Judges' Panel
Western District Bankruptcy Court
Fees, Forms and Features:
What's on the Horizon 2014[1]

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

A. Decisions of the Supreme Court of the United States

Citation: ***Law v. Siegel*, 134 S. Ct. 1188 (2014).**
Date Decided: March 4, 2014
Code Sections: 11 U.S.C. §§ 105(a), 522
Background: Petitioner filed for Chapter 7 bankruptcy, and Respondent was appointed as trustee. The estate's only significant asset was the Petitioner's house, which he valued at $363,348 and claimed $75,000 as exempt under California's homestead exemption. Petitioner reported two voluntary liens on the house, one for $147,156.52 and the other for $156,929.04. Petitioner thus represented that no equity existed in the house that could be used for the benefit of his other creditors. The trustee initiated an adversary proceeding to show that the second voluntary lien in favor of "Lin's Mortgage & Associates" was fraudulent. After costly and extensive litigation, the Bankruptcy Court found that the second lien was fictional, meant to preserve Petitioner's equity beyond what he was entitled to exempt. The trustee incurred more than $500,000 in attorney's fees, and the Bankruptcy Court granted trustee's motion to "surcharge" Petitioner's exemption to defray attorney's fees.
Issue: Whether a bankruptcy court may order that a debtor's claim of exemption ineffective against administrative expenses incurred as a result of the debtor's misconduct.
Holding: Bankruptcy Court's "surcharge" was unauthorized. Bankruptcy Court may not contravene express provisions of the Bankruptcy Code by ordering that the debtor's exempt property be used to pay debts and expenses for which the property is not liable under the Code.
Effect on Fourth Circuit: The Court of Appeals for the Fourth Circuit had not ruled on this issue, but bankruptcy courts in the Fourth Circuit have permitted a surcharge of a debtor's exemption when necessary to carry out the provisions of the code. *See, e.g.*, *In re Spiers*, No. 11-32345, 2013 WL 319785 (Bankr. W.D.N.C. Jan. 28, 2013).

Citation: ***Bullock v. Bank Champaign*, *N.A.*, 133 S. Ct. 1754 (2013).**
Date Decided: May 13, 2013
Code Section: 11 U.S.C. § 523(a)(4)
Background: Petitioner's father created a trust for the benefit of petitioner and his siblings and made Petitioner the Trustee. Petitioner borrowed funds three times and repaid funds with interest. Siblings obtained a state court judgment for breach of fiduciary duty. When Petitioner filed for bankruptcy, Respondent opposed discharge of the state-imposed debts to the trust. Bankruptcy Court granted respondent summary judgment, holding that the petitioner's debts were not dischargeable pursuant to 11 U.S.C. § 523(a)(4), which provides that an individual cannot obtain a bankruptcy discharge from a debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." The Federal District Court and the Eleventh Circuit affirmed.
Issue: Whether the bankruptcy term "defalcation" applies in the absence of any specific finding of ill intent or evidence of an ultimate loss of trust principal.

[1] The Honorable Rebecca B. Connelly and Honorable Paul M. Black with the assistance of their law clerk, Caleb Chaplain, prepared these materials.

Holding: The U.S. Supreme Court vacated and remanded the decision of the lower court, holding the term "defalcation" includes a culpable state of mind requirement described as "one involving knowledge of, or gross recklessness in respect to, the improper nature of the relevant fiduciary duty."
Effect on Fourth Circuit: The U.S. Supreme Court abrogated the Fourth Circuit's previous holding in *In re Uwimana*, 274 F.3d 806, 811 (4th Cir. 2001), that defalcation occurs when "negligence or even an innocent mistake . . . results in misappropriation."

B. Pending Decisions of the Supreme Court of the United States

Case: ***Clark v. Rameker***
Date Decided: TBD (argued March 24, 2014)
Code Section: 11 U.S.C. § 522
Background: Heidi Heffron-Clark inherited a $300,000 individual retirement account from her mother's estate. If inherited by someone other than the spouse of the deceased, the U.S. tax code prohibits additional contributions to the account and requires the beneficiary to withdraw and pay taxes on a minimum amount from the account each year. When Heidi and her husband filed for bankruptcy, they exempted the IRA from creditor claims. A bankruptcy judge ruled that retirement funds must be held for the current owner's retirement in order to qualify as an exempt retirement fund. Because the Clarks were required to withdraw money from the inherited IRA before their retirement, the judge held that the account was subject to creditor claims. The federal district court reversed and held that Heidi's inheritance of the IRA did not change its status as a protected retirement fund. The U.S. Court of Appeals for the Seventh Circuit reversed finding that the inherited funds were no longer retirement funds.
Issue: Whether an individual retirement account that a debtor has inherited is exempt from the debtor's bankruptcy estate.
Circuit Split: The Seventh Circuit's holding splits with the Fifth, Sixth and Ninth Circuits on this issue, each holding that the plain language of the statute renders the retirement funds exempt regardless of original ownership. The Seventh Circuit also relied upon the plain language of the statute to conclude that the funds were no longer retirement funds and therefore did not qualify for the exemption.
Holding: TBD

Case: ***Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency)***
Date Decided: TBD (argued January 14, 2014)
Code Section and Constitutional Article: 28 U.S.C. § 157; U.S. Const. art. 3
Background: Bellingham Insurance Agency, Inc. (BIA) was a company owned by Nicholas Paleveda and his wife, Marjorie Ewing. Shortly before BIA filed for voluntary Chapter 7 bankruptcy in 2006, the company assigned the insurance commission from one of its largest clients to Peter Pearce, a long-time employee. Additionally, Paleveda used BIA funds to incorporate the Executive Benefits Insurance Agency, Inc. (EBIA). Pearce then deposited over $100,000 into an account held jointly by EBIA and another company owned by Paleveda and Ewing. The Chapter 7 Trustee, Peter Arkison, filed an avoidance action against EBIA in the BIA bankruptcy proceeding. Arkison alleged fraudulent conveyances and that EBIA, as a successor corporation, was liable for BIA's debts. The bankruptcy court granted summary judgment in favor of the Trustee and the district court affirmed. On appeal to the U.S. Court of Appeals for the Ninth Circuit, EBIA argued, for the first time, that the bankruptcy judge's entry of a final judgment on the Trustee's action was unconstitutional. The Court of Appeals affirmed the district court's decision. It held that, while a bankruptcy court may not decide a fraudulent conveyance claim, it may hear the claim and make a recommendation for review by a district court. Additionally, the Court of Appeals determined that EBIA, by failing to object to the bankruptcy court's jurisdiction, waived its Seventh Amendment right to a hearing before an Article III court.
Circuit Split: The Ninth Circuit's holding directly splits with holdings from the Fifth, Seventh and Sixth Circuits. Fifth Circuit held in *BP RE, L.P. v. RML Waxahachie Dodge, L.L.C. (In re BP 10 RE, L.P.*), 2013 WL 5975030 (5th Cir. Nov. 11, 2013) and *Frazin v. Haynes & Boone, L.L.P. (In re Frazin)*, 732 F.3d 313, 320 n.3

(5th Cir. 2013) that parties *could not consent* or waive an objection to authority and thereby bestow constitutional authority upon a non-Article III tribunal. Likewise the Sixth Circuit has held that parties cannot waive a Seventh Amendment right to a trial by an Article III court or otherwise by consent bestow constitutional authority upon a non-Article III tribunal. *Waldman v. Stone*, 698 F.3d 910, 917-918 (6th Cir. 2012), cert. denied, 133 S.Ct. 1604 (2013). The Seventh Circuit also rejected the concept that parties may consent to bankruptcy court authority in a proceeding in which the bankruptcy judge lacked constitutional authority. *Wellness Int'l Network Ltd. v. Sharif*, 727 F.3d 751, 767-773 (7th Cir. 2013). The Seventh Circuit also held that the United States Code does not permit a bankruptcy court to issue proposed findings of fact and conclusions of law in a core proceeding in which the bankruptcy court lacked constitutional authority to hear it. The Seventh Circuit ruled that if the bankruptcy court lacks constitutional authority to hear a core proceeding the remedy is for the district court to withdraw the reference and hear the matter, not for the bankruptcy court to issue proposed findings of fact and conclusions of law. The Seventh Circuit's holding splits from all the other circuits on this one issue.
Issues: (1) Whether Article III permits the exercise of the judicial power of the United States by bankruptcy courts on the basis of litigant consent, and, if so, whether "implied consent" based on a litigant's conduct, where the statutory scheme provides the litigant no notice that its consent is required, is sufficient to satisfy Article III; and (2) Whether a bankruptcy judge may submit proposed findings of fact and conclusions of law for de novo review by a district court in a "core" proceeding under 28 U.S.C. § 157(b).
Holding: TBD

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

Citation: *In re Taneja*, 743 F.3d 423 (4th Cir. 2014).
Date Decided: February 21, 2014
Code Section: 11 U.S.C. §§ 548, 550
Background: Vijay K. Taneja began operating Financial Mortgage, Inc. (FMI) in the 1990s. The business engaged in originating home mortgages and selling those loans to investors. To do so, FMI worked with various "warehouse lenders," financial institutions that extended lines of credit and advanced funds to FMI so that FMI could extend mortgage loans to mortgagees. Sometime after 1999, FMI had some difficulty selling the mortgage loans and began engaging in fraudulent conduct, which included selling the same mortgage loans to several different secondary purchasers and conspiring with other entities controlled by Taneja to have them serve as intermediate parties to conceal the fraud. In 2008, Taneja and FMI filed for bankruptcy under Chapter 11. The trustee filed an adversary proceeding against First Tennessee Bank (who had extended credit briefly to FMI) in accordance with §§ 548(a) and 550(a) seeking to avoid and recover certain payments made to the bank, totaling nearly $4 million on the ground that they were fraudulently conveyed. Bank contended that it received the payments for value and in good faith, and thus the bank pleaded good faith as an affirmative defense in accordance with § 548(c). The Bankruptcy Court concluded that the bank had established a good faith defense and dismissed the complaint. On appeal by the trustee, the District Court affirmed.
Issue: Whether the bank proved its good-faith defense based on the testimony of two bank employees.
Holding: Bankruptcy courts, in evaluating the good-faith exception to a trustee's fraudulent-transfer avoidance power, must consider whether the transferee actually was aware or should have been aware, at the time of the transfers and in accordance with routine business practices that the debtor intended to hinder, delay, or defraud any entity to which the debtor was or became indebted. A party asserting the defense need not present evidence that every action concerning the transfers was objectively reasonable in light of industry standards and need not present third-party expert testimony to establish those standards.

Citation: *Jaffé v. Samsung Elecs. Co.*, 737 F.3d 14 (4th Cir. 2013).
Date Decided: December 3, 2013
Code Section: 11 U.S.C. §§ 365(n), 1521, 1522
Background: A German company that manufactured semiconductor devices filed for insolvency in Munich, Germany. The principal assets of the company consisted of some 10,000 patents, 4,000 of which were U.S.

patents, subject to cross-license agreements with the company's competitors. Dr. Michael Jaffé, the insolvency administrator appointed by the Munich court, filed an application in the Bankruptcy Court for the Eastern District of Virginia under Chapter 15, asking the court to recognize the German insolvency proceedings as a "foreign main proceeding" in order to obtain certain privileges. Of note, Jaffé specifically requested that the court entrust him with the administration of all of the company's assets within the territorial jurisdiction of the United States, mainly the 4,000 patents.
Issue: How to mediate between the United States' interests in recognizing and cooperating with a foreign insolvency proceeding and its interests in protecting creditors of the foreign debtor with respect to U.S. assets as provided in 11 U.S.C. §§ 1521 and 1522.
Holding: Bankruptcy courts must ensure that the discretionary relief a recognized foreign representative requests does not impinge excessively on any one entity's interests, which implies that each entity must receive at least some protection. The analysis required to protect creditors and other interested persons calls for application of a balancing test that balances the respective interests based on the relative harms and benefits in light of the circumstances presented.

Citation: *Carroll v. Logan*, 735 F.3d 147 (4th Cir. 2013).
Date Decided: October 28, 2013
Code Section: 11 U.S.C. §§ 541, 1306, 1329
Background: Three years after filing their bankruptcy petition, the Carrolls notified the Bankruptcy Court that Mr. Carroll's mother had died and that he anticipated an inheritance of approximately $100,000. The Chapter 13 Trustee moved to modify the repayment plan to include an amount of the inheritance to pay in full all allowed general unsecured claims. Trustee based this motion on the fact that Mr. Carroll had acquired the inherited interest before the bankruptcy case was closed, dismissed, or converted. The Bankruptcy Court held that the inheritance was property of the bankruptcy estate and ordered that it be included in a modified plan. The Carrolls noticed their appeal, and the Bankruptcy Court stayed its order and certified a direct appeal to the Court of Appeals.
Issue: Whether Section 1306(a) extends the 180-day time limit under Section 541 for identifying property that may be included in a bankruptcy estate.
Holding: The plain language of Section 1306, governing property of the estate in Chapter 13, broadens the definition of property of the estate for Chapter 13 purposes by capturing the types, or "kinds," of property described in Section 541, but not the 180-day temporal restriction; under section 1306, property of the estate includes "all property acquired and all earnings from services performed by the debtor after the commencement of the case."

Citation: *Alvarez v. HSBC Bank USA, N.A. (In re Alvarez)*, 733 F.3d 136 (4th Cir. 2013).
Date Decided: October 23, 2013
Code Sections: 11 U.S.C. §§ 301, 363(h), 506(a), 541(a)(1), 1322(b)
Background: Debtor filed Chapter 13 petition in which he identified property that he owned with his wife as tenants by the entirety. His wife was not party to the bankruptcy petition. The property had a value of $442,400 and was encumbered by two mortgage liens. The first-priority mortgage lien had a balance of $447,572.84, rendering the second mortgage lien valueless. Debtor and his wife filed a joint complaint arguing that because the second-priority lien was valueless, and thus was unsecured under Section 506(a), they were entitled to strip off the lien. The Bankruptcy Court denied the request, and the District Court subsequently affirmed.
Issue: Whether Bankruptcy Court erred in refusing to strip off a valueless lien against real property that a debtor owned with his spouse as tenants by the entirety on the ground that the spouse's property was not part of the bankruptcy estate.
Holding: Bankruptcy courts lack the authority in Chapter 13 proceedings to strip off valueless junior liens on property held in tenancy by the entirety, when only one tenant spouse filed the bankruptcy petition. Only the debtor's interest in the entireties property becomes part of the bankruptcy estate. Courts, therefore, do not have the authority to modify lienholder's rights with respect to the non-debtor's interest in the property, even when the debtor and the debtor's spouse file a joint complaint to strip off the lien.

Citation: *Mort Ranta v. Gorman*, 721 F.3d 241 (4th Cir. 2013).
Date Decided: July 1, 2013
Code Sections: 28 U.S.C. § 158(d)(1); 11 U.S.C. § 1325(a)(6), (b)(2)
Background: Debtor filed a Chapter 13 petition and five-year plan, which would pay off his mortgage arrears and joint credit card with his wife in full but pay off his individual credit card debt at less than one percent (0.42%). Debtor reported Social Security income on Schedule I. Trustee objected that the expenses on Schedule J were overstated and thus that debtor's disposable income was higher than it appeared to be. Debtor argued that, because Social Security income is excluded from disposable income, even when expenses were adjusted downward, his expenses would still exceed his non-Social Security income. Bankruptcy Court found that the plan was not feasible and that if debtor wanted to include the Social Security income in the feasibility analysis he needed to include such amount in disposable income. The District Court affirmed, and debtor appealed.
Issues: (1) Whether denial of confirmation and District Court's affirmance of denial are appealable when case has not been dismissed; (2) Whether Social Security income is excluded from the "projected disposable income" calculation; and (3) Whether Social Security income excluded from the "projected disposable income" can be considered in determining feasibility.
Holdings: (1) Denial of confirmation of proposed Chapter 13 plan, and District Court's affirmance, were appealable as final orders for purposes of appeal, although underlying bankruptcy petition had not been dismissed; (2) for both above-median income and below-median income debtors, Social Security income is excluded from the calculation of "projected disposable income"; and (3) when a Chapter 13 debtor proposes to use Social Security income to fund a plan, the bankruptcy court must consider such income in evaluating plan feasibility.

Citation: *SG Homes Assocs., LP v. Marinucci*, 718 F.3d 327 (4th Cir. 2013).
Date Decided: June 4, 2013
Code Section: 11 U.S.C. § 523(a)(2)(A)
Background: Chesapeake Site Contracting Inc., of which Marinucci was president and a 50% shareholder, responded to SG Homes' bid request for site work on a building project in Maryland. Chesapeake received the contract. Although representing to SG Homes that it was acquiring performance and payment bonds, Marinucci decided not to obtain a bond because his wife would not sign a personal guaranty which the bonding companies required. The payment applications contained a certification that the money paid by SG Homes was being paid to subcontractors and suppliers on the SG Homes project. Chesapeake, however, was also using SG Homes' payments to pay its other creditors. Marinucci filed individually for Chapter 7 bankruptcy protection while a case brought by SG Homes was pending against him and Chesapeake in state court. SG Homes filed an adversary proceeding in the bankruptcy court seeking a declaration that Marinucci's debt to it was nondischargeable. The case went to trial on the fraud count, based on two theories of liability: (1) that Marinucci falsely represented that Chesapeake would obtain a payment bond; and (2) that Marinucci had falsely certified that Chesapeake was paying the subcontractors and suppliers. Bankruptcy Court entered judgment in favor of SG Homes finding each theory of liability in the alternative sufficient to grant an exception from discharge, and debtor appealed. District Court affirmed, and debtor appealed again.
Issue: Whether the bankruptcy court erred in entering a nondischargeable judgment against the debtor.
Holding: SG Homes justifiably relied on debtor's false certifications in the monthly payment applications that debtor's construction company was paying its subcontractors and suppliers on construction project. In showing justifiable reliance the plaintiff must show actual reliance on the false certifications and that he was justified in doing so.

Citation: *Grayson Consulting, Inc. v. Wachovia Sec., LLC (In re Derivium Capital, LLC)*, 716 F.3d 355 (4th Cir. 2013).
Date Decided: May 24, 2013
Code Sections: 11 U.S.C. §§ 541, 544, 546, 548, 550

Background: Derivium Capital, LLC filed Chapter 11 bankruptcy following the collapse of its "stock loan" lending program, under which borrowers would transfer their stock to an account at Wachovia and get a loan for 90% of its value. When the loans matured, the borrowers had the option of repaying the principal plus interest and regaining their stock, surrendering the stock, or refinancing the loan. Derivium directed Wachovia to transfer the stocks to another account and liquidate them, the proceeds of which Derivium's owners used to fund the loans and fund their own start-up ventures. The case was converted to Chapter 7 and transferred to South Carolina. The Trustee filed suit against Wachovia alleging nine tort claims and two claims under 11 U.S.C. §§ 544 and 548. Trustee assigned these claims to Grayson Consulting.
Issues: (1) Whether the customer transfers of stock into the Wachovia account were transfers of debtor property; (2) Whether Wachovia qualified as an "initial transferee"; (3) Whether the "stock broker defense" applies to commissions; and (4) Whether *in pari delicto* bars tort claims brought by assignee of the Chapter 7 trustee.
Holdings: (1) Customer transfers were not transfers of "an interest of the debtor in property or any obligation incurred by the debtor" as required by 11 U.S.C. §§ 544(b)(1) and 548(a); (2) Applying the "dominion and control" test to determine whether an entity qualifies as an "initial transferee," Wachovia was not an initial transferee; (3) Commissions shown to be reasonable and customary parts of settling stock sales come within the stockbroker defense as "settlement payments"; and (4) Assignee of trustee, standing in the shoes of Derivium (who engaged in the alleged torts), is barred from suing entity for those torts.

Citation: *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337 (4th Cir. 2013).
Date Decided: May 17, 2013
Code Sections: 11 U.S.C. §§ 1303, 1306(b), 1322; Fed. R. Bankr. P. 6009; Fed. R. Civ. P. 17(a)(1)(G)
Background: Dollar General terminated Wilson after he was unable to return to work due to an eye condition. Wilson filed a charge of discrimination with the EEOC. While waiting for notice of the right to sue from the EEOC, Wilson field for Chapter 13 bankruptcy. After the EEOC issued Wilson a notice of his right to sue, Wilson filed the underlying suit alleging unlawful discrimination in violation of the ADA. Dollar General argued that Wilson, as a Chapter 13 debtor, lacked standing to maintain his prepetition claim and, therefore, the District Court lacked subject-matter jurisdiction to hear Wilson's claim.
Issue: To what extent may a Chapter 13 debtor possess standing to assert an independent cause of action.
Holding: Unlike a Chapter 7 debtor, a Chapter 13 debtor possesses standing—concurrent with that of the trustee—to maintain a non-bankruptcy cause of action on behalf of the estate.

Citation: *Branigan v. Davis (In re Davis)*, 716 F.3d 331 (4th Cir. 2013).
Date Decided: May 10, 2013
Code Sections: 11 U.S.C. §§ 506(a), 1322(b)
Background: In two "Chapter 20" cases, the Bankruptcy Court allowed the debtors to strip off junior liens against debtors' residences. Trustee appealed, and the District Court affirmed both cases. Trustee appealed.
Issue: Whether BAPCPA precludes the stripping off of valueless liens by "Chapter 20" debtors ineligible for a discharge.
Holding: The Bankruptcy Abuse Prevention and Consumer Protection Act permits the stripping off of valueless junior liens against Chapter 20 debtors' residences.

Citation: *Campbell v. Hanover Ins. Co. (In re ESA Envtl. Specialists, Inc.)*, 709 F. 3d 388 (4th Cir. 2013).
Date Decided: March 1, 2013
Code Section: 11 U.S.C. § 547
Background: ESA was an environmental and industrial engineering firm that sought and performed construction projects under contract with the federal government. Hanover Insurance Company issued security bonds to ESA as required when taking on government contracts. When ESA needed bonds to secure new government contracts, Hanover wanted additional security and required a letter of credit. ESA obtained funds from a third party to get the capital needed to fund the letter of credit. After ESA filed a voluntary petition under Chapter 11, Hanover drew on the letter of credit receiving $1.375 million. Subsequently, the bankruptcy court converted the case to Chapter 7 and appointed a trustee. The trustee

filed an adversary proceeding alleging that Hanover was an indirect beneficiary of a transfer of loan proceeds and that transfer was an avoidable, preferential transfer. Hanover asserted earmarking and new value affirmative defenses. The Bankruptcy Court granted summary judgment to Hanover, the District Court affirmed, and the trustee appealed.
Issues: (1) Whether the Bankruptcy Court improperly applied the earmarking defense, because ESA did not use loan proceeds to pay an antecedent debt; and (2) Whether Bankruptcy Court properly applied the new value defense, because Hanover did not with specificity prove the amount of new value provided.
Holding: (1) Debtor's borrowing of money and use of those funds to collateralize both existing obligations to surety as well as new surety bonds was not use of funds to pay an antecedent debt, and thus earmarking defense does not apply; and (2) For the new value defense to apply, the surety only needs to prove with specificity that new government contracts for which it had provided required bonds had value at least as great as the amount of the alleged preferential transfer in order to demonstrate that the Chapter 7 bankruptcy estate had not diminished as result of transfer of funds under the letter of credit.

II. New Filing Fees. The below is excerpted from the Administrative Office of the Courts memo regarding new miscellaneous fees.

a. Effective June 1, 2014 certain miscellaneous fees will be increased.
b. Some notable changes to the fees include the below.

- For filing an amendment to the debtor's schedules of creditors, lists of creditors, or mailing list, $30, except:
  - The bankruptcy judge may, for good cause, waive the charge in any case.
  - This fee must not be charged if –
  - the amendment is to change the address of a creditor or an attorney for a creditor listed on the schedules; or
  - the amendment is to add the name and address of an attorney for a creditor listed on the schedules.

- For filing a complaint, $350, except:
  - If the trustee or debtor-in-possession files the complaint, the fee must be paid only by the estate, to the extent there is an estate.
  - This fee must not be charged if -
  - the debtor is the plaintiff; or
  - a child support creditor or representative files the complaint and submits the form required by § 304(g) of the Bankruptcy Reform Act of 1994.

- For filing any document that is not related to a pending case or proceeding, $46.
- Administrative fee:
  - For filing a petition under Chapter 7, 12, or 13, $75.
  - For filing a petition under Chapter 9, 11, or 15, $550.
  - When a motion to divide a joint case under Chapter 7, 12, or 13 is filed, $75.
  - When a motion to divide a joint case under Chapter 11 is filed, $550.

- For payment to trustees pursuant to 11 U.S.C. § 330(b)(2), a $15 fee applies in the following circumstances:
  - For filing a petition under Chapter 7.
  - For filing a motion to reopen a Chapter 7 case.
  - For filing a motion to divide a joint Chapter 7 case.
  - For filing a motion to convert a case to a Chapter 7 case.
  - For filing a notice of conversion to a Chapter 7 case.

- In addition, the following fees must be collected:
  - For filing a motion to convert a Chapter 12 case to a Chapter 7 case or a notice of conversion pursuant to 11 U.S.C. § 1208(a), $45.
  - For filing a motion to convert a Chapter 13 case to a Chapter 7 case or a notice of conversion pursuant to 11 U.S.C. § 1307(a), $10.

The fee amounts in this item are derived from the fees prescribed in 28 U.S.C. §1930(a). If the trustee files the motion to convert, the fee is payable only from the estate that exists prior to conversion.

If the filing fee for the chapter to which the case is requested to be converted is less than the fee paid at the commencement of the case, no refund may be provided.

- For filing a motion to reopen, the following fees apply:
  - For filing a motion to reopen a Chapter 7 case, $245.
  - For filing a motion to reopen a Chapter 9 case, $1167.
  - For filing a motion to reopen a Chapter 11 case, $1167.
  - For filing a motion to reopen a Chapter 12 case, $200.
  - For filing a motion to reopen a Chapter 13 case, $235.
  - For filing a motion to reopen a Chapter 15 case, $1167.

  The fee amounts in this item are derived from the fees prescribed in 28 U.S.C.§ 1930(a). The reopening fee must be charged when a case has been closed without a discharge being entered.

  The court may waive this fee under appropriate circumstances or may defer payment of the fee from trustees pending discovery of additional assets. If payment is deferred, the fee should be waived if no additional assets are discovered.

  The reopening fee must not be charged in the following situations:
  - to permit a party to file a complaint to obtain a determination under Rule 4007(b); or
  - when a debtor files a motion to reopen a case based upon an alleged violation of the terms of the discharge under 11 U.S.C. § 524; or
  - when the reopening is to correct an administrative error.

- For filing an appeal or cross appeal from a judgment, order, or decree, $293.

  This fee is collected in addition to the statutory fee of $5 that is collected under 28 U.S.C. § 1930 (c) when a notice of appeal is filed.

  Parties filing a joint notice of appeal should pay only one fee.

  If a trustee or debtor-in-possession is the appellant, the fee must be paid only by the estate, to the extent there is an estate.

  Upon notice from the court of appeals that a direct appeal or direct cross-appeal has been authorized, an additional fee of $157 must be collected.

- For a motion filed by the debtor to divide a joint case filed under 11 U.S.C. § 302, the following fees apply:
  - For filing a motion to divide a joint Chapter 7 case, $245.
  - For filing a motion to divide a joint Chapter 11 case, $1167.

- For filing a motion to divide a joint Chapter 12 case, $200.
- For filing a motion to divide a joint Chapter 13 case, $235.

These fees are derived from and equal to the filing fees prescribed in 28 U.S.C.§ 1930(a).

- For filing the following motions, $176:
  - To terminate, annul, modify or condition the automatic stay;
  - To compel abandonment of property of the estate pursuant to Rule 6007(b) of the Federal Rules of Bankruptcy Procedure;
  - To withdraw the reference of a case or proceeding under 28 U.S.C. § 157(d); or
  - To sell property of the estate free and clear of liens under 11 U.S.C. § 363(f).

  This fee must not be collected in the following situations:
  - For a motion for relief from the co-debtor stay;
  - For a stipulation for court approval of an agreement for relief from a stay; or
  - For a motion filed by a child support creditor or its representative, if the form required by § 304(g) of the Bankruptcy Reform Act of 1994 is filed.

- For filing a transfer of claim, $25 per claim transferred.

III. New Default Procedures for Adversary Proceedings

a. Judge Black and Judge Connelly will require that the Clerk's Entry of Default be issued prior to entering a default judgment in an adversary proceeding.
b. Rule 7055 applies to Adversary Proceedings.
c. The below is excerpted from the US Courts website at www.uscourts.gov and provides instructions for Official Form 260. Pay particular attention to the Instructions to Official Form 260 and Instructions to Official Forms 261A-C.

Instructions to Official Form 260

<u>Background</u>

1. Fed. R. Bankr. P. 7012(a) provides that the defendant in an adversary proceeding must serve an answer within 30 days of the issuance of the summons by the court, unless the court prescribes a different time. If the United States or an officer or agency of the United States is the defendant, an answer must be served within 35 days of the issuance of the summons. (Fed. R. Bankr. P. 9006 provides that if the last day is a Saturday, Sunday or legal holiday, the deadline is extended to the next business day following the Saturday, Sunday, or legal holiday.).

2. Rule 7012(b) incorporates by reference Fed. R. Civ. P. 12(b)-(h). These provision permit the defendant to serve several types of motions, including a motion to dismiss the complaint, a motion for a more definite statement, and a motion to strike, in lieu of serving an answer.

3. Although Rule 7012(a) requires that the answer or motion be served, Fed. R. Civ. P. 5(d), which is incorporated by reference by Fed. R. Bankr. P. 7005, requires that all papers which are to be served also "shall be filed with the court within a reasonable time after service ." (emphasis added).

4. If the defendant serves neither an answer nor one of the motions described in Rule 12(b) -(h) within the time fixed by Rule 7012(a), the defendant is in default.

5. Fed. R. Bankr. P. 7055 incorporates by reference Fed. R. Civ. P. 55. This rule provides that when the defendant is in default, the plaintiff may seek to have the clerk enter the default on the court docket. This entry of default is accomplished by the execution of form 260.

6. The court may set aside an entry of default for good cause shown. Fed. R. Civ. P. 55(c) as incorporated by Fed. R. Bankr. P. 7055.

7. The Service members Civil Relief Act, 50 U.S.C. App. §§ 501 - 596, provides protections for members of the military in judicial and administrative proceedings in state and federal courts and agencies.

8. If the defendant has not made an appearance in the proceeding, the plaintiff must file an affidavit stating whether or not the defendant is in military service, or that the plaintiff is unable to determine whether the defendant is in military service, before the court may enter a default judgment. If the defendant is in the military, or may be, the defendant afforded certain protections, including a stay of the proceedings, the appointment of an attorney to represent the defendant, requiring the plaintiff to post a bond, or vacating a default judgment. 50 U.S.C. App. § 521.

<u>Affidavit</u>

The clerk is permitted to enter a default only upon being presented with an affidavit or affirmation setting forth the facts. These facts should normally include:

1. Date of issuance of the summons;

2. Statement of whether the court fixed a deadline for serving an answer or motion, or whether the 30 (or 35) day time limit applies;

3. Date of service of the complaint;

4. Date of filing of an affidavit of service;

5. Statement that no answer or motion has been received within the time limit fixed by the court or by Fed. R. Bankr. P. 7012(a);

6. Statement that the defendant is not in the military service, as required by 50 U.S.C. App. § 521. If the defendant is, or may be, in the military service, the defendant is afforded certain protections which must be addressed prior to the entry of a default; and

7. Statement that the defendant is not an infant or incompetent person, as is required by Fed. R. Civ. P. 55(b)(1).

The affidavit or affirmation should be attached to form 260 and filed with the court.

<u>General Information</u>

Fed. R. Civ. P. 55, as incorporated by Fed. R. Bankr. P. 7055, authorizes the clerk to enter the default of a party. This can only be done upon a showing by the party seeking the entry of the default "by affidavit or otherwise" that a default has in fact occurred.
Prior to the entry of a default, special care should be taken to ensure that the defendant

has in fact defaulted. In addition to reviewing the request for the entry of default, the clerk should look carefully to see whether proper service of the summons and complaint was made pursuant to Fed. R. Civ. P. 4, as incorporated by Fed. R. Bankr. P. 7004(a), and whether the time to answer or file a motion has passed. In most instances the time is 30 days from the issuance of the summons. The United States, its agencies, and its officers have 35 days. Also, the court may have entered an order extending or reducing the time. (If the last day is a Saturday, Sunday or legal holiday, the deadline is extended to the next business day following the Saturday, Sunday, or legal holiday. Fed. R. Bankr. P. 9006.).

The failure of the defendant to file an answer or motion within the prescribed time does not necessarily mean that the defendant is in default. Fed. R. Civ. P. 5(d), made applicable by Fed. R. Bankr. P. 7005, permits the defendant to file the answer or motion with the court "within a reasonable time after service." Thus, an answer or motion may have been timely served but not yet filed with the court. The clerk will therefore have to rely upon the application seeking the entry of the default for proof that the plaintiff has not been served with an answer or motion.

One additional note of caution. If the defendant served the plaintiff with an answer or motion by mail, Rule 5(b), as made applicable by Rule 7005, states that service by mail is complete upon the mailing, not upon receipt. Thus, if the request for entry of default is made the day after the time to answer expires, the clerk should postpone entry of the default for one or two days to see whether the answer or motion is in the mail. (If the default is entered and it subsequently develops that an answer or motion was delayed in the mail, the defendant can seek to have the entry of the default revoked by the court.

50 U.S.C. App. § 521 affords protection against default to those in the military service. If the affidavit does not contain a statement that the defendant is not in the military, the clerk should not enter the default without prior direction from the judge.

IV. Motions to Extend Stay under section 362(c).

1. 11 U.S.C. § 326(c) provides that the automatic stay may expire 30 days after the petition date if the debtor had been in a prior bankruptcy case that had been dismissed within the previous 12 months. In addition, this section provides that the stay may not be in effect at all if the debtor had been in two or more bankruptcy cases that had been dismissed in the previous 12 months.

2. The bankruptcy court may extend the stay upon motion, and hearing, prior to the expiration of the stay if the debtor can show that the new case was filed in good faith as to the creditors stayed.

3. The debtor may wish to file the motion to extend stay on negative notice and obtain a bridge order when he is unable to obtain a hearing within the first thirty days of the petition date.

THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

RE: * CHAPTER 13
* CASE NO.
Debtor(s) *

MOTION TO EXTEND AUTOMATIC STAY
ORDER AND NOTICE OF OPPORTUNITY FOR HEARING

The Debtor(s), by Counsel, pursuant to Bankruptcy Code Section 362, states as follows:

1. That on ***date petition filed***, the Debtor(s) filed in this Court a Petition under Chapter 13 of the US Bankruptcy Code.
2. The Debtor's previous bankruptcy cases are as follows: (List all cases, filing date, Chapter, status and date of discharge or dismissal)
   Case No.; Filed Date; Chapter; Case status (dismissed, completed, discharged, etc) and dates of dismissal or discharge
   Case No.; Filed Date; Chapter; Case status (dismissed, completed, discharged, etc) and dates of dismissal or discharge

   Due to the dismissal of the previous case, the automatic stay will expire 30 days after the date of filing this new petition.[note – this motion must be filed well in advance of the expiration of 30 days after the petition date]
3. The Debtor(s) is requesting that the Court extend the automatic stay for the following reason(s). ***Explain in detail why the prior cases were dismissed and how the new case will be successful when the prior case or cases were not. In particular note the actual changes and whether these changes demonstrate that the new case is filed in good faith as to the creditors sought to be stayed.***

WHEREFORE, your Debtor(s) prays that the Court, after notice and an opportunity for hearing, enter an Order extending the automatic stay until such time the Court deems otherwise.

Dated: *insert date*

By: /s/ *debtor's counsel*
Attorney's Name and address

Seen and Agreed to:
By: /s/_______________
Chapter 13 Trustee

NOTICE AND ORDER FOR HEARING

It appearing to the Court proper so to do, it is **ORDERED** that any affected party or creditor (the "Respondent(s)") shall have twenty one (21) days from the date of the entry of this order on the docket to file with the *Clerk of the United States Bankruptcy Court,1101 Court Street, Lynchburg, Virginia 24504*, and **serve upon the Counsel for the Debtor(s)** at the address given above a written response to said MOTION and absent same, the Debtor may tender an order extending the automatic stay.

If Respondent(s) timely files a response to the Debtor's MOTION, or should the Chapter 13 trustee object to the granting of an order extending the automatic stay, a hearing shall be held in the *United States Bankruptcy Court*, ***insert address for bankruptcy court*** on ***Date of hearing***, at ***time for hearing***, on the Debtor's MOTION TO EXTEND AUTOMATIC STAY. The Respondent must be present in person, or represented by Counsel at said hearing.

If no response is filed within the twenty one (21) days and the trustee endorses an order extending the automatic stay, the court may enter a separate order extending the automatic stay. But however should an order not be entered within 1 day prior to the date set by this court, then the Debtors shall appear and be prepared to present evidence as to why the extension of the automatic stay shall be granted.[note – movant must submit an order, endorsed by the Trustee, granting a stay extension; if the court does not enter the order, the debtor must appear at the hearing and provide evidence for the stay extension]

The Court further finds that cause exists to extend the automatic stay temporarily in order to facilitate this noticing procedure for the extension of the stay pursuant to 11 U.S.C. 362(c)(3)(B) that is necessary to provide all interested parties sufficient time to review object to the Debtor(s)' motion; it is therefore ORDERED that the automatic stay is extended temporarily through ***date of hearing***.

The Debtor(s) shall serve a copy of this order upon all affected parties, within 5 days of the date of entry of this order on the docket, and certify in writing to the Court that he or she has done so.

DATED

Rebecca Connelly - United States Bankruptcy Judge

I hereby, certify that I have this date mailed a true copy of the foregoing motion and order to all creditors on the mailing matrix in this case.

DATED:

Counsel for Debtor(s)