Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence

(a) IN GENERAL. This rule applies in a chapter 13 case to claims (1) that are ~~(1)~~secured by a security interest in the debtor's principal residence, and (2) *for which the plan provides that either the trustee or the debtor will make contractual installment payments provided for under § 1322(b)(5) of the Code in the debtor's plan.* Unless the court orders otherwise, the notice requirements of this rule cease to apply when an order terminating or annulling the automatic stay becomes effective with respect to the residence that secures the claim.

* * * *

Rule 7008. General Rules of Pleading

Rule 8 F.R.Civ.P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. In an adversary proceeding before a bankruptcy ~~judge~~*court*, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement ~~that the proceeding is core or non-core and, if non-core~~ that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy ~~judge~~*court*.

Rule 7012. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on the Pleadings

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(b) Applicability of Rule 12(b)–(i) F. R.Civ.P. Rule 12(b)–(i) F.R.Civ.P. applies in adversary proceedings. A responsive pleading shall admit or deny an allegation that the proceeding is core or non-core. If the response is that the proceeding is non-core, it shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judgecourt. In non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties.

Rule 7016. Pre-Trial Procedures; Formulating Issues

(a) *PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT.* Rule 16 F.R.Civ.P. applies in adversary proceedings.

(b) *DETERMINING PROCEDURE.* The bankruptcy court shall decide, on its own motion or a party's timely motion, whether:

- (1) to hear and determine the proceeding;
- (2) to hear the proceeding and issue proposed findings of fact and conclusions of law; or
- (3) to take some other action.

Rule 9006. Computing and Extending Time; Time for Motion Papers

* * * *

(f) ADDITIONAL TIME AFTER SERVICE BY MAIL OR UNDER RULE 5(b)(2)(D), ~~(E)~~, OR (F) F.R.CIV.P. When there is a right or requirement to act or undertake some proceedings within a prescribed period after ~~service being served~~ and that service is by mail or under Rule 5(b)(2)(D) (*leaving with the clerk*), ~~(E)~~, or (F) (*other means consented to*) F.R.Civ.P., three days are added after the prescribed period would otherwise expire under Rule 9006(a).

* * * *

Rule 9027. Removal

(a) Notice of Removal.

(1) Where Filed; Form and Content. A notice of removal shall be filed with the clerk for the district and division within which is located the state or federal court where the civil action is pending. The notice shall be signed pursuant to Rule 9011 and contain a short and plain statement of the facts which entitle the party filing the notice to remove, contain a statement that upon removal of the claim or cause of action ~~the proceeding is core or non-core and, if non-core,~~ ~~that~~ the party filing the notice does or does not consent to entry of final orders or judgment by the bankruptcy judge ~~court~~, and be accompanied by a copy of all process and pleadings.

* * * *

(e) Procedure After Removal.

* * * *

(3) Any party who has filed a pleading in connection with the removed claim or cause of action, other than the party filing the notice of removal, shall file a statement ~~admitting or denying any allegation in the notice of removal that upon removal of the claim or cause of action the proceeding is core or non-core.~~ If the statement alleges that the proceeding is non-core, it shall state that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge ~~court~~. A statement required by this paragraph shall be signed pursuant to Rule 9011 and shall be filed not later than 14 days after the filing of the notice of removal. Any party who files a statement pursuant to this paragraph shall mail a copy to every other party to the removed claim or cause of action.

* * * *

Rule 9033. Review of Proposed Findings of Fact and Conclusions of Law in Non-Core Proceedings

(a) Service. ~~In non-core proceedings heard pursuant to 28 U.S.C. §157(e)(1),~~ *In a proceeding in which the bankruptcy court has issued* ~~the bankruptcy judge shall file~~ proposed findings of fact and conclusions of law,⁻ ~~T~~he clerk shall serve forthwith copies on all parties by mail and note the date of mailing on the docket.

* * * *

V. Don't Be *THAT* Lawyer: Courtroom Decorum and Procedure; Other Concerns

1. Local Rule 5072-1. Courtroom Decorum: “Counsel shall at all times conduct and demean themselves with dignity and propriety. When addressing the Court, counsel shall rise

unless excused therefrom by the Court. All statements and communications to the Court shall be clearly and audibly made from a standing position at the attorney's lectern facing the Court or the witness. Counsel shall not approach the bench unless requested to do so by the Court or unless permission is granted upon the request of counsel."

2. Exhibit Instructions (*see Attachment 1*)

a. "All exhibits must be filed electronically prior to the hearing in the electronic filing system (ECF)."

b. "Counsel must bring to court three (3) separate sets of exhibits for court use during the Trial, one set for the Judge, one for the Law Clerk, and one for the use by witnesses unless the litigant has obtained permission from the court in advance of the Trial to provide electronic exhibits at the Trial."

3. Examining Witnesses

a. They are there to testify; let them

b. Federal Rule of Evidence 611 (Mode and Order of Examining Witnesses and Presenting Evidence) (via Federal Rule of Bankruptcy Procedure 9017)

c. Have them answer *orally* for the record (nodding is not saying "yes")

d. Gestures

4. Testimony by Attorney Proffer

a. Witness must be in the courtroom

b. Witness must be available for cross-examination

c. Receive opposing counsel's consent

d. State what the witness would testify under oath

e. Court will ask if any party wishes to cross-examine

f. Federal Rule of Civil Procedure 43(a) (Taking Testimony) and Federal Rule of Evidence 611 (Mode and Order of Examining Witnesses and Presenting Evidence) (via Federal Rule of Bankruptcy Procedure 9017)

5. Proof

a. Who has burden?

b. Standard of proof?

6. Judicial Notice

a. Federal Rule of Evidence 201 (Judicial Notice of Adjudicative Facts) (via Federal Rule of Bankruptcy Procedure 9017)

7. Protection of Personally Identifiable Information

a. Federal Rule of Bankruptcy Procedure 9037; 11 U.S.C. § 107

8. Staff Issues

a. Unauthorized Practice of Law; Virginia Rule of Professional Conduct 5.3: Responsibilities Regarding Nonlawyer Assistants

b. Contacting Chambers

c. Submitting Orders . . . and then immediately calling about them

9. Court Appearance/Telephonic Appearance

a. Local Rule 9011-1(A): “Counsel of record who files a petition under any chapter in this Court for a debtor, or debtors, must appear at all Court hearings unless excused or given permission to withdraw by the Court.”

b. When the order is entered, the matter is removed from the docket

b. CourtSolutions (*see website <http://www.vawb.uscourts.gov/?q=hearings-appearing-telephone>*)

VI. New Procedures

1. Motion for Relief from Stay

a. Pre-hearing Order (*see Attachment 2*)

b. Movant and Respondent Certifications (*see Attachments 3 and 4*)

2. Adversary Proceeding Summons and Pretrial Conferences (*see attachment 5*)

a. Answer or responsive pleading will trigger setting pre-trial conference by Court order

b. If no responsive pleading, move toward default judgment (Federal Rule of Bankruptcy Procedure 7055)

3. Proposed New and Amended Local Rules

a. Local Rule 1006-1 is amended to remove the bar on applications for payment of filing fees in installments

b. Local Rule 1017-2 is amended to permit two contemporaneous petitions after notice and hearing and good cause shown

c. New Local Rule 3004-1 will require debtor's counsel and the trustee to give notice when filing a claim on behalf of a creditor

4. Local Rules Committee (maybe)

Attachment 1

UNITED STATES BANKRUPTCY COURT WESTERN DISTRICT OF VIRGINIA EXHIBIT INSTRUCTIONS

All exhibits must be filed electronically prior to the hearing in the electronic filing system (ECF).

The Exhibit list must be typewritten, double-spaced, and should briefly describe each exhibit to be introduced at trial. The “admitted” and “marked” columns should be left blank.

Counsel should pre-mark exhibits near the bottom of the exhibit.

If a group of related items, such as checks or photographs, are to be introduced, each individual item must have page numbers.

Plaintiff's exhibits are to be in numerical order.

Defendant's exhibits are to be in alphabetical order.

Government exhibits should be marked “Government.”

Joint exhibits should be marked “Joint exhibits.”

If there is more than one Plaintiff or Defendant, the exhibit must identify the party on exhibit.

For exhibits that contain multiple pages, please identify the number of pages within each exhibit. (Example: Defendant Exhibit A - Page 1 of 10)

The marked exhibit shall contain the exhibit number (or letter), the case number [and adversary proceeding number, if applicable] and the date of the trial or hearing.

Example of exhibit format:

Plaintiff's Exhibit #1 07/01/92 Case #92-00001 APN 92-00017A Page 1 of 10
--

Counsel must bring to court three (3) separate sets of exhibits for court use during the Trial, one set for the Judge, one for the Law Clerk, and one for the use by witnesses unless the litigant has obtained permission from the court in advance of the Trial to provide electronic exhibits at the Trial.

Attachment 2

UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF VIRGINIA

In re: DEBTOR(S)	CASE NO. CHAPTER:7
v. MOVANT(S) AND RESPONDENT(S)	

PRE-HEARING ORDER

A Motion for Relief from Stay pursuant to 11 U.S.C. Sec. 362 has been filed and it appearing that pursuant to the provisions of Sec. 362 of the Bankruptcy Code the Court is required to conduct prompt hearings with respect to motions for relief from the automatic stay; and it further appearing that it is necessary to enter certain orders to permit the Court to conduct the aforesaid hearings, and good cause appearing, it is

ORDERED:

1. Within seven (7) days from the date of this Pre-Hearing Order, the Movant shall file with the Court and serve on each Respondent a certification on the Movant's certification form available on the Court's website, and supporting exhibits, unless the particular information specified below is contained in the Motion for Relief from Stay. If all the below information is not contained in the Motion for Relief, the Movant must file the certification attaching exhibits as necessary for subsection (a) and containing the information in subsections (b) and (c):

- a. True copies of all notes, bonds, deeds of trust, security agreements, car titles, financing statements, assignments, and every other document upon which the Movant(s) will rely at the time of hearing. Attaching these documents as exhibits to the motion shall constitute compliance.
- b. A statement of amount due including a breakdown of the following categories:
 - (1) Unpaid principal
 - (2) Accrued interest and the beginning and ending dates for accrual thereof
 - (3) Late charges and the period covered by the late charges
 - (4) Attorney's fees
 - (5) Advances for taxes, insurance, and the like
 - (6) Unearned interest
 - (7) Any other charges
 - (8) A per diem interest factor
- c. A valuation of the property involved as well as the basis for such valuation.

Attachment 2

2. If any Respondent opposes the relief sought in the Motion for Relief, such Respondent(s) shall file within fourteen (14) days from the date of this Pre-Hearing Order a pleading responsive to the allegations contained in the Motion, including as an exhibit the information required in the Respondent's Certification **form available on the Court's website, if necessary.** Notwithstanding the foregoing provision, if the Motion for Relief has been filed in a case under Chapter 7 before the date of the initial meeting of creditors pursuant to 11 U.S.C. § 341(a), the Chapter 7 trustee Respondent, if any, shall file any pleading responsive to the allegations contained in the Motion within fourteen (14) days from the date of the initial meeting of creditors. In the event the Movant's Certification form is not timely filed, the Respondent(s) shall file a responsive certification within seven (7) days of the date of its tardy filing, but no later than the day prior to the scheduled hearing. As part of the responsive pleading, the Respondent(s) shall indicate whether controversy exists as to the authenticity of any documents involved in the motion and shall specify the disputed documents. Upon the filing of a responsive pleading, a "contested matter" shall exist.

Failure to file a responsive pleading, by the applicable deadline set forth above, shall be deemed consent by the non-responding party to the relief requested by the Movant(s) and a waiver of any further notice or opportunity for hearing. Upon default, Movant(s) may prepare and file for entry a default order and there will be no necessity for appearance of counsel as long as the order is entered by the Court prior to the hearing date.

3. In contested matters, at least five (5) days prior to the scheduled hearing, the Movant(s) shall file with the Court and serve upon each Respondent a detailed report of any appraiser whose testimony is to be presented at the hearing. Said detailed report shall include, without limitation, the qualifications of the appraiser and the factual basis for the appraisal, including comparable sales if utilized, and the method of appraisal. In the case of a motor vehicle, Blue Book or Black Book values may be submitted and counsel shall certify which Book is being used and which category of value is being used, e.g. with respect to Blue Book - wholesale, retail or loan value.

4. In contested matters, at least three (3) days prior to hearing, the Respondent(s) shall file with the Court and serve upon the Movant(s) a report of any appraiser it intends to utilize at the time of hearing, which report shall include the same detail as is specified in the preceding paragraph.

5. In contested matters, at least three (3) days prior to hearing, the Respondent(s) shall file with the Court and serve upon the Movant(s) a statement as to how the Movant(s) can be adequately protected if the stay is to be continued by the Court.

6. **The attorneys for the parties are directed to confer with respect to the issues raised by the Motion prior to the scheduled day of the hearing for the purpose of determining whether a consent order may be entered and/or for the purpose of stipulating to relevant facts, such as the value of the property, and the extent and validity of any security interest. They shall also confer prior to such hearing day concerning whether the hearing will be a preliminary or final hearing. In the event of their failure to confer or failure to agree and advise the Court prior to the day of the hearing that either party is requesting that the scheduled hearing be a final hearing, the Court, unless it finds good cause to do otherwise, will treat the scheduled hearing as a preliminary hearing as provided in 11 U.S.C. § 362(e)(1).**

7. In contested matters, not later than the working day prior to hearing, counsel shall file with the court, via CM/ECF, one copy of all exhibits to be introduced at the hearing properly marked for identification and shall serve a copy of the exhibits on opposing counsel and any pro se party. On the day of hearing any party filing exhibits via CM/ECF shall bring to court 3 copies of all exhibits filed via CM/ECF for use at the hearing. Exhibits filed via CM/ECF shall be deemed the originals for purposes of the record and admissibility of the exhibits shall be determined on the record at the hearing. *Pro se* parties are required to file exhibits conventionally with the Clerk of this Court rather than via CM/ECF, but will be required to comply with all other provisions of this paragraph. Strict compliance is required to the exhibit instructions **available on the Court's website.**

8. All counsel and the parties shall comply with this Order and failure to do so will result in imposition of appropriate sanctions and/or dismissal of the proceeding.

Enter this date:

Rebecca B. Connelly, Judge

Attachment 3

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

In re: DEBTOR(S)	CASE NO. CHAPTER:
MOVANTS NAME MOVANT(S) v. RESPONDENTS NAME AND TRUSTEE RESPONDENT(S)	

**MOVANT'S CERTIFICATION REQUIRED WITH
RESPECT TO MOTION FOR RELIEF FROM STAY**

1. Description of Property: _____
2. Copies of Security Instruments: Attached as Movant's Exhibit No. 1.
3. Statement of Amount Due:
 - (a) Unpaid Principal: _____
 - (b) Accrued Interest from a specific date to a specific date: _____
 - (c) Late Charges from a specific date to a specific date: _____
 - (d) Attorney's fees: _____
 - (e) Advances for Taxes, Insurance, and the Like: _____
 - (f) Unearned Interest: _____
 - (g) Any Other Charges: _____
 - (h) Dates of missed contractual payments as of date of Motion for Relief: _____
4. A Per Diem Interest Factor: _____
5. Movant's valuation of property: \$ _____
Basis of such valuation: _____
Appraisal or other documentation of such valuation, if attached, is identified as Movant's Exhibit No. 2.

I HEREBY CERTIFY, as a Member of the Bar of the Court, that I represent the above-named Movant(s) and that the information contained herein is true according to the best of my knowledge and belief.

DATED: _____

Signature of Movant's Attorney

*** ALL BLANKS MUST BE COMPLETED
IF THE ANSWER IS NONE OR NOT
APPLICABLE, PLEASE SO STATE.

Attachment 4

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

In re: DEBTOR(S)	CASE NO. CHAPTER:
MOVANTS NAME MOVANT(S) v. RESPONDENTS NAME AND TRUSTEE RESPONDENT(S)	

**RESPONDENT'S CERTIFICATION REQUIRED WITH
RESPECT TO MOTION FOR RELIEF FROM STAY**

1. If different from Movant's certification, description of property:

2. Respondent's valuation of property: \$ _____

Basis for such valuation: _____

Appraisal or other documentation of such valuation, if attached, is identified as Respondent's Exhibit A.

I HEREBY CERTIFY, as a Member of the Bar of this Court, that I represent the above-named Respondent(s) and that the information contained herein is true according to the best of my knowledge and belief.

DATED: _____

Signature of Respondent(s) Attorney

***ALL BLANKS MUST BE COMPLETED.
IF THE ANSWER IS NONE OR NOT
APPLICABLE, PLEASE SO STATE.

TYPE Name & Address Above

Attachment 5

B 2500A (Form 2500A)

United States Bankruptcy Court Western District of Virginia

In re:)	Case No.
Debtor)	
)	Chapter
)	
Plaintiff)	
)	
v.)	Adv. Proc. No.
)	
Defendant)	

SUMMONS IN AN ADVERSARY PROCEEDING

YOU ARE SUMMONED and required to file a motion or answer to the complaint which is attached to this summons with the clerk of the bankruptcy court within 30 days after the date of issuance of this summons, except that the United States and its offices and agencies shall file a motion or answer to the complaint within 35 days.

Address of clerk:

At the same time, you must also serve a copy of the motion or answer upon the plaintiff's attorney.

Name and Address of Plaintiff's Attorney:

If you make a motion, your time to answer is governed by Fed. R. Bankr. P. 7012. The motion or answer to the complaint shall contain a statement that the defendant does or does not consent to entry of final orders or judgment by the bankruptcy court.

IF YOU FAIL TO RESPOND TO THIS SUMMONS, YOUR FAILURE WILL BE DEEMED TO BE YOUR CONSENT TO ENTRY OF A JUDGMENT BY THE BANKRUPTCY COURT AND JUDGMENT BY DEFAULT MAY BE TAKEN AGAINST YOU FOR THE RELIEF DEMANDED IN THE COMPLAINT.

John W. L. Craig, II (Clerk of the Bankruptcy Court)

By: _____
(Deputy Clerk)

Date:



Attachment 5

B 2500A (Form 2500A)

CERTIFICATE OF SERVICE

I, _____ (name), certify that service of this summons and a copy of the complaint was made _____ (date) by:

- Mail service: Regular, first class United States mail, postage fully pre-paid, addressed to:

- Personal Service: By leaving the process with the defendant or with an officer or agent of defendant at:

- Residence Service: By leaving the process with the following adult at:

- Certified Mail Service on an Insured Depository Institution: By sending the process by certified mail addressed to the following officer of the defendant at:

- Publication: The defendant was served as follows: [Describe briefly]

- State Law: The defendant was served pursuant to the laws of the State of _____, as follows: [Describe briefly]

If service was made by personal service, by residence service, or pursuant to state law, I further certify that I am, and at all times during the service of process was, not less than 18 years of age and not a party to the matter concerning which service of process was made.

Under penalty of perjury, I declare that the foregoing is true and correct.

Date _____

Signature _____

Print Name: _____

Business Address: _____
