

**RECENT CHAPTER 13 CASES OF INTEREST (04/30/13 TO PRESENT)**  
**WD OF VA BANKRUPTCY CONFERENCE, ROANOKE, 04/28/14**

**Western District of Virginia**

B145B. **In re Cynthia Dudley**, Bankr. W.D. Va. #10-50840, A.P. # 11-05040. **Chap. 7** case, 4/16/13 opinion (Connelly). **University failed to carry its burden of proof that it had the right under Massachusetts law to enforce this student loan debt.** Debtor reopened a discharged chapter 7 case to hold the University in contempt for attempting to collect the debt. University alleged it was non-dischargeable per 523(a)(8), as it was originally a Nellie Mae loan. Court agreed that in hands of Nellie Mae, it was a “qualified educational loan” which was excepted from discharge. The loan had been transferred from Nellie Mae to the University, then reduced to judgment. University has burden to prove its debt is excepted from discharge. Note contains a provision that MA law applies which the Court honored. Under MA law the Note is a “negotiable instrument” and “possession” of the Note at some point is necessary for enforcement. The University could not prove that they ever had possession of the Note so they cannot enforce it and therefore cannot prove the debt is non-dischargeable. And, there was no evidence that Nellie Mae assigned the Note to the University. The University could not establish the 5 factors under Mass. law to establish any subrogation rights. When no evidence of the transfer from Nellie Mae to the University could be found, and parties argued about its impact - *“The Court disagreed, holding that it is logically fallacious to conclude that absence of evidence is evidence of absence.”*

B146. **In re Heidi Elmore**, #12-51394, Bankr. W.D. Va., 5/9/13 Opinion (Connelly). **Disposable income, above median case: allowance of health-related expenses (lines 24b, 36, and 39c).** Trustee objected to confirmation. Debtor is an above-median married person filing separately. Trustee objected to \$405/mo. in claimed medical expenses on Form B22C: \$120 on Line 24b (the federally allowed amounts), \$160 on Line 36 (additional expenses) , and \$125 on Line 39c (health savings plan). Court overruled the Trustee’s objections to Line 24 and Line 39c, but ruled that the expenses claimed on Line 36 had not been established by the debtor, and sustained the Trustee’s objection and disallowed that expense. Court found that the debtor could claim on Line 39c amounts contributed to a health savings account for the debtor *and her spouse*. Code 707(b)(2)(A)(ii)(I). Because this means that the debtor’s resulting disposable income as determined by Form B22C is greater than the amount to be paid to the GUCs under the proposed plan, confirmation of the proposed plan is denied.

B147. **In re Heidi L. Elmore**, Bankr. W.D. Va., 6/12/13 Opinion [rehearing], #12-51394 (Connelly). **For above median debtor, non-filing spouse’s medical expenses are not expenses of the debtor, and non-filing spouse is not the debtor’s dependent.** Debtor attorney sought rehearing on Court’s holding that in an above-median case, (i) the expenses of the non-filing spouse were not expenses of the debtor and (ii) the non-filing spouse was not a dependent of the debtor. Court looked to the Code to define “expense” and “dependent,” and then other federal law, not to Virginia law. The Code uses the terms “co-obligor” and “co-debtor” in other situations, and the Court therefore believes that Congress did not intend to imply “co-obligation” when it used the term “expense” as the debtor tries to argue. Similarly, Congress has not used the term “expense” interchangeably with “debt” or “claim.” Congress has identified some particular expenses for a non-filing spouse that may be deducted (HSA contributions, e.g.) and others that may not. This Court concludes that (i) “Congress did not intend that “other necessary expenses” of a spouse were also expenses of each debtor-spouse” and (ii) the “other necessary expenses” for out of pocket medical expenditures of the non-filing spouse are not expenses of the debtor in this non-joint case.” Court is not persuaded that debtor’s spouse is her dependent: other federal law does not define when a spouse is a dependent, but these statutes contain some requirement of income dependency. Dependency for purposes of the Bankruptcy Code is not justified based upon the Virginia Necessaries Doctrine. This Court’s ruling in **In re Root**, 203 B.R. 55 (1996) [holding that 1301 applies to medical debt] is not controlling; it involved whether consideration had been received for purposes of staying collection of a debt, not a determination of dependency of a spouse. Debtor’s motion to amend the denial of confirmation is denied.

B147A. **In re Amber Erbschloe**, Bankr. W.D. Va., #11-72562, A.P. # 12-07013, 6/13/13 opinion (Connelly) [Chap. 7 case] **Partial future discharge of student loan debt; interplay with the Income Based Repayment Plan.** Debtor sought hardship discharge of student loan. She had been the victim of a serious sexual assault in 2002 that left her with severe mental and physical injuries; then two of her close friends were sexually assaulted and murdered. As a result, the

debtor suffers from post-traumatic-stress disorder; also a shoulder disorder. (1) Court is applying the 4<sup>th</sup> Circuit three factor Brunner test (433 F.3d at 400); debtor must prove all three prongs by a preponderance of the evidence. (2) Frushour opinion (4<sup>th</sup> Cir.) requires a case by case approach. (3) 1<sup>st</sup> prong: Court adopts standard in Correll, 105B.R. 302 (W.D. Pa. 1989): if debtor's modest budget is still unbalanced, that's a hardship that will support a discharge of the student loan obligations, and she has shown that. (4) 2<sup>nd</sup> prong: debtor has failed to establish a "certainty of hopelessness" exists, that her current financial difficulty is likely to persist. (5) But this test must be applied within the context of income-based and extended repayment programs. (6) Court finds that 523(a)(8) allows partial discharge of student loan debts for undue hardship, even though the 4<sup>th</sup> Cir. has not ruled on this issue. (7) W.D. Va. Has held that partial discharges are permissible under 523(a)(8): In re Mort, 272 B.R. 181 (W.D. Va. 2002). (8) This debtor has made a good faith effort to repay her loans, and government failed to offer her any information on alternative repayment plans. (9) Court finds that this debtor, whose income is below 150% of the poverty line, "has a partial financial hardship, qualifies for the Income-Based Repayment Plan ("IBRP", and would have monthly payments of \$0 for as long as her current financial situation persists. 20 U.S.C. 1098e(a)(3) and (b)(1). She can elect to stay in the IBRP after her hardship is eliminated and make payments; after 25 years, she will be forgiven the balance. (10) To the extent that she qualifies for an participates in IBRP and fulfills her obligations under that Plan, the Court finds that any balance owing at the end of 25 years would impose an undue hardship under 523(a)(8) and is hereby discharged prior to any forgiveness granted by the government pursuant to 1098e(b)(7).

B149. **In re Terrance and Leslie Reece**, Bankr. W.D. Va., #11-51044, 8/20/13 Opinion (Connelly). **A case filed under Chapter 13 and converted to Chapter 7 is subject to Sec. 707(b), and cause to dismiss a case pursuant to that section includes bad faith.** The Court disagrees with the debtors' contention that the Supreme Court's holding in Marama should be limited merely to conversions from Ch. 7 to Ch. 13. That decision supports a Bankruptcy Court's ability "to employ section 105 and apply an appropriate remedy in the face of egregious conduct." Held: The UST will be allowed to proceed on her motion to dismiss pursuant to 707(a) and (b); the fact that the case was converted is immaterial.

B150. **In re David and Amy Quesenberry**, #12,62001, Bankr. W.D. Va., 8/26/13 Consent Order (Connelly). **Rule 3002.1(c) notices are not claims, Trustee cannot pay them, and filing them is an administrative function.** Trustee sought a ruling from the Court that Rule 3002.1(c) notices were not claims that needed to be provided for in the debtors' plan. Court entered a consent order which stated that: (a) it was using the reasons set forth in In re Johnny and Christina Sheppard, #10-33959-KRH, Bankr. ED VA; (b) a post-petition Rule 3002.1 (c) Notice of fees, expenses, or charges such as that filed in this case is filed for informational purposes only, and does not constitute a proof of claim or otherwise amend the proof of claim it is filed to supplement; (c) the Trustee is not obligated, and is not authorized, to make payments from estate property on fees, etc., set forth in Rule 3002.1 Notices, and is only authorized to make payments based upon proofs of claim filed under Code section 501 and allowed under section 502 or upon a specific Court order; (d) such post-petition fees, expenses, or charges shall not require modification of the debtor's plan to pay them; (e) instead, any such fees, expenses, or charges shall, if permitted by state or federal law and the applicable loan documents, and if not otherwise disallowed, be payable by the debtor outside the Plan unless the debtor chooses to modify his plan to provide for them and such fees, etc., are allowed claims in the case; (f) this ruling shall not prejudice or prevent Chase from recovering the fees and charges set forth in the Rule 3002.1(c) Notice outside the Plan and Chase expressly reserves all of its rights and remedies to collect such fees as permitted by state and federal law and the applicable loan documents; and (g) filing this supplement should be an administrative function that the creditor can accomplish entirely on its own without the need of an attorney.

B151. **In re Richard and Shirley Niday**, Bankr. W.D. Va., # 11 72491, 8/27/13 Opinion (Stone). **To pay off a confirmed 36 month case early, a below median debtor must modify his plan under 1329 and prove good faith.** Issue: Does 1325(b) provide below-median debtors in a confirmed, 36 month, less than 100% plan with "an unqualified right to pay off early their remaining payments"? This was a 20% plan with significant litigation between the debtors and the primary lending bank. Trustee objected to the early discharge b/c there was \$65K of life insurance on the wife for which the husband was the beneficiary; the wife died after confirmation. The beneficiary of the wife's life insurance was changed from the husband to the children at some point, but the timing is unclear. The husband was using money from an exempt workers comp. claim settlement to pay off the case early. The Trustee refused to accept the payment of these proceeds to complete the plan payments, which caused the matter to be brought before the Court. Held: there is no such unqualified right, but the debtors may seek modification of the confirmed plan for that purpose under 1329. (1) Judge Krumm previously held, in an above-median case, that the ACP is a temporal requirement. In re Hylton. (2) There was

no pre-BAP & CPA recognized right to pay off early that was retained after 2005 and that continues to remain viable for under-median debtors. (3) The ACP is “a material element of the confirmation bargain not subject to reduction absent a modification” under 1329. (4) The Court understands that “it arguably ventures beyond the rational employed by the Court of Appeals in *Arnold* and *Murphy*, but a “fresh analysis” is warranted b/c (i) both cases were governed by pre-BAP & CPA law that didn’t contain expanded creditor rights under sec. 315(b)(2), 521, or the ACP concept, and (ii) focusing on the funding source to pay off a case “could easily lead to gamesmanship by canny debtors.” (5) If this case were to be heard by the Court of Appeals now, it would approve an approach under which all of the relevant circumstances surrounding an early payoff would be taken into account in deciding whether to allow it. (6) So to obtain an early discharge, the debtors need to obtain modification of their plan to do so. See *In re Fridley*, 380 B.R. 538 (9<sup>th</sup> Cir. BAP 2007). They would bear the burden of showing compliance with 1329, including good faith. An evidentiary hearing will be necessary.

B152. ***In re Michael and Brandy Perrow***, Bank. W.D. Va., #09-61234, A.P. # 11-06082, 9/5/13 Opinion (Connelly). **Ch. 13 Trustee can use his strong-arm powers under Code 544(a)(3) to avoid an unrecorded deed of trust; numerous equitable remedies overruled.** Issue: Do a Ch. 13 Trustee’s Code sec. 544(a)(3) strong arm powers defeat an unrecorded deed of trust, or do equitable remedies block his powers? Trustee sought to avoid the lien and disallow the POC under sec. 502. [The Court does not address the Trustee’s powers under 544(a)(1) b/c he did not seek relief under that section.] Facts: Plan confirmed on 9/17/09; Creditor filed POC as a secured creditor on 9/24/09; POC deadline was 8/17/09. On 8/15/11 the Trustee filed this A.P. to avoid the unrecorded lien and disallow as untimely the POC. Creditor had executed a refinance loan on 5/15/07 w/ the debtors for \$197,900; the d/t was never recorded and has since been lost or destroyed; the proceeds of the loan were used to pay off a prior 2006 d/t. (1) *Stern v. Marshall* issues: the Creditor’s requested equitable state law remedies are necessary to the claims allowance process, b/c they will ultimately determine whether the Creditor’s claim will be allowed. The Court holds that it has authority to issue a final ruling on all these matters. (2) A Ch. 13 debtor may only bring a sec. 544(a) action after the Ch. 13 Trustee fails to do so. The Trustee has standing to bring this action under 544(a) and is the real party in interest in this action. (3) The Trustee’s knowledge as hypothetical bona fide purchaser is at issue. The Court will not impute to the Trustee the debtor’s actual knowledge in actions under 544(a)(3), as it would lead to absurd results, and the Code says to disregard the Trustee’s actual knowledge. The Court must focus on the knowledge the Trustee would have as a hypothetical bona fide purchaser. (4) As between the Creditor and debtors, a valid enforceable interest in the property was created when the d/t was granted. But Virginia law says that this interest is not enforceable against a BFP, because it is a race notice jurisdiction (VaC 55-96), and the Trustee’s rights and powers under 544(a)(3) are defined by applicable state law. Court holds that the Trustee, as a hypothetical BFP, had no actual notice of the lien: the presence of the release of a prior recorded d/t was not sufficient to put a purchaser on constructive notice of the creditor’s interest in the property. (5) A BFP, paying valuable consideration for the property, would be entitled to avoid the CR’s unrecorded interest in the property under VaC 55-96; the Trustee steps into those shoes via 544(a)(3), so the Trustee may, subject to any affirmative defenses, avoid this lien. (6) The creditor urges the imposition of a constructive trust in this case. But under Virginia law a constructive trust (“a latent equity against the property”) protects a creditor’s interest from a lien creditor, but not from a BFP. If the Trustee had been proceeding under 544(a)(1), a constructive trust would have prevented the lien avoidance. But the Trustee is proceeding under 544(a)(3), so he takes the property free of such “latent equity,” including property subject to a constructive trust. (7) Code 541(d) has no effect on the Trustee’s ability to void a CR’s equitable interest and bring such interest into the estate under 544(a)(3). (8) Similarly with the CR’s request that an equitable lien be established: the Trustee, as a BFP, takes the property free of any such latent equity. (9) The CR has requested specific performance of the debtor’s promise in a “Document Correction Agreement” to execute all documents needed to transfer the property into a d/t for the CR. Again, such a defense cannot defeat a BFP, because this agreement was not recorded. And the automatic stay would prevent the CR from recording this agreement at this late date. (10) The issue of equitable subrogation presents an issue of first impression: would “Virginia law allow a secret creditor to be equitably subrogated to the rights of a previous creditor to the detriment of a BFP”? This remedy is another equitable remedy, and therefore a BFP would take the property free of this remedy. It is concerned with an invalid security interest, not one that the creditor failed to perfect, so equitable subrogation “would not be appropriate in these circumstances,” as it would “reward a creditor’s negligence to the detriment of others.” (11) The CR has also sought relief under Code sec. 105. But there is no Court order to effectuate, and such relief would be “contrary to the purpose of the Code.” (12) The Trustee is granted summary judgment on his request to void the CR’s unrecorded d/t; the lien will be removed as of the petition date. (13) Therefore the CR is an unsecured creditor who must file his POC within 90 days of the 341 mtg.; the CR’s claim was filed 38 days late, and was

therefore untimely. Because the Court may not extend the filing date, the CR's claim cannot be allowed under 502(a), and the Trustee is entitled to summary judgment on this count as well.

B153. **In re Jack Riggs, Jr.**, W.D. VA. Bankr. Ct., #12-71294, 9/19/13 opinion (Connelly). **Rules for allocating the burden of proof in an objection to claim.** Debtor objected to POC filed by the ex-spouse creditor for reimbursement of medical expenses incurred for the debtor's children. The child support order from the J & DR court is unclear about the changes to the debtor's child support obligation and any retroactive effect. (1) Fourth Circuit states that Code 501 and 502 create a burden-shifting framework for POCs. After a creditor files a proper claim with supporting documentation, burden shifts to the objecting debtor to introduce evidence to rebut claim's presumptive validity. Such evidence must negate at least one fact necessary to the claim's legal sufficiency, demonstrate the existence of a true dispute, and have probative force equal to the contents of the claim. In re Falwell, 434 B.R. 779 (2009). If the debtor carries this burden, creditor has the ultimate burden of proving the amount and validity of the claim by a preponderance of the evidence. (2) Here the debtor's evidence that he was not legally obligated to pay the medical expenses is "incomplete and insufficient" because the Court cannot tell what the J & DR Court's prior order said or why the debtor was held not guilty for non-payment of these expenses. And the creditor has not provided sufficient evidence to prove by a preponderance of the evidence the amount and validity of the claim had the debtor's objection sufficiently rebutted the POC. (3) Matter is continued for the debtor to present rebuttal evidence, and if he succeeds, the pro se creditor must present further evidence to overcome the objection.

B153B. **In re Amanda Dotson**, Bankr. W.D. Va., #09-72188, A.P. # 13-07027, 10/16/13 opinion (Stone). [Chap. 7] **Post-discharge collection actions justify a judgment under Code sec. 105 for \$9K in damages, but Court has no jurisdiction to award damages under FDCPA for such actions.** Action by debtor for post-discharge collection actions by a creditor. (1) Bankruptcy Courts do not have jurisdiction to hear Fair Debt Collection Practices Act ("FDCPA") cases arising out of post-discharge actions. (2) But the Court does have power under sec. 105 to enforce its discharge injunction by awarding damages and attorney's fees against a creditor who has ignored or defied the injunction. (3) Here the creditor's actions were in "reckless disregard of the existence of the discharge" and sufficiently egregious to justify an award of \$2,663 in compensatory damages, \$2,500 in punitive damages, and \$3,840 in attorney's fees, plus a \$10,000 judgment for contempt if the damages aren't paid in full within 30 days.

B154. **In re Glenn and Julie Hilton**, 12 61102, Bankr. W.D. Va., 12/02/13 opinion (Connelly). **Framework for burden shifting in an objection to a claim; insufficient documentation alone is insufficient grounds.** Debtor and Trustee objected to a deficiency POC following a surrender of real estate. Court overrules T's objection but sustains the debtors' objection. **Facts:** BB&T held the first mortgage; BB&T Commercial ("BB&TC") held the second mortgage. The plan proposed to surrender the RE that secured both liens. Both lienholders filed secured claims prior to the claims bar date. The confirmed plan provided that the lienholders must file any unsecured deficiency claim within 180 days of confirmation, and document the liquidation of the collateral and how the proceeds were applied. Within the 180 days BB&T filed a deficiency claim for a potential deficiency on BB&TC's claim, based solely on the appraised value of the house, since the property had not been liquidated. Both the Trustee and the debtors objected to the POC because it failed to document the liquidation of the collateral and how the deficiency was computed. **Discussion:** (1) Before sustaining an objection to claim based on violation of a confirmation order, the Court must first apply the burden-shifting framework of In re Harford Sands, 372 F.3d 637 (4<sup>th</sup> Cir. 2004). (2) In considering the effect of 1327, the plan language should be afforded considerable weight and be treated as a new and binding contract. (3) Confirmation order is generally treated as res judicata as long as creditors received notice sufficient to satisfy due process. Linkous. (4) Failing to file the required documentation to a POC does not disallow the POC entirely, but only deprives it of its prima facie effect. FRBP 3001(c)(1) and (f). (5) Under Harford Sands, once a creditor files a prima facie valid POC, burden shifts to the debtor to introduce evidence to rebut the claim's presumptive validity that demonstrates a true dispute, negates at least one fact necessary to the claim's legal sufficiency, and has a probative force equal to the contents of the claim. Falwell. (6) But even if the POC lacks the requisite documentation required under Rule 3001, the debtor must have some other legally sufficient grounds for challenging the claim. (7) If the debtor carries his burden of making a proper objection, the burden shifts back to the claimant to prove the amount and the validity of the claim by a preponderance of the evidence. (8) The language of the confirmed plan enlarged the deadline and expanded the documentation requirements beyond Rule 3001. (9) The BB&T POC was filed timely, but lacked documentation sufficient to afford prima facie validity. But the burden still rested with the debtors, since this defect alone was "insufficient to defeat the claim." (10) Trustee's objection is overruled because it only alleges failure to comply with the documentation requirement. (11) Trustee's concern over

finality and certainty could have been resolved using 502(c) for an estimated POC, which the Trustee can pay. The parties can agree on such a claim amount, or they can obtain Court approval of such a claim. But here there is no such estimated claim, and there is insufficient evidence to estimate the correct amount. The Court declines to consider BB&TC's deficiency claim to be a valid estimated POC. (12) Regarding the debtors' objection, it was sufficient to call into question the validity of the POC, because it alleged and put on evidence of other factors challenging the legal basis of the claim: failure to liquidate other collateral, no efforts by the creditor to foreclose, failure to apply proceeds, etc. The burden was shifted back to the creditor, and it failed to carry its burden to prove the validity of the claim by a preponderance of the evidence: no evidence of how BB&TC calculated the amount of the POC or why the amount was inconsistent with the amount claimed, and the value of its other collateral. (13) Court won't excuse BB&TC from the time frames of the confirmed plan: they were bound by them, failed to object to them, and failed to ask for an extension of them. Held: The deficiency claim fails, and any amended claim for a deficiency is hereby barred.

B156. **In re Jane Brown, UST vs. Mark Jennings**, Bankr. W.D. Va., # 13-70356, 1/24/14 (Stone). **Court fines bankruptcy petitioner \$3,500 pursuant to Code sec. 110.** (discussion of the statutory provisions for bankruptcy preparers).

B157. **In re Robin Tomer**, Bankr. W.D. Va., #08-61265, 3/14/14 opinion (Black). **Creditor's request for debtor documents under 521 after debtor had completed plan payments is denied.** Creditor asking for debtor's tax returns in the 59<sup>th</sup> month of her plan under 521. Debtor's \$171K debt to the CR had already been deemed to be non-dischargeable (criminal embezzlement). Debtor had completed her plan payments; Trustee opposed the motion. *Held*: Nothing here to support that this motion would assist in the administration of the bankruptcy estate or support a post-confirmation modification of the plan. 521 "not intended to be a discovery tool" to assist in the collection of non-dischargeable debts. CR has made no showing that this information cannot be obtained from any other source; he has no absolute right to these documents; the request must meet the A.O. standards published to safeguard confidentiality in these circumstances. Motion denied.

B158. **In re Carlton and Betty Cassell**, W.D. Bankr., #13 71980, 3/14/14 opinion (Black). **On a 910 car claim, the allowed amount of the claim controls the total to be paid in para. 3.D., not the debtor's estimated amount.** Capital One objected to confirmation because its 910 car claim was not being paid contract interest rate, can't be crammed down, and it's entitled to \$250 in attorney fees. Creditor later withdrew its first and third objections. Plan listed debt as \$20,000, POC is for \$21,653. *Held*: Objection not well taken: Trustee must pay the balance of the claim, since para. 3A was not used in this plan. Plan will be confirmed.

#### **Fourth Circuit**

F44. **In re Davis (Branigan v. Davis)**, 716 F.3d. 331, #12-1184, 5/10/13 opinion. **A Chapter 13 debtor ineligible for a discharge may, upon completion of the plan, strip a wholly-unsecured lien.** In the first Court of Appeals decision on the issue, the Fourth Circuit Court of Appeals, in a 2-1 panel decision, held that a Chapter 13 debtor ineligible for a discharge may strip a wholly-unsecured lien. The court first held, for the first time in a published decision, that, in general, a Chapter 13 debtor may strip an unsecured lien. A completely valueless lien is classified as an unsecured claim under Code § 506(a), the court said, and Code § 1322 expressly permits modification of the rights of unsecured creditors.

Turning to the issue of a debtor who, due to a discharge in a prior Chapter 7 case, is ineligible under Code § 1328(f)(1) for a discharge in the debtor's current Chapter 13 case, the court said that the starting point in its analysis was its recent decision in *In re Bateman*, 515 F.3d 272 (4th Cir. 2008), which held that a debtor is eligible to file a Chapter 13 case even where the debtor was ineligible for a discharge. BAPCPA did not amend sections 506 or 1322(b), so the analysis permitting lien-stripping in "Chapter 20" cases is no different than that in any other Chapter 13 case. A requirement that a claim secured by a worthless lien be considered an "allowed secured claim" for the purpose of Code § 1325(a)(5) would be inconsistent with *Nobleman v. American Sav. Bank*, 508 U.S. 324, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993), which valued a claim under section 506 before analyzing whether section 1322 barred its modification. While the court did not take lightly the Chapter 13 trustee's assertion that permitting lien-stripping in Chapter 20 cases created an end run around the bar to such relief in Chapter 7 cases enacted in *Dewsnup v. Timm*, 502 U.S. 410, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992), the trustee's premise ignored the equally reasonable view that Congress intended to leave intact the

normal Chapter 13 lien-stripping regime where a debtor could otherwise satisfy the requirements for filing a Chapter 20 case.

It bore emphasizing, the court said, that a bankruptcy discharge alters in personam rights. In contrast, a lien-stripping order alters in rem liability where the creditor's lien has no value. For that reason, the court was persuaded that, upon completion of the plan, its provisions—including any orders stripping off valueless liens—become permanent, even in the absence of a discharge. Accordingly, the court affirmed *TD Bank, N.A. v. Davis*, 2012 WL 439701 (D. Md., Jan. 12, 2012), which had affirmed *In re Davis*, 447 B.R. 738 (Bankr. D. Md., March 30, 2011).

F45. **National Capital Management v Lashauna Gammage-Lewis**, #12-2286, 6/6/13 judgment. [no oral argument; “Affirmed by unpublished per curiam opinion, which are “not binding precedent in this circuit.”] **An objection to a secured claim seeking disallowance of the secured claim and allowance as an unsecured claim is, upon discharge, sufficient to void the creditor’s lien on a vehicle.** [4<sup>th</sup> Cir. affirms, without a written opinion, the judgment of the Dist. Ct. (E.D. NC), decided 8/14/12.] **Facts:** Ch. 13 plan proposed to cram down the debtor’s 2003 Nissan. Creditor NCM filed a secured claim; the certif. of title showed Wells Fargo to be the lienholder. Trustee objected to the POC because NCM hadn’t shown it had a duly perfected security interest, and asked that it be disallowed in full as a secured claim and allowed in full as an unsecured claim. NCM failed to respond to the objection, and the Bankruptcy Court disallowed the secured claim and allowed it as a general unsecured claim. After discharge, NCM took possession of the car; debtor filed in the Bankruptcy Court to recover it. Bank. Ct. held that any lien became void upon the granting of the debtor’s discharge; the taking by NCM violated 524(a)(2), and NCM was ordered to return the car to the debtor. **Held:** (1) NCM argued that 506(d) cannot strip a lien without clear notice that it was being done. By disallowing the secured claim, the Bank. Ct., by operation of 506(d), found that any claim of NCM in the car “became void.” (2) A claim objection can be a suitable substitute for an adversary proceeding brought under 506 where the objection “gives clear notice that the debtor is challenging the validity, priority, or extent of the lien and seeks to abrogate the creditor’s right to look to its collateral, and the debtor complies with procedural safeguards in Part VII of the FRBP.” [citing a Texas case]. (3) The Trustee’s objection here satisfied those safeguards: it was “an appropriate affirmative action that provides sufficient clear notice to render voidance of its claim under 506(d) valid.” [Note from the Trustee in the case: the creditor did appeal the subsequent Order granting turnover. The debtor subsequently commenced an adversary proceeding seeking damages. That AP was thereafter stayed, pending outcome of the appeal. Looks like the AP will be ramping up again.]

F47 **Mort Ranta v. Gorman (In re Ranta)**, 2013 WL 3286252, \_\_\_\_\_ F3d \_\_\_\_\_ (4<sup>th</sup> Cir. 7/1/13, opinion by Gregory). **Social Security benefits are excluded from a debtor’s projected disposable income for both above and below median debtors, but can be voluntarily offered by the debtor to show plan feasibility; Court’s refusal to confirm a proposed plan is an appealable order.** [case summary by H. Hildebrand] Robert Mort Ranta filed a Chapter 13 petition and indicated that his “Current Monthly Income” was \$3,097.46. On his Schedule I, however, Mort Ranta indicated that the average monthly income for his household was \$7,492.10. The Schedule I income included both employment income Mort Ranta and his wife earned and also their combined monthly Social Security benefits. Initially, Mort Ranta’s payments to the Trustee were equal to the amount of his Schedule I income minus his Schedule J expenses. After the Trustee challenged his over-stated expenses, the amount of net income indicated that Mort Ranta could pay, in full, all of his debts. Mort Ranta argued, however, that his Projected Disposable Income, calculated based upon his Current Monthly Income minus his expenses, did not require him to pay anything to his unsecured creditors. This was because, after excluding the Social Security income from his available income, he was left with no Projected Disposable Income, even after subtracting the reduced expenses. The Bankruptcy Court agreed with Tom Gorman, the trustee. The overall view of the case demonstrated that Mort Ranta could afford to pay more than he was proposing to pay, because there were funds that were available to pay debts but were not being so used. Confirmation was denied. Although the Fourth Circuit spent a great deal of the opinion discussing whether a refusal to confirm a proposed plan was an appealable order (concluding that it was), the substance of the decision brought the Fourth Circuit in line with every other appellate court in holding that Social Security income is totally excluded from the calculation of “Projected Disposable Income.” Although Congress may have hoped that BAPCPA would compel debtors to pay what they could afford to pay, Congress also clearly stated that Social Security income would not be considered income that would be required to fund a Chapter 13 plan. “Because the Code expressly excludes Social Security income from ‘current monthly income,’ and thus, ‘disposable income,’ it follows that Social Security income must also be excluded from ‘projected disposable income.’ Indeed, every other circuit to address this issue has arrived at the same conclusion.” The Circuit Court rejected the trustee’s argument that *Lanning* permits the court to consider the availability of Social Security income as part of the

debtor's Projected Disposable Income even though it is excluded from "disposable income." "In *Lanning*, however, the Court held only that foreseeable changes in the debtor's financial circumstances may be taken into account when calculating 'Projected Disposable Income,' not that the basic formula for 'disposable income' may be ignored." The court also rejected the trustee's argument that Social Security income must be included because there was a line for Social Security income on Schedule I. Schedule I, however, only requires the disclosure of "average monthly income," not "Current Monthly Income." Schedule I calculates "monthly net income," not "disposable income." The court clarified its decision in this matter: "For all debtors, the starting point for calculating projected disposable income is the debtor's 'current monthly income,' which is provided by Form B22C. For above-median income, parts IV and V of Form B22(C) allow the debtor to calculate 'disposable income' by deducting the limited expenses allowed under the means test from the debtor's 'current monthly income.' For below-median income debtors, however, 'disposable income' should be calculated by subtracting the full amount 'reasonably necessary to be expended' for the debtor's support or maintenance based on information provided in Schedule J, from the 'currently monthly income' figure." The court also rejected the argument of the trustee that by arbitrarily excluding Social Security income, abuses would occur. These concerns are best addressed to Congress, not to the courts. "The function of the judiciary is to apply the law, not to rewrite it to conform with the policy positions of the litigants. When the statutory language is clear, as it is in this case, our inquiry must end." It was thoroughly proper, however, for the lower court to consider Mort Ranta's social security income to determine whether he could propose a confirmable plan. Thus, "a debtor with zero or negative projected disposable income may propose a confirmable plan by making available income that falls outside of the definition of disposable income such as benefits under the Social Security Act to make payments under the plan."

F48. **In re Jose Alvarez (Alvarez v. HSBC Bank USA,NA)**, #12-1156, 4<sup>th</sup> Cir. , 10/23/13 Opinion. **A married debtor cannot use 506(a) to strip a valueless lien off T by Es property if his wife is not a co-debtor.** *Issue:* Did the Bankruptcy Court err in refusing to strip off a "valueless lien" against certain real property owned by the debtor and his non-debtor-spouse as tenants by the entireties on the ground that the spouse's property interest was not part of the bankruptcy estate? (The strip-off complaint was filed by both the debtor and his non-debtor spouse.) *Held:* Based on the Bankruptcy Code and Maryland law, the Bankruptcy Court correctly held that it lacked authority to strip this lien because the complete entireties estate was not before the Court; the lower Court decision is affirmed. (1) Court does have the authority, under 506(a) and 1322(b)(2) [not 506(d)], to strip off a completely valueless lien on a debtor's primary residence. Branigan v. Davis. (2) Under Maryland law, in a T by Es situation the property is not owned by either spouse individually, but by the "marital unit": each has an undivided interest in the whole property. (3) Under Code 541, a debtor's undivided interest in T by Es property becomes part of his bankruptcy estate. (4) The filing of a bankruptcy petition by one of them does not sever the T by Es estate created by Maryland law, but that does not mean that the whole of the T by Es property became part of his bankruptcy estate; only his individual undivided interest as it existed before the case was filed became part of the bankruptcy estate. (5) A confirmed plan binds only the debtor and the debtor's creditors; so the Court is without authority to modify a lienholder's rights with respect to a non-debtor's interest in property held as T by Es. (6) The wife joining in the lien strip complaint did not bring her interest in the property before the Court and did not alter the property rights contained in his bankruptcy case. (7) Code 363(h) is only a "narrow legislative exception to the general common-law rule prohibiting any unilateral severance of an entireties estate"; it does not authorize the elimination of a lienholder's rights with respect to a non-debtor's interest in property.

F49. **In re Rickey and Cheri Carroll (Logan v. Carroll)**, 4<sup>th</sup> Circuit, #13-1024, 10/28/13 opinion. **1306(a) extends 541 in Chap. 13 to include in the debtors' estate an inheritance received more than 180 days after filing, and to allow the Trustee to add those funds to the debtors' plan.** *Issue:* whether Code sec. 1306(a) extends the 180 day time limit of sec. 541 for identifying property that may be included in a bankruptcy estate. *Held:* we affirm the Bankruptcy Court's inclusion of the Debtors' post-180-day inheritance in their Chapter 13 estate. *Facts:* Case was filed 2/09; a 3.8% payout plan was confirmed; husband's mother died in 12/11 and he anticipated a \$100K inheritance. Debtors advised the Court of all this in 8/12. Trustee then moved to modify their confirmed plan to include the inheritance. *Reasoning:* (1) Congressional history shows that Congress intended to broaden the definition of property of the estate contained in sec. 541 by enacting sec. 1306 to apply to Chap. 13; it intended to capture those kinds of property but not retain the 180 day restriction. (2) The kind of property is a distinct concept from the time at which the debtor's interest is acquired. (3) "When a Chapter 13 debtor's financial fortunes improve, the creditors should share some of the wealth." Arnold. (4) Debtors' argument that we must give effect to every word of the statute requires us to reach this conclusion. (5) 1306 is more specific than 541, so the Debtors' other argument also fails. (6) 1306(a) "blocks the Carrolls from depriving their creditors a part of the windfall acquired before their Chapter 13 case was closed, dismissed, or converted." Lanning.

F50. **Piler v. Stearns (In re Joe and Katherine Piler)**, #13-1445, (direct appeal from Bankr. Ct. E.D. N.C., 3/28/14 opinion. **Above median debtors with negative disposable income on B22 must remain in Chapter 13 for the full 60 months if their unsecured creditors have not been paid in full.** *Issue:* Whether above median debtors with negative disposable income must maintain their Chapter 13 plan for 5 years when their unsecured creditors have not been paid in full? *Held:* Yes; Bankruptcy Court order is affirmed. *Facts:* Debtors' disposable income was *minus* \$291/mo. on Form B22. Proposed 55 month plan (\$1,784/mo. x 15 mos. + \$1,784/mo.x 40 mos. = \$88,640) would pay \$0 to unsecured creditors. Plan contained early termination language that would have allowed plan completion and discharge in 55 months. Bankruptcy Court judge denied confirmation, held the applicable commitment period (ACP) to be a temporal requirement requiring 60 months regardless of projected disposable income, and ordered the Trustee to move for a plan that would pay 60 months x \$1,784/mo. and an 85% dividend to the unsecured creditors. *Discussion:* (1) ACP is a temporal and "freestanding plan length" requirement; all Circuits now agree on this. (2) There's nothing in the statute to suggest that the ACP is related to, or dictated by, the debtor's projected disposable income. (3) Lack of projected disposable income at confirmation does not necessarily mean that additional funds to satisfy claims will not later surface, and sec. 1329 allows for plan modification to devote such funds to plan payments. (4) Plain meaning of sec. 1325 mandates an above-median debtor maintain his plan for 5 years unless all unsecured creditors are paid in full "irrespective of projected disposable income." (5) "Problematic" that Court below said it was at liberty to abandon the Code formula for disposable income in favor of Schedules I and J simply because there is a disparity between the formula and the debtor's actual income as set forth on Schedule I. (6) But we also recognize that projected disposable income (forward looking concept) and disposable income (based on the past) are not identical; we have "no doubt" of the Bankruptcy Court's "ability to consider Sch. I and Sch. J or other pertinent evidence to capture known or virtually certain changes to disposable income," as the Supreme Court did in Lanning. (7) But here the Court relied upon the plan payment figure proposed by the Debtors; it just stretched out that figure to the full 60 months; no error in doing that. (8) On remand the Debtors must be given an opportunity to present evidence regarding the feasibility of the \$1,784/mo. 60 month plan ordered by the Judge.

### **Supreme Court**

S45. **Bulloch v. Bankchampaign**, #11-1518, 5/13/13, \_\_\_\_\_ S. Ct. \_\_\_\_\_. **"Defalcation" under Code sec. 523(a)(4) is defined.** Petitioner's father established a trust for him and his siblings. He borrowed funds from the trust, but paid it all back with interest. Siblings sued and obtained a state court judgment for breach of fiduciary duty; court found no malicious motive. Petitioner filed bankruptcy, and siblings opposed discharge of this debt under 523(a)(4). Bankruptcy Court and appellate courts held that the debt was non-dischargeable. *Held:* (1) "Defalcation" includes "a culpable state of mind requirement involving knowledge of, or gross recklessness in respect to, the improper nature of fiduciary behavior." (2) It should be treated similarly to "fraud," in that "where the conduct at issue does not involve bad faith, moral turpitude, or other immoral conduct, defalcation requires an intentional wrong." (3) "Where actual knowledge of wrongdoing is lacking, conduct is considered as equivalent if, as set forth in the Model Penal Code, the fiduciary "consciously disregards," or is willfully blind to, "a substantial and unjustifiable risk" that his conduct will violate a fiduciary duty." Judgment of the Court of Appeals is vacated and the matter is remanded for further proceedings.

S46. **Law v. Siegel** \_\_\_\_\_ St. Ct. \_\_\_\_\_, 3/4/14 opinion. **Supreme Court rejects Ninth Circuit's creative punishment of deceptive Chapter 7 debtor.** The Supreme Court ruled that a home remains exempt property even if the individual's flagrantly deceptive conduct results in hundreds of thousands of dollars of litigation. The case involves a debtor (Law) who tried to keep money from his creditors by claiming that his home was subject to a fictional lien. Law's activity in support of this fiction was remarkable; as the Court's opinion notes, it extended (according to the courts below) to the filing of fictitious pleadings that he forged in the name of the fictitious lienholder. The trustee in the bankruptcy proceeding (Siegel) spent several hundred thousand dollars proving that Law's claim was wholly fabricated. Outraged by the conduct, the bankruptcy court (following established Ninth Circuit precedent) held that the trustee could collect the expenses of that litigation out of the funds Law received from the sale of his homestead. However, on review, the Supreme Court (in a unanimous opinion written by Justice Scalia) pointed to the provision in §522(k) of the Code, which states that exempt assets are "not liable for the payment of any administrative expense." The trustee's

litigation costs have to be administrative expenses for bankruptcy purposes, because they were incurred by the trustee litigating on behalf the estate; if they weren't administrative expenses, they wouldn't be reimbursable at all. The suggestion that administrative expenses should have a narrower meaning in §522(k) than in the framework that makes those expenses an obligation of the estate was dismissed out of hand. The Court concluded: "... in crafting the provisions of [the relevant section of the Bankruptcy Code], 'Congress balanced the difficult choices that exemption limits impose on debtors with the economic harm that exemptions visit on creditors.' The same can be said of the limits imposed on recovery of administrative expenses by trustees. For the reasons we have explained, it is not for courts to alter the balance struck by the statute."

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