

Second Annual
WESTERN DISTRICT OF VIRGINIA BANKRUPTCY CONFERENCE



April 29, 2015
8:55 A.M. to 4:30 P.M.

at

Holiday Inn Valley View
Grand Ballroom
3315 Ordway Drive
Roanoke, VA 24017

Special Thanks To:



Federal Bar Association
Roanoke Chapter

WR WOODS ROGERS
ATTORNEYS AT LAW

CONFERENCE AGENDA
&
CONFERENCE MATERIALS

CONFERENCE AGENDA

8:45 A.M. – Pre-Conference Refreshments

8:55 A.M. – Welcome and Opening Remarks

9:00 A.M. – The Court’s Clerks’ Commentary: Commentary from the Clerk of the Bankruptcy Court and the Judges’ Law Clerks: *Featuring John W. L. Craig, II, Clerk of Court; Elizabeth B. Carroll, Career Law Clerk for the Hon. Paul M. Black; Caleb Chaplain, Term Law Clerk for the Hon. Paul M. Black and the Hon. Rebecca B. Connelly*

9:35 A.M. – Ethics and Professionalism: Discussion and application of the principles of professionalism and rules of professional conduct in a bankruptcy setting: *Feat. the Hon. Rebecca B. Connelly, Chief Bankruptcy Judge, United States Bankruptcy Court for the Western District of Virginia; Hon. Paul M. Black, Bankruptcy Judge, United States Bankruptcy Court for the Western District of Virginia; Richard C. Maxwell, Esq., of Woods Rogers, Attorneys at Law*

10:30 A.M. to 10:40 A.M. – Mid-Morning Break

10:40 A.M. – Chapter 7 Issues and Perspectives: Members of the Panel of Chapter 7 Trustees for the Western District of Virginia and the Assistant United States Trustee for the Western District of Virginia: *Feat. Margaret K. Garber, Assistant United States Trustee for the Western District of Virginia; Roy V. Creasy and George A. McLean, Jr., Chapter 7 Panel Trustees for the Western District of Virginia*

11:35 A.M. – Incorporating Technology in a Bankruptcy Practice: Discussion by practitioners of technology useful for lowering costs, implementing a paperless practice and managing cases in and out of court: *Feat. Donald M. Burks, The Law Office of Don Burks, P.C.; H. David Cox, Cox Law Group, PLLC; Malissa L. Giles, Giles & Lambert, P.C.*

12:30 P.M. to 1:45 P.M. – Lunch Break: You are invited to join the presenters and fellow practitioners for lunch at Holiday Inn at a cost of \$10.00 per person (inclusive of gratuity and tax), Holiday Inn will serve a luncheon consisting of roast beef, fried chicken, mashed potatoes, green beans, rolls, a separate salad bar and a dessert bar. Conference attendees are responsible for cost.

1:45 P.M. – Chapter 13 Trustees and Staff Panel: Featuring discussion of recent case law in the Western District, issues with ongoing mortgages, interplay between bankruptcy and personal injury claims, as well as analysis of particular decisions and rules to be aware of: *Feat. Herbert M. Beskin and Christopher T. Micale, Chapter 13 Trustees for the Western District of Virginia; Angela M. Scolforo and Jason B. Shorter, Staff Attorneys for the Chapter 13 Trustees*

3:15 P.M. to 3:30 P.M. – Afternoon Break

3:30 P.M. – The Judges’ Perspective: *Feat. the Hon. Rebecca B. Connelly, Chief Bankruptcy Judge, Presiding Judge for Cases in Lynchburg, Charlottesville and Danville; Hon. Paul M. Black, Bankruptcy Judge, Presiding Judge for Cases in Abingdon, Big Stone Gap, Danville and Roanoke*

4:30 P.M. – Surveys/CLE Form Completion

*Five-Minute Breaks to be taken between
Presentations unless a Longer Break is indicated*

THE COURT'S CLERKS' COMMENTARY - 9:00 A.M.

John W. L. “Chip” Craig, II, presently serves as Clerk of the United States Bankruptcy Court for the Western District of Virginia. Mr. Craig was formerly a practicing Virginia attorney until his appointment as Clerk of the Court. He is a graduate of the Virginia Polytechnic Institute and State University (“Virginia Tech”) and the Mercer University School of Law.

Elizabeth B. Carroll is a career law clerk for the Honorable Paul M. Black. She graduated from the University of North Carolina at Chapel Hill with a B.S. in Business Administration in 1990 and received her J.D. from the George Mason School of Law in 1997. Elizabeth formerly served as the career law clerk for the Honorable William F. Stone, Jr. from 2005 to 2014. She was in private practice for seven years and was a partner at the law firm of Daniel, Vaughan, Medley & Smitherman in Danville before joining the bankruptcy court.

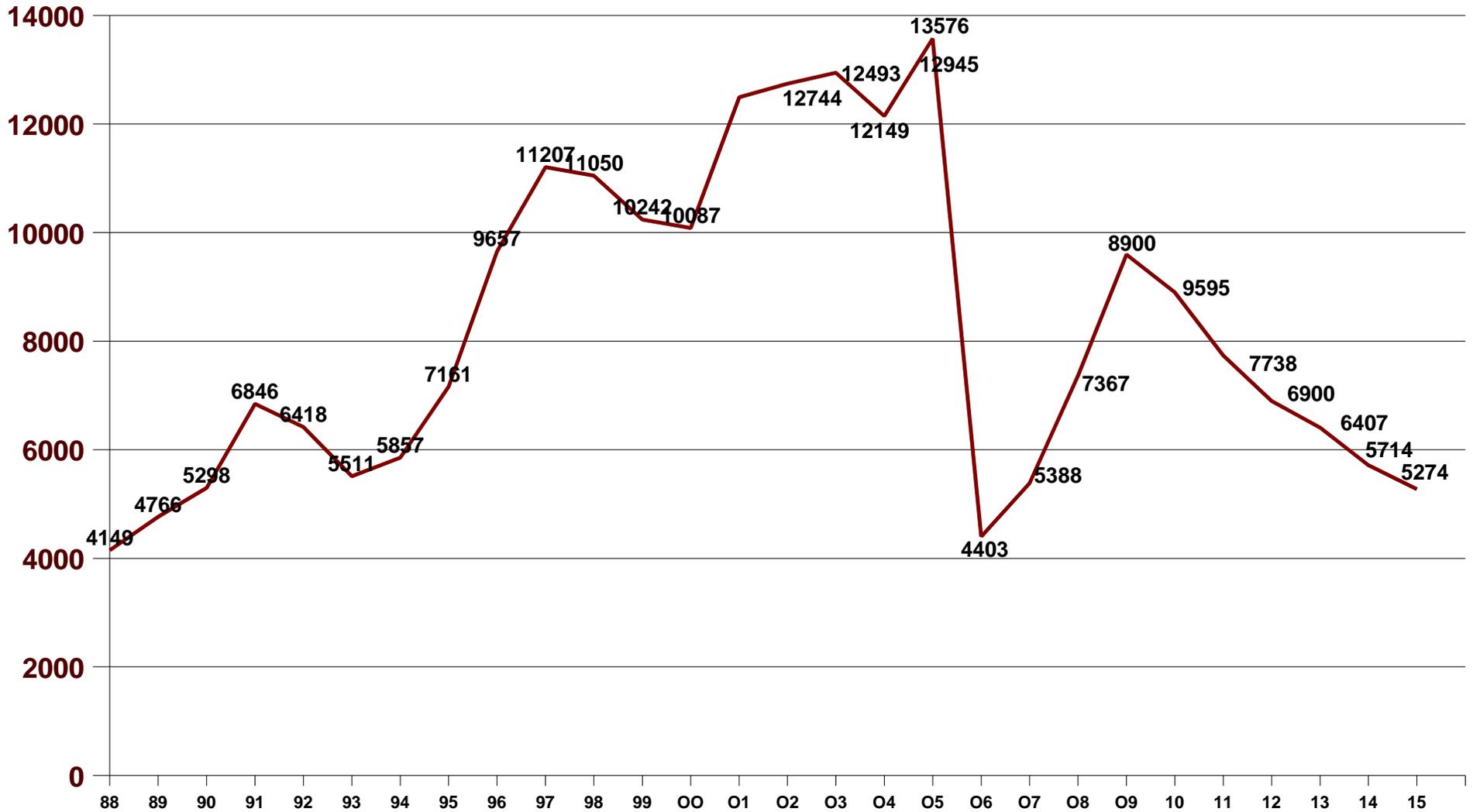
Caleb Chaplain is currently a term law clerk for the Honorable Rebecca B. Connelly and the Honorable Paul M. Black; however, he will continue as a career law clerk for Judge Connelly starting this summer. He graduated from Dartmouth College with a B.A. in Classical Language and Literature in 2007 and received his J.D. from Indiana University Maurer School of Law in 2013. Between undergrad and law school, Mr. Chaplain worked for General Electric Capital Corporation as a records analyst.

**UNITED STATES BANKRUPTCY COURT
FOR THE
WESTERN DISTRICT OF VIRGINIA**

**Tricks and Tips
From the Clerk's Office**

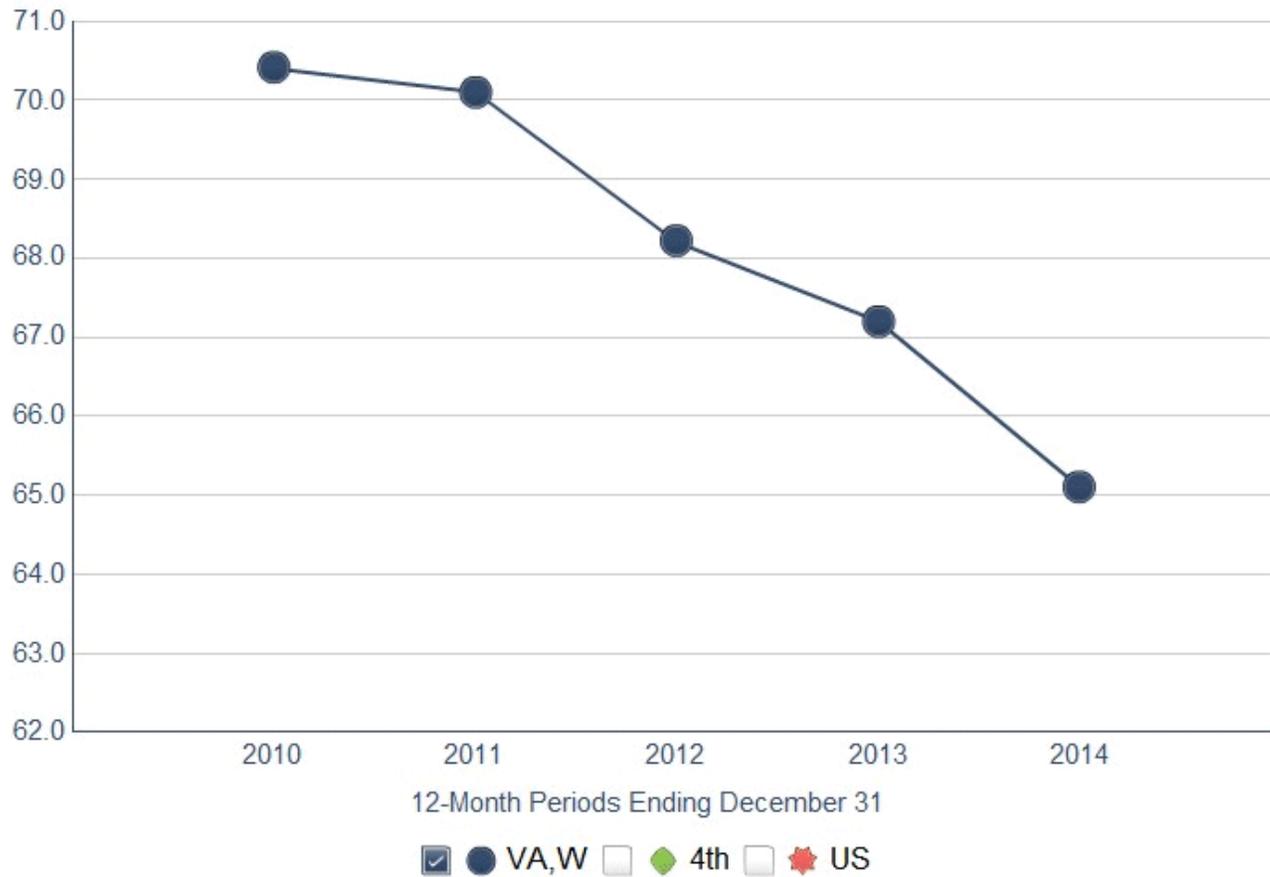


United States Bankruptcy Court Western District of Virginia Bankruptcy Petitions



Bankruptcy Statistics: Virginia Western

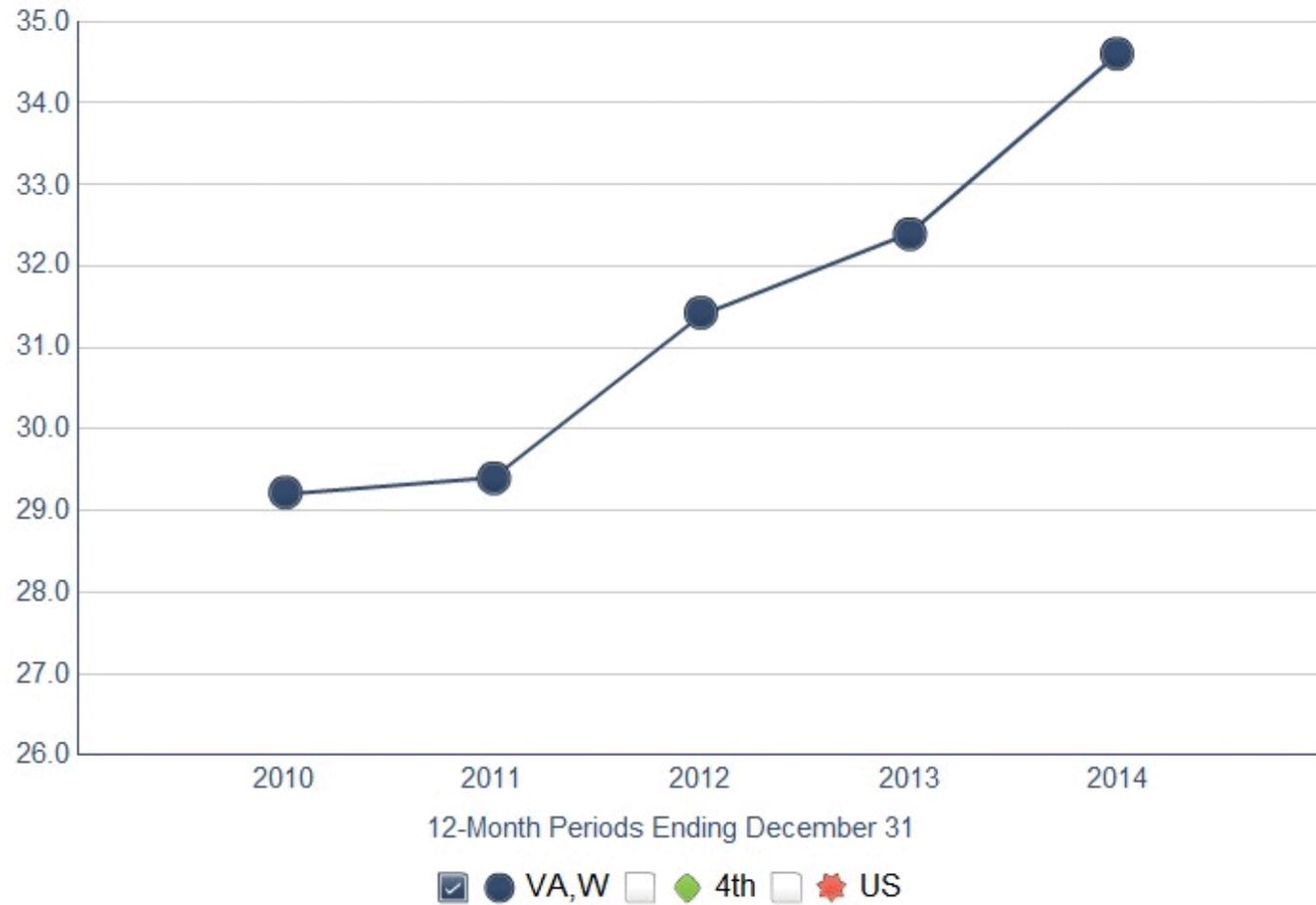
Chapter 7 Filings (% of Total Filings)



	2010	2011	2012	2013	2014	% Chg., 2013-14
VA,W	70.4	70.1	68.2	67.2	65.1	-3.1%
4th Circuit	65.5	65.3	62.5	60.2	58.6	-2.7%
US	71.5	70.3	69.1	68	66.1	-2.8%

Bankruptcy Statistics: Virginia Western

Chapter 13 Filings (% of Total Filings)



	2010	2011	2012	2013	2014	% Chg., 2013-14
VA,W	29.2	29.4	31.4	32.4	34.6	6.8%
4th Circuit	33.5	33.8	36.7	38.9	40.6	4.4%
US	27.6	28.8	30	31.1	33.1	6.4%

Bankruptcy Statistics: Virginia Western

Percent of Chapter 13s Closed by Discharge



	2010	2011	2012	2013	2014	% Chg., 2013-14
VA,W	56.1	58.4	54.9	59.9	70.5	17.7%
4th Circuit	53.2	49.6	49.9	51.9	57.6	11.0%
US	39.8	36	38.3	44.6	52.5	17.7%

Circuit Rank: 3 U.S. Rank: 13

Bankruptcy Statistics: Virginia Western

Median Chapter 7 Disposition (Months)



	2010	2011	2012	2013	2014	% Chg., 2013-14
VA,W	3.3	3.1	3.2	3.2	3.2	1.0%
4th Circuit	3.6	3.6	3.6	4	3.6	-9.8%
US	4	3.9	3.8	3.8	3.8	-1.7%

Circuit Rank: 1 U.S. Rank: 2

Bankruptcy Statistics: Virginia Western

Pro Se Filings (% of Total Filings)



	2010	2011	2012	2013	2014	% Chg., 2013-14
VA,W	2	2.4	2.8	3.3	2.5	-24.2%
4th Circuit	5.4	5.7	7	8.4	9	7.1%
US	7.7	8.6	8.9	8.8	8.8	0.0%

Circuit Rank: 8 U.S. Rank: 68

**All those little
things we wish
you just
wouldn't do.**



➤ When opening a new case or when inputting any data please use proper case.

➤ Please file the Petition in proper order:

★ Voluntary Petition

★ Schedules A-J

★ Statement of Affairs

★ Other Pleadings

★ Then by separate docket entry:

■ Social Security Form (B21)

■ Certificate of Credit Counseling

➤ In BKOpen in CM/ECF

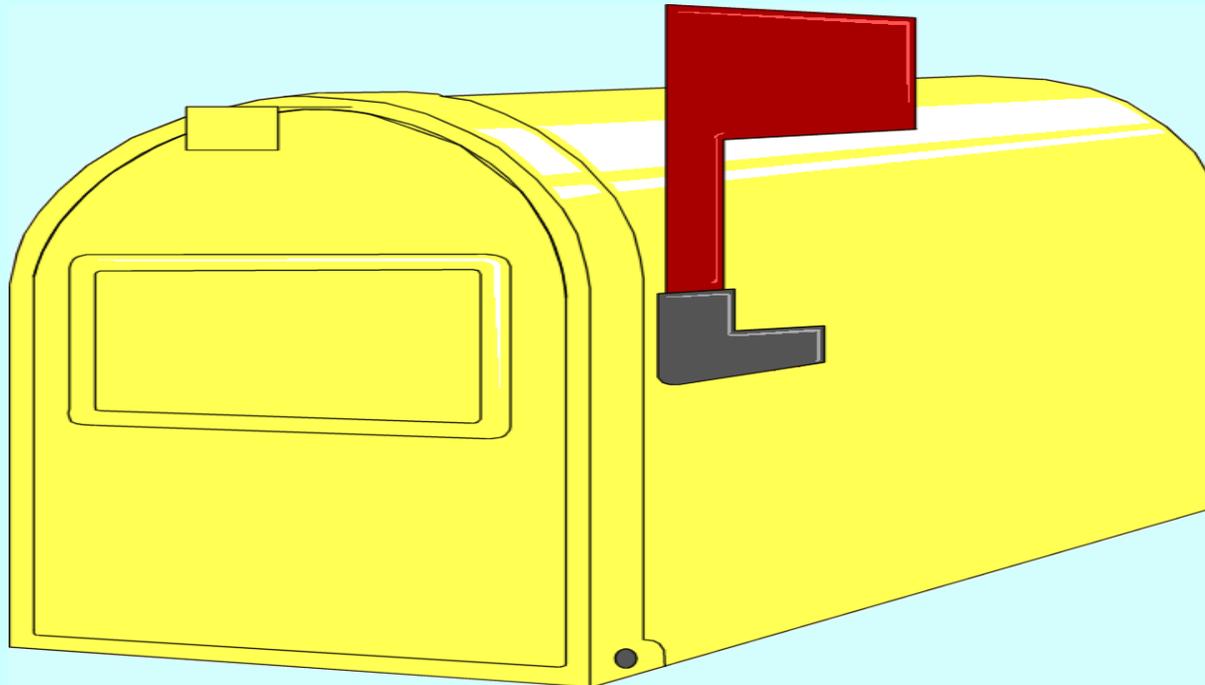
★ All data input **MUST** match what is on the Petition

- Chapter
- Debtor(s) Name(s)
- Alias(es)
- Debtor(s) Address(es)
- County Code
- Asset Designation
- Statistical Information



Debtor's Mailing Address

- ★ Remember to put the debtor's mailing address in CM/ECF if it is different from the street address



Beware 6:00 PM

- ★ All cases for that day are sent to the Noticing Center
- ★ If creditors are loaded after six they may not get notice
- ★ Cases filed after six will not have any orders processed until the second day because of the delay in Judge assignment



So you inadvertently filed a duplicate petition.



Contact the Clerk's Office Immediately!

Petition must be signed by **BOTH** the Debtor(s) and Counsel



When filing for a business don't forget to choose the nature & type of business



Please Verify All Attachments



Always Proofread

You might have something out!



When Filing a Motion you must also either:

★ Submit a Proposed Order properly endorsed by all necessary parties

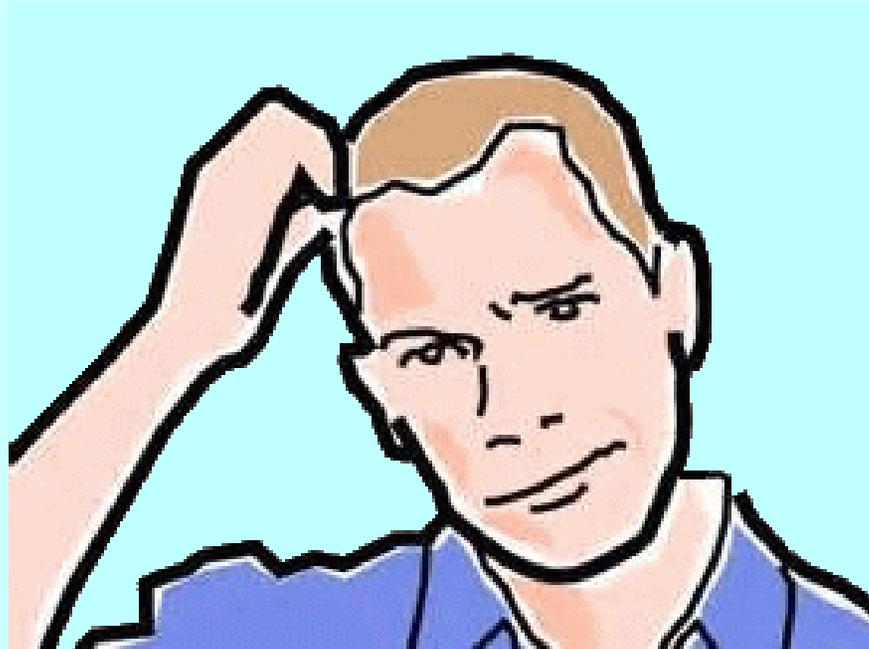
or

★ Notice it for Hearing



When filing an Amended Petition

- ★ Please tell us what you are amending



Don't forget to upload the Creditors

- ★ Failure will cause you to have to amend and pay \$30
- ★ Filing an Amendment: remember to add to mailing matrix
- ★ Must be signed by Debtor(s) and Counsel



When Filing a Notice to Amend to Add a Creditor(s)

- ★ Use the Amendment Form
- ★ Make sure it is signed by the Debtor(s)
- ★ The fee is paid (\$30)
- ★ The Creditor is added to the Electronic Mailing Matrix



When filing a Notice of Appearance or Request for Notice:

- ★ The event can be found in CM/ECF under:
Bankruptcy >Other >Notice of Appearance and Request for Notice
- ★ Full Access Users will be prompted for noticing information
Use the “Creditor Maintenance” function to add to creditor list
- ★ Limited Access Users are added by us



When Filing an Adversary Proceeding

➤ In Open AP Case in CM/ECF

★ All data input **MUST** match what is on the Pleading

- Plaintiff(s) Names

- Defendant(s) Name(s)

- Nature of Suit

- Demand Amount *enter amount in rounded thousands*

★ Be sure to choose “Adversary” as the association type

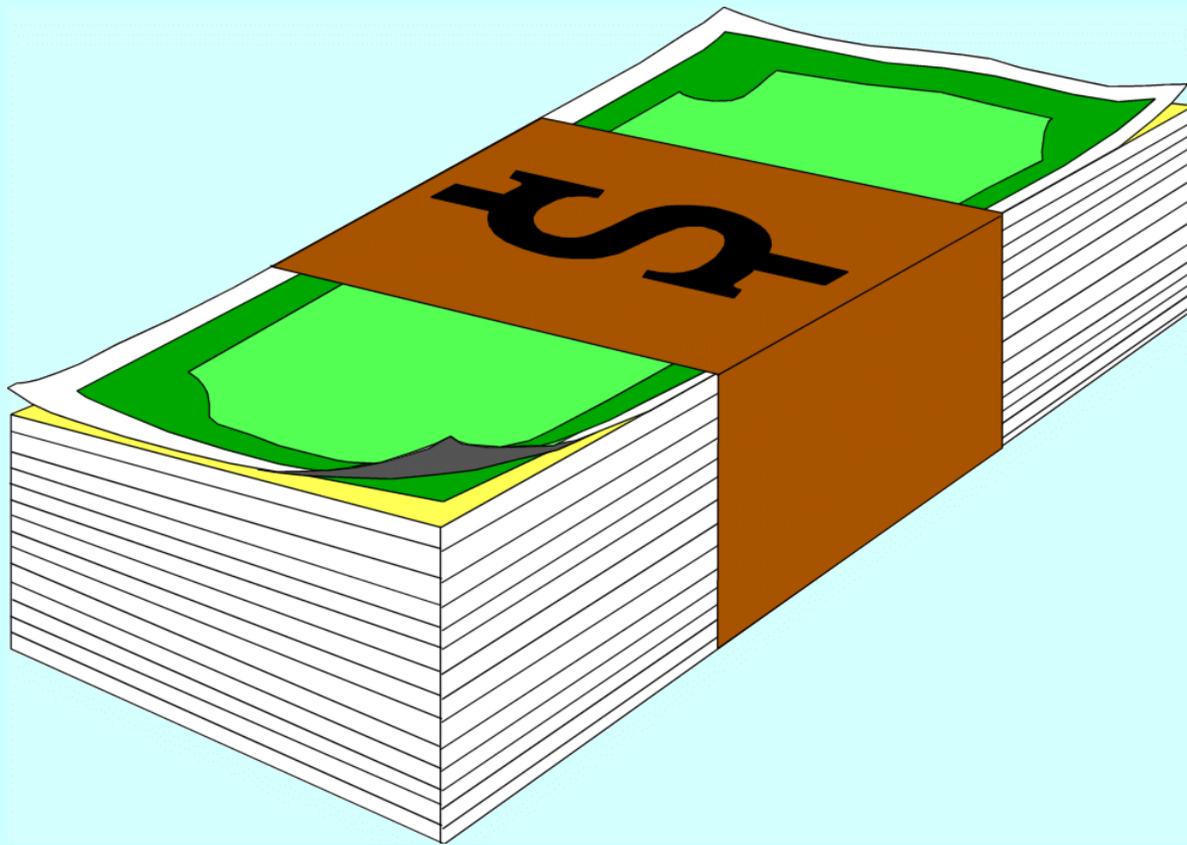


FILE FINANCIAL MANAGEMENT CERTIFICATES TIMELY

Failure will cause the case to be closed
without the issuance of a **Discharge**



PLEASE pay your filing fee
at the time of filing



Need to Remove Identity Information from Something You Inadvertently Filed?





- ☞ File a motion requesting that the document or exhibit be restricted from public access.
- ☞ Propose filing a redacted copy of the document being restricted.
- ☞ File a proposed order setting out the terms above.

Sample Proposed Order

**UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA**

In re:

**JOHN Doe,
BETTY Doe,
Debtors.**

Chapter 13

Case No. 15-77777

ORDER RESTRICTING ACCESS TO PROOF OF CLAIM _____

This matter came before the Court on Motion to restrict public access to personal identification information contained in a proof of claim, number ____, filed in the above styled case. It appearing just and proper to do so, it is therefore

ORDERED

That the Motion is granted. It is further

ORDERED

That the above identified proof of claim shall be restricted from public access. It is further

ORDERED

That an amended proof of claim with the personal identification information redacted shall be docketed forthwith by the Movant.

Entered this ____ day of _____, 20__.

REBECCA B. CONNELLY
Chief Judge

Flatten All Documents You File

**Absolutely no Internet links in
your .pdf's**



LOCAL RULE 5005-4

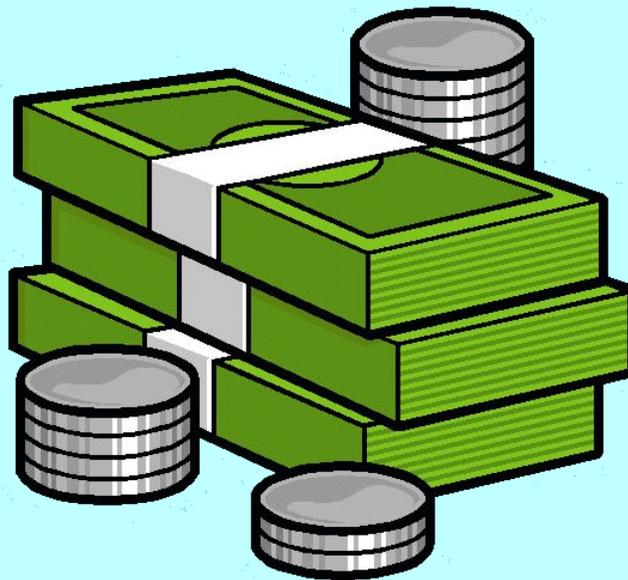
Electronic Filing of Petitions, Pleadings, Orders and Other Documents

.....
.....

L. Hyperlinks: Hyperlinks or other embedded links to commercial or personal internet sites will not be allowed in any electronic documents filed with the court.

REFUNDS:

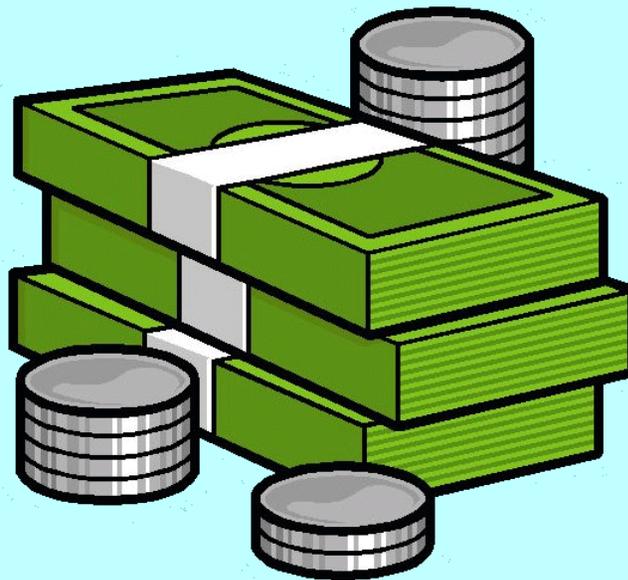
- ★ **8. Prohibition Against Refunding Filing Fees.** The Judicial Conference [of the United States] prohibits refunding the fees due upon filing. The Conference prohibits the clerk from refunding these fees even if the party filed the case in error, and even if the court dismisses the case or proceeding...
- ★ **Refunds require a Judicial determination and can only be accomplished by a motion and order**



REFUNDS:

You Cannot get a Refund if:

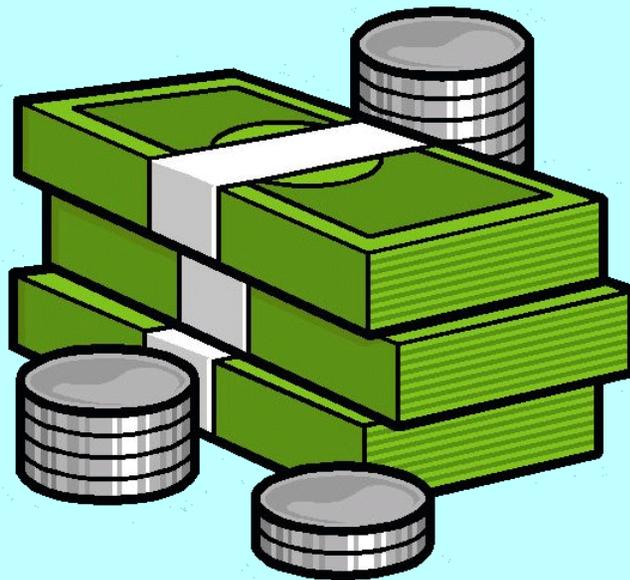
- ★ You lost
- ★ You changed your mind
- ★ You never got paid
- ★ I didn't mean to file



REFUNDS:

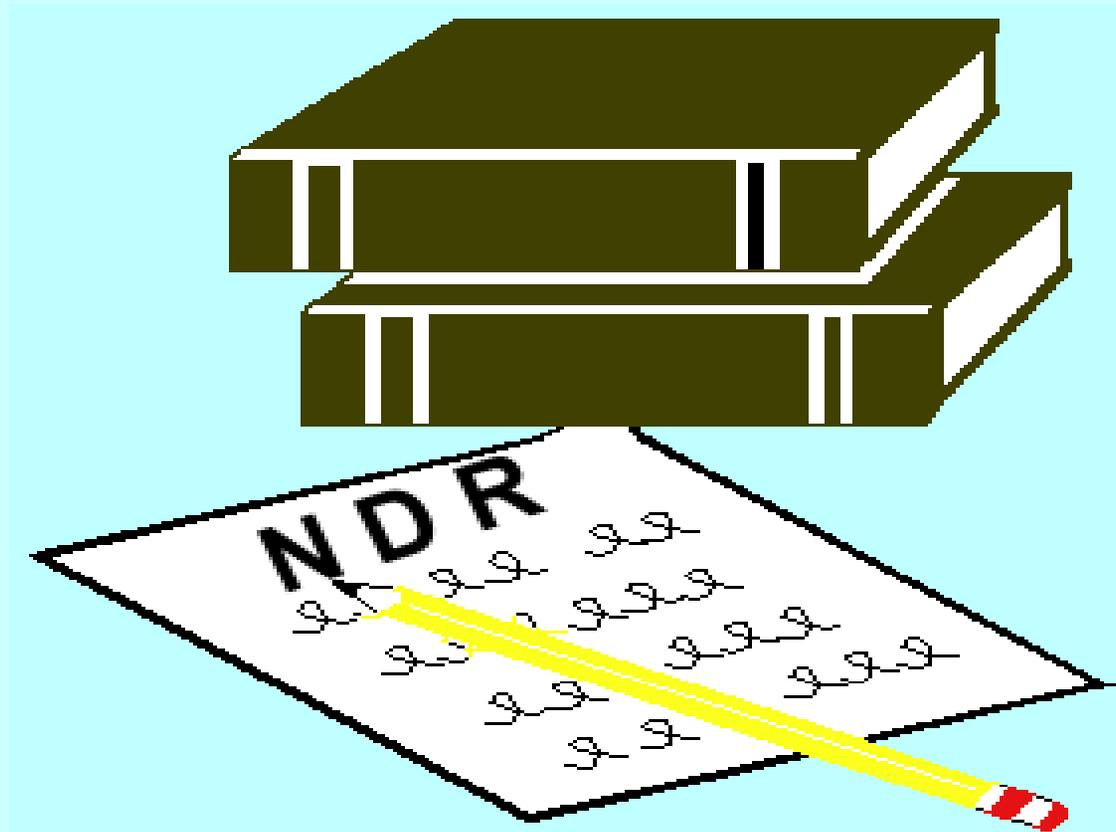
You **May** get a Refund if:

- ★ You added an extra zero to the fee {\$3,350}
- ★ You had your account hacked (actual fraud)



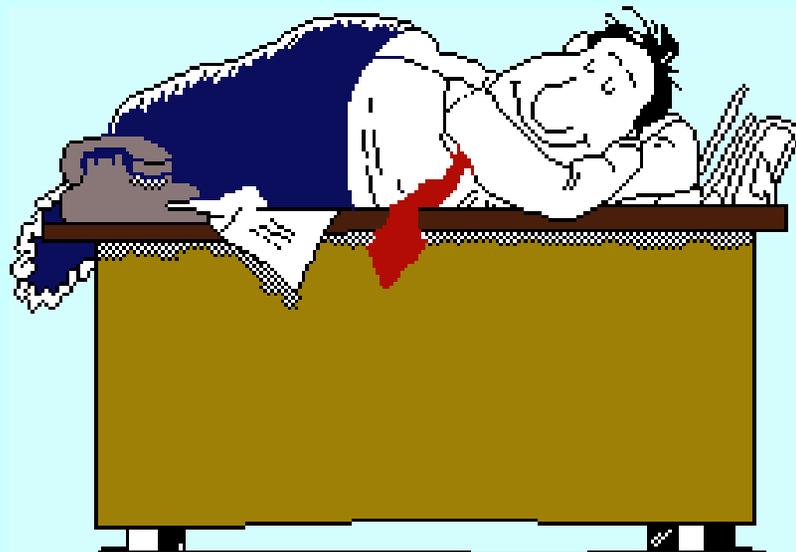
TRUSTEES:

**PLEASE FILE YOUR REPORTS
OF NO DISTRIBUTION TIMELY**



SUBMIT ORDERS TIMELY

★ LR 9072-1 requires filing with the Court within **10 days**



Filing Orders

**PROPOSED ORDERS SHOULD
NEVER BE ATTACHED TO AND
DOCKETED WITH A PLEADING**

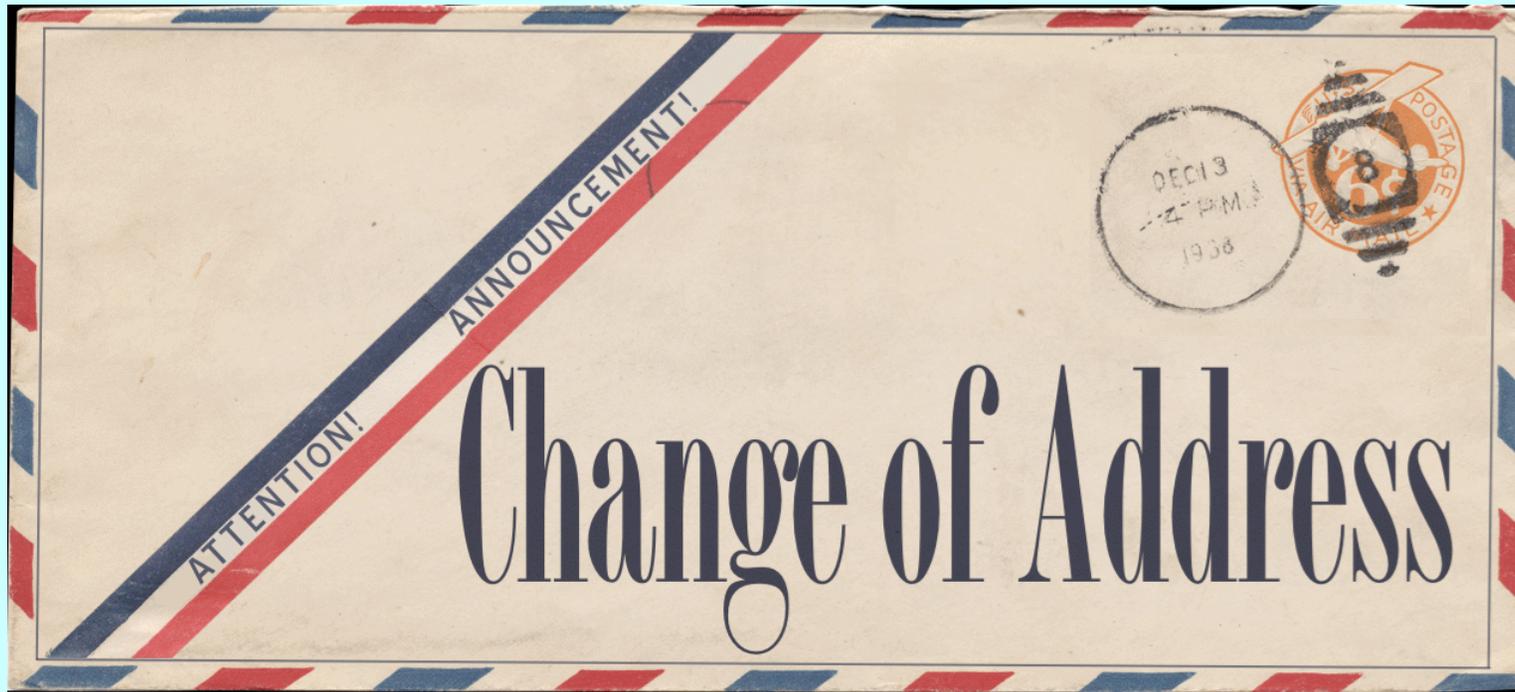


Filing Orders

- ★ Tendered by email to: cmorders@vawb.uscourts.gov
- ★ Must be in “**Word**” format
- ★ Only 1 order per email
- ★ Make sure all signatures are included 
- ★ Subject line for **Cases**:
 - case number-office (ROA, LYN, HAR) **ex.14-70225-ROA**
- ★ Subject line for **AP's**:
 - case number-office, ap number **ex.14-70225-ROA, AP 14-07002**



If you Change your Email Address
or any important personal information
Name, Physical Address, etc.



PLEASE TELL US!

Check the Court Web Page Periodically

- ★ Changes to the Local Rules
- ★ Changes to the Fee Schedule
- ★ Changes to the Court Schedule
- ★ Special Announcements

www.vawb.uscourts.gov

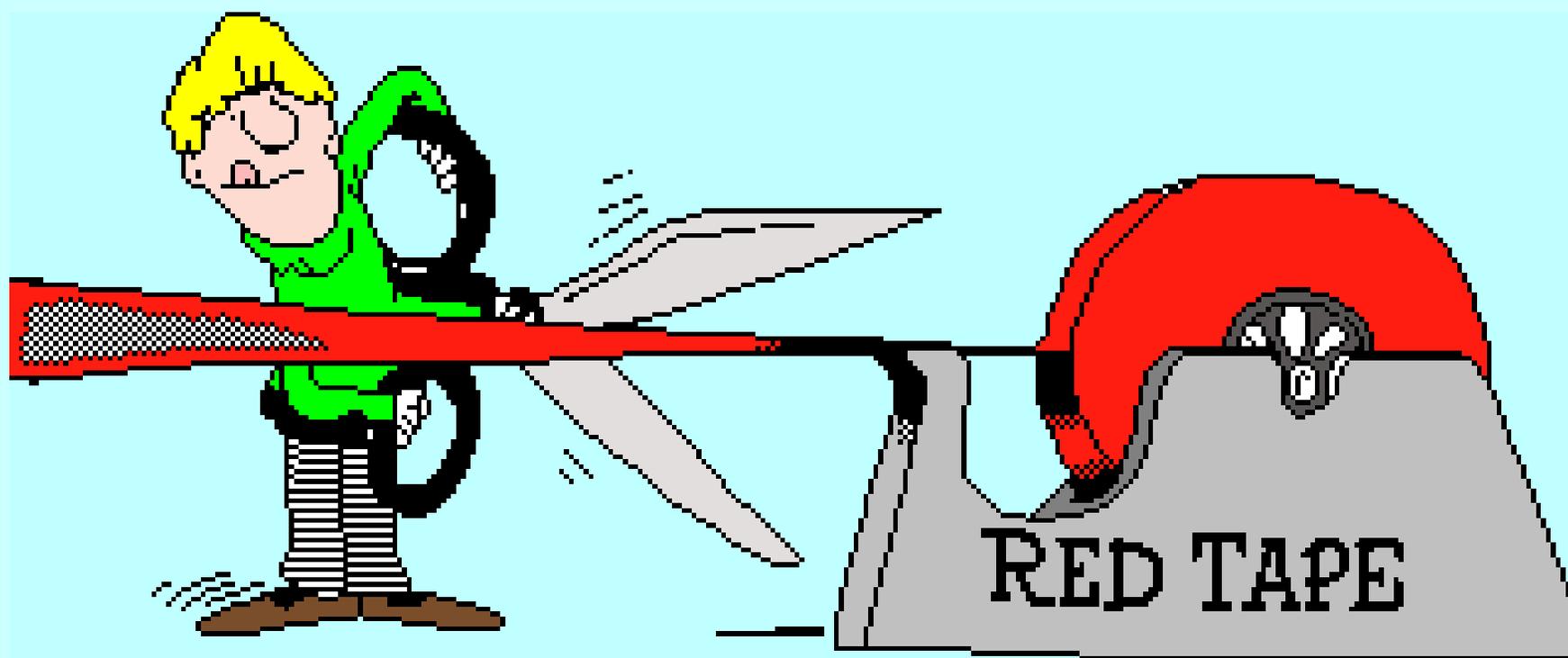


Call Us

Roanoke: 540-857-2391

Lynchburg: 434-845-0317

Harrisonburg: 540-434-8327





**Contact our Training Coordinator
Vickie Southall
540-857-2391 Ext.132**

DON'T IGNORE OUR CALLS OR EMAILS

★ We may be with the Government but

We really do want to help you



ETHICS & PROFESSIONALISM – 9:35 A.M.

MATERIALS FOLLOW

**ETHICS AND PROFESSIONALISM
2ND ANNUAL WESTERN DISTRICT OF VIRGINIA
BANKRUPTCY CONFERENCE**

APRIL 29, 2015

Honorable Rebecca Connelly

Honorable Paul M. Black

Richard C. Maxwell¹

¹ Mr. Maxwell acknowledges the courtesy of Thomas Spahn in making available his Virginia's Principles of Professionalism as a reference in the preparation of these materials.

Principles of Professionalism

Preamble

Virginia can take special pride in the important role its lawyers have played in American history. From Thomas Jefferson to Oliver Hill, Virginia lawyers have epitomized our profession's highest ideals. Without losing sight of what lawyers do for their clients and for the public, lawyers should also focus on how they perform their duties. In their very first professional act, all Virginia lawyers pledge to demean themselves "professionally and courteously." Lawyers help their clients, the institutions with which they deal and themselves when they treat everyone with respect and courtesy. These Principles of Professionalism serve as a reminder of how Virginia lawyers have acted in the past and should act in the future.

Principles

In my conduct toward everyone with whom I deal, I should:

- Remember that I am part of a self-governing profession, and that my actions and demeanor reflect upon my profession.**
- Act at all times with professional integrity, so that others will know that my word is my bond.**
- Avoid all bigotry, discrimination, or prejudice.**
- Treat everyone as I want to be treated — with respect and courtesy.**
- Act as a mentor for less experienced lawyers and as a role model for future generations of lawyers.**
- Contribute my skills, knowledge and influence in the service of my community.**
- Encourage those I supervise to act with the same professionalism to which I aspire.**

In my conduct toward my clients, I should:

- Act with diligence and dedication — tempered with, but never compromised by, my professional conduct toward others.**
- Act with respect and courtesy.**

•Explain to clients that my courteous conduct toward others does not reflect a lack of zeal in advancing their interests, but rather is more likely to successfully advance their interests.

In my conduct toward courts and other institutions with which I deal, I should:

- Treat all judges and court personnel with respect and courtesy.**
- Be punctual in attending all court appearances and other scheduled events.**
- Avoid any conduct that offends the dignity or decorum of any courts or other institutions, such as inappropriate displays of emotion or unbecoming language directed at the courts or any other participants.**
- Explain to my clients that they should also act with respect and courtesy when dealing with courts and other institutions.**

In my conduct toward opposing counsel, I should:

- Treat both opposing counsel and their staff with respect and courtesy.**
- Avoid ad hominem attacks, recognizing that in nearly every situation opposing lawyers are simply serving their clients as I am trying to serve my clients.**
- Avoid reciprocating any unprofessional conduct by opposing counsel, explaining to my clients that such behavior harms rather than advances the clients' interests.**
- Cooperate as much as possible on procedural and logistical matters, so that the clients' and lawyers' efforts can be directed toward the substance of disputes or disagreements.**
- Cooperate in scheduling any discovery, negotiations, meetings, closings, hearings or other litigation or transactional events, accommodating opposing counsels' schedules whenever possible.**
- Agree whenever possible to opposing counsels' reasonable requests for extensions of time that are consistent with my primary duties to advance my clients' interests.**
- Notify opposing counsel of any schedule changes as soon as possible.**
- Return telephone calls, e-mails and other communications as promptly as I can, even if we disagree about the subject matter of the communication, resolving to disagree without being disagreeable.**
- Be punctual in attending all scheduled events.**

•Resist being affected by any ill feelings opposing clients may have toward each other, remembering that any conflict is between the clients and not between the lawyers.

HYPOTHETICAL NO. 1
"DID I GET ON THE WRONG TRAIN?"

Omi Gosh is one of four attorneys in a firm in a small city in Virginia. Omi has been practicing for 10 years and handles a range of matters from business formations to commercial transactions with some collection and bankruptcy work thrown in. Zell Ott, a local car dealer, comes to see Omi seeking help in dealing with trade creditors who are getting tired of waiting for payment and have threatened to bring suit. Omi agrees to help Zell figuring that it will involve a few calls and placating a few creditors.

About a week after the meeting, the lawsuits begin to be filed. It turns out that Zell determined that he should "negotiate" with the creditors. His negotiating style of threatening his creditors with counterclaims if they sue did not play very well with the creditors.

Zell delivers the complaints to Omi and says that they are going to grind the creditors into dust and that he has all his assets hidden so that no one can find them. Zell tells Omi to file answers which just deny everything. Omi files a bare bones answer.

About a week later, Omi receives Requests for Admission, Requests for Production, and Interrogatories from the counsel for each of the creditors. When Omi contacts Zell about responding to this discovery, Zell tells Omi "Just object to everything. Let's run them around the post."

QUESTIONS:

1. Is Omi obligated to follow Zell's directions?
2. Should Omi let the court know his client is not being cooperative?
3. If he should, how does he do it?

DISCUSSION

HYPOTHETICAL NO. 1

1. Is Omi obligated to follow Zell's directions?

A lawyer has discretion to carry out a representation as he/she sees fit. Before agreeing to represent a client, a lawyer should define the scope of his representation. Virginia Rule 1.2. Representation is generally a "joint undertaking" between the lawyer and his/her client, but a lawyer is not required to pursue objectives or employ means simply because a client orders the lawyer do so. Virginia Rule 1.2 cmt. [1]. The client should designate the objective and the lawyer should advise the client on the best means to achieve the objective.

Comment [1] to Virginia Rule 1.2 states:

Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by the law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. In that context, a lawyer shall advise the client about the advantages, disadvantages, and availability of dispute resolution processes that might be appropriate in pursuing these objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. These Rules do not define the lawyer's scope of authority in litigation.

Comment [7] to Virginia Rule 3.4 states:

In the exercise of professional judgment on those decisions which are for the lawyer's determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of a client. However, when an action in the best interest of a client seems to the lawyer to be unjust, the lawyer may ask the client for permission to forego such action. The duty of lawyer to represent a client with zeal does not militate against his concurrent obligation to treat, with consideration, all persons involved in the legal process and to avoid the infliction of needless harm. Under this Rule, it would be improper to ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade any witness or other person.

Comment [1] to Virginia Rule 1.3 states:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. A lawyer's work load should be controlled so that each matter can be handled adequately.

2. Should Omi let the court know his client is not being cooperative? If he should, how does he do it?

The Virginia Rules do not require Omi to inform the court that Zell is not cooperating. Omi should explain to Zell the implications of his behavior and try to convince him to reconsider his direction to "deny everything." "One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights." Virginia Rule 1.6 cmt. [1]. Generally, a client's only duty is to himself, whereas a lawyer has a duty to his profession and the court. Therefore, even

though a client may feel it is in his best interest to omit information or falsify facts, a lawyer must diligently balance the client's interests with those of the court.

If Zell's behavior continues to get out of hand and Zell's zealous directions to object to and deny everything appear to be unjust behavior, Virginia Rule 1.6 includes a "safe harbor" provision for lawyers to disclose information by admitting facts that cannot properly be disputed. Thus, if Omi knows that what Zell wants him to deny are undisputed facts, Omi may admit such facts.

Comment 5 of Virginia Rule 1.6 states:

[a] lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

The Principles of Professionalism state:

In my conduct toward my clients, I should:

Act with diligence and dedication tempered with, but never compromised by, my professional conduct toward others.

In my conduct toward opposing counsel, I should:

Cooperate as much as possible on procedural and logistical matters, so that the clients' and lawyers' efforts can be directed toward the substance of disputes or disagreements.

If Zell were to continue on a path of obstructionism, and such actions are brought to the attention of the court, Omi should describe to the court the matters at hand and the directions that he has received from his client. Not really throwing Zell under the bus, but describing to the court the constraints under which Omi is operating. For example, "Your honor, the defendant has asked that my client admit that the validity of an invoice sent by

the defendant. I have reviewed the invoice with Mr. Ott and explained to Mr. Ott that we have an obligation to admit those facts which are not in dispute. Mr. Ott directed me to deny the request for this admission, because he wants the defendant to have to prove everything."

HYPOTHETICAL NO. 2

"WHY AM I STILL ON THE WRONG TRAIN?"

Things have not gone as well as Zell might have hoped in state court. Trial dates are coming up and Zell's continued efforts to "negotiate" have not worked any magic with creditors. Zell figures he can fix these creditors by filing bankruptcy on the eve of the trials.

Even though he has been paying Omi only sporadically, some money magically appears to pay the Omi's fees provided that he files a chapter 11 petition for Zell. Omi emails the Schedules and Statement of Affairs to Zell. When Zell and Omi meet to go over the information, Omi is amazed to see that "None" or "None of your business" are the answers to most of the questions. Omi files the petition, but not the Schedules and Statement of Affairs. After several hours of hard negotiating, Omi finally gets answers for the Schedules and Statement of Affairs, but he has doubts about the accuracy of the information

As part of the filing, Omi files a request for Zell to be permitted to use cash collateral. During the hearing on the use of cash collateral, the counsel for a creditor, follows up his earlier requests for back up information on the numbers in the cash collateral budget. Zell tells Omi that under no conditions are the creditors going to look at his books. Before the hearing, Zell tells Omi that the other attorney is the enemy and that polite conversation is not going to get the job done. During the hearing, Zell makes facial expressions when the other side is making its case. When Zell feels that Omi is not being effective, Zell gets into an argument with opposing counsel.

QUESTIONS:

1. Is there a problem with filing bankruptcy on the eve of trial?
2. What should Omi do with Zell?
3. Assuming that Omi realizes that he does not want to be on this train anymore, how does he get off?

DISCUSSION

HYPOTHETICAL NO. 2

1. Would it be wrong for Omi to file bankruptcy on the eve of trial?

That depends on what you mean by wrong. We need to distinguish the standards set by the ethics rules from the aspirational goals of the Principles of Professionalism. The ethics rules deal with a lawyer's obligations to represent a client and the lawyer's responsibilities to the judicial system. The ethics rules establish a fairly low threshold for performance. The Principles of Professionalism guide the lawyer to the highest level of performance in her interaction with other attorneys, the courts, and her clients.

There are Virginia Rules dealing with misconduct.

Virginia Rule 3.4(j)

A lawyer shall not: . . . [f]ile a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

Virginia Rule 4.4

In representing a client, a lawyer shall not use means that have no purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

The Preamble to the Virginia Rules set some parameters on lawyer behavior.

A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials.

[A] lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.

Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

The Virginia Rules do provide some guidance on how an attorney should conduct herself.

Virginia Rule 3.4 cmt. [7]

In the exercise of professional judgment on those decisions which are for the lawyer's determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of a client. However, when an action in the best interest of a client seems to the lawyer to be unjust, the lawyer may ask the client for permission to forego such action. The duty of lawyer to represent a client with zeal does not militate against his concurrent obligation to treat, with consideration, all persons involved in the legal process and to avoid the infliction of needless harm. Under this Rule, it would be improper to ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade any witness or other person.

Virginia Rule 3.4 cmt. [8]

In adversary proceedings, clients are litigants and though ill feeling may exist between the clients, such ill feeling should not influence a lawyer's conduct, attitude or demeanor towards opposing counsel. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system. A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings,

settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of the client. A lawyer should follow the local customs of courtesy or practice, unless the lawyer gives timely notice to opposing counsel of the intention not to do so. A lawyer should be punctual in fulfilling all professional commitments.

While the Virginia Rules provide a framework for ethical practice, you can still be a jerk and not be in violation of the Virginia Rules. A 1997 LEO stated that a lawyer only violates the rules of ethics if he intentionally or habitually violates a court rule or order. Virginia LEO 1700 (6/24/97) (Attorney failed to notify opposing counsel of an action to transfer venue and filed a notice of hearing without obtaining available dates).

In many instances, there is no alternative except to file a bankruptcy pleading on the eve of a foreclosure. However, where there is some latitude in the date of the filing, the better course of action would be to not file at a time where the other party has to incur the expense of traveling to a foreclosure sale only to find out that a bankruptcy was filed 30 minutes before the sale. Likewise, a filing on the eve of trial is a disservice to the judge who has prepared for a trial which one attorney knows was never going to happen.

The best answer to this question is found in the Principles of Professionalism: "Treat everyone as I want to be treated – with respect and courtesy." Call the other side and let them know your client is going to file and email the other attorney the notice of filing as soon as you file. I have found that I am more likely to go out of my way to assist or cooperate with debtor's attorneys that don't run me around the pole before filing.

2. What should Omi do with Zell?

Omi should explain the benefits of courteous behavior to Zell. This won't always be easy and some clients won't want to hear it, but you should explain that your civility toward the other attorney is not a sign of weakness and civility can pay off by saving money in the long run. Acting with courtesy may also ultimately benefit your client to the extent that a judge becomes involved or has the ability to see unprofessional behavior from the other side.

The Principles of Professionalism state:

In my conduct toward my clients, I should:

Explain to clients that my courteous conduct toward others does not reflect a lack of zeal in advancing their interests, but rather is more likely to successfully advance their interests.

In my conduct toward opposing counsel, I should:

Avoid reciprocating any unprofessional conduct by opposing counsel, explaining to my clients that such behavior harms rather than advances the clients' interests.

Resist being affected by any ill feelings opposing clients may have toward each other, remembering that any conflict is between the clients and not between the lawyers.

Experienced lawyers may find it easier than a less experienced attorney to admonish this type of client, but every attorney should explain to this type of client that the attorney is acting this way because that is how a professional attorney acts and that the client's interests will be benefitted long term by this professional approach.

In the Hypothetical it is hard to believe that the judge would not make some comment to Zell. Indeed, the judge benefits the attorney, the case, and the process when he sets a wayward client straight. Sometimes, a client just needs to hear it from the judge before the client believes it. Likewise, a judge's favorable comments about counsel's civility can have the same effect.

3. Assuming that Omi realizes that he does not want to be on this train anymore, how does he get off?

Omi may consider withdrawing from this representation. Virginia Rule 1.16 outlines the means for terminating representation under both mandatory and discretionary circumstances.

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is illegal or unjust;

(2) the client has used the lawyer's services to perpetrate a crime or fraud;

(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) In any court proceeding, counsel of record shall not withdraw except by leave of court after compliance with notice requirement pursuant to the applicable Rules of Court. In any other matter, a lawyer shall continue representation notwithstanding good cause for terminating the representation, when ordered to do so by the tribunal.

Omi must keep in mind that withdrawal of representation must be accomplished without any material adverse effect on the client's interests (Virginia Rule 1.16 cmt. [7]) unless the client persists in a course of action the lawyer believes is illegal or unjust or if the client insists on pursuing an objective that the lawyer considers repugnant or imprudent (Virginia Rule 1.16 (b)(1),(3)). Listen to your inner voice, when deciding whether to take on a particular client. If something just does not seem right, send the client elsewhere. If you have just started a representation and you find the client questioning every decision you make or you dread getting a phone call from that client, consider sending them on to another attorney.

HYPOTHETICAL NO. 3

"THE LIGHT AT THE END OF THE TUNNEL IS THE TRAIN COMING AT ME"

Somehow Zell's bankruptcy case is still alive when the date for the meeting of creditors arrives. Zell tells Omi not to worry because he has been practicing his responses to questions that Robert VanArsdale might ask. Omi asks how Zell knows what questions will be asked. Zell says it does not matter because his answers will be "I don't know", "I'm not sure", or "I'll have to get back with you on that."

Robert asks Zell if he has listed all of his assets on his Schedules. Before Zell answers, Omi's mind runs back to his initial conversation when Zell told him that he had hidden lots of assets. Omi has not probed into this area other than to tell Zell that he was signing the Schedules under penalty of perjury. Still Omi wonders "Should I say something?" A few seconds later Zell says "Yep, that's everything."

QUESTIONS:

1. Should Omi have said anything?
2. Should Omi have probed deeper?

DISCUSSION

HYPOTHETICAL NO. 3

1. Should Omi have said anything?

From the Hypothetical it is not clear that Omi knows that Zell is committing perjury by lying under oath about his assets. It could be that Zell just likes to say he is hiding assets when, in fact, he has honestly reported all of his assets on his Schedules.

The best course of action would be to immediately address this matter the first time it comes up. This might result in the client storming out the door, but that is a client you do not want. Some potential clients have the thought that it is a lawyer's role to assist them in committing fraud. Reinforcement of honesty should be incorporated into the initial letter to the potential client, any worksheets the client is asked to prepare, and followed up with a Schedule by Schedule reaffirmation that the information on each Schedule is correct. Sometimes a client will remember an asset when asked by the trustee at the 341 meeting. If this occurs, the Schedules should be immediately amended. Likewise, if a client gets religion after the 341 meeting and remembers some unlisted assets, the Schedules should be immediately amended.

The problem for Omi is that Zell is a loose cannon. If it turns out that Zell was hiding assets and those assets are discovered, there is a very good chance that Zell will say that he was advised by Omi that those assets did not have to be listed. Omi's best defense is to document that he advised Zell to list all of his assets.

Comment [10] to Virginia Rule 1.2 states:

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer shall not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. See Rule 1.16.

Virginia Rule 1.6 (c)(1) and (2) state:

A lawyer shall promptly reveal:

- (1) the intention of a client, as stated by the client, to commit a crime and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned, and, if the crime involves perjury by the client, that the attorney shall seek to withdraw as counsel;
- (2) information which clearly establishes that the client has, in the course of the representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal. Before revealing such information, however, the lawyer shall request that the client advise the tribunal of the fraud. For the purposes of this paragraph and paragraph (b)(3), information is clearly established when the client acknowledges to the attorney that the client has perpetrated a fraud.

If Omi knows that Zell is untruthfully testifying under oath about his assets and if Omi confronts Zell and Zell continues to commit perjury, Omi must reveal Zell's intentions to the court. Virginia LEO 542 addresses this problem: "If the client cannot be dissuaded and the crime involves perjury, the attorney must reveal the error to the court and withdraw from further representation. If the client commits perjury despite the assurances to his lawyer that he would not, the attorney has the duty to disclose the commission of the crime to the court." Virginia LEO 1367 informs and Virginia Rule 1.6(c)(2) provides that an attorney is required to disclose that a client has perpetrated a fraud on a tribunal when the client acknowledges to the attorney that the client has committed a fraud.

Comment [1] to Virginia Rule 1.6 states:

The lawyer is part of a judicial system charged with upholding the law and one of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

2. Should Omi have probed deeper?

If Zell had come in seeking to file a bankruptcy, the matter should have been addressed when the statement about hiding assets was made. In this scenario, when the representation became one involving bankruptcy, Omi should have pressed his client extremely hard on the subject of hidden assets. By probing deeper, Omi would have been protecting himself.

HYPOTHETICAL NO. 4

"OUCH"

During Zell's bankruptcy case, one of Zell's creditors, Ms. Persistent, who had a judgment against Zell and his ex-wife brought an action to deny a discharge to Zell based on the fact that in the year prior to the filing of his bankruptcy case and prior to that creditor obtaining a judgment Zell and his ex-wife had transferred real property to Zell's sister with the intent to hinder, delay, or defraud creditors. A hearing was held on the denial of discharge complaint.

While the bankruptcy judge had the matter under advisement, he independently discovered that earlier that year in another district, Ms. Persistent had brought a similar denial of discharge action in the bankruptcy case filed by Zell's ex-wife. In that action, the bankruptcy judge in the other district determined that the sale of the property had the attributes of an arms-length transaction. Ms. Persistent was represented by the same counsel in both denial of discharge actions.

According to counsel for Ms. Persistent, counsel for Ms. Persistent and counsel for Zell, discussed the decision in the other district that the sale was an arm's length transaction. Because counsel believed that the cases had an independent fact basis, they determined not to advise the bankruptcy judge of the other decision. The difference in the facts as stated by Zell's counsel were that (1) Zell's ex-wife received \$0 for the sale of the property and Zell received \$6,005.57; (2) Zell's ex-wife did not retain any interest in the property and Zell retained a right of first refusal; (3) the purchaser was the Zell's sister, but the sister-in-law of Zell's ex-wife; (4) Zell knew the identity of the purchaser, but Zell's ex-wife claimed not to know the identity of the purchaser; and (5) Zell's ex-wife only saw a signature page and was told by Zell that what she was signing was a dual-agent agreement, but Zell had been attempting to sell the property for some time.

QUESTIONS:

1. Did counsel for Ms. Persistent have a duty to advise the judge in Zell's case of the prior decision?
2. Did counsel for Zell's counsel have a duty to advise the judge of the prior decision?

DISCUSSION
HYPOTHETICAL NO. 4

This hypothetical comes directly from *In re Bowen (Tiffany Smith v. Charles Bowen)*, 2015 WL 775053 (Bkrtcy. E.D.Va.).

It is always better to disclose adverse law. Bring it up first, state why it does not control or why the court should reach a different result, and move on. First, this approach shows that you are a professional. Second, there is a good chance that opposing counsel will have found the adverse law and your argument will look very weak when opposing counsel rebuts your argument with the adverse law that you forgot to mention. Finally, there is even a better chance that the judge will either know of or discover the adverse law. You never want to be in the position where the judge thinks you are lacking in candor. Not only will your credibility be destroyed in the present action, but it will be destroyed in all other matters before that judge. Your biggest asset is your credibility.

Here is what Judge Phillips said about the situation:

In this case, there also exists an unusual circumstance in that another court has already examined the transfer of the Property and found that the price paid by Eileen Bowen was "comparable to what might have been received by a stranger in an arm's length transaction under similar circumstances" *Smith v. Bowen (In re Bowen)*, 498 B.R. 584, 590 (Bankr. W.D. Va. 2013). On March 15, 2012, two days before the Debtor's bankruptcy filing, Melissa Bowen filed a Chapter 7 petition in the U.S. Bankruptcy Court for the Western District of Virginia, Lynchburg Division, Case No. 12-60622. Approximately six months later, Ms. Smith filed an adversary proceeding (*Smith v. Bowen (In re Bowen)*, 498 B.R. 584, (Bankr. W.D. Va. 2013)) seeking to bar Melissa Bowen's discharge pursuant to 11 U.S.C. § 727(a)(2)(A) alleging, as in the present case, that Melissa [15] Bowen transferred her interest in the Property within one year of her bankruptcy filing with the intent to hinder, delay or defraud Ms. Smith. Judge Connelly issued a memorandum opinion and separate

related order denying the relief requested by Ms. Smith and concluding that Melissa Bowen did not have the actual intent to hinder, delay or defraud Ms. Smith. Among her findings of fact was a determination that the sale of the Property "appear[ed] to be fairly consistent with what would be expected from an arm's length transaction under similar circumstances." 498 B.R. at 590. Ms. Smith did not appeal this decision.

Had Judge Connelly's prior decision been known to Debtor's counsel prior to the trial, it would be reasonable to think that the Court might have been called upon to determine whether the doctrine of collateral estoppel, also known as "issue preclusion," would have precluded the Plaintiff from relitigating whether there was a lack of consideration paid for the Property. Despite the various issues that may be involved in determining whether all of the required elements of collateral estoppel have been met (see *Taylor v. Sturgell*, 553 U.S. 880, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008); *Harper v. Knight (In re Knight)*, Adv. Pro No. 02-06838-DOT, 2004 Bankr. LEXIS 2217, 2004 WL 3186390, at *2 (Bankr. E.D. Va. Dec. 15, 2004)), the failure of the Debtor to raise these issues renders them moot. The Court stresses that [16] it has made its findings in this adversary proceeding without reliance on Judge Connelly's determinations but strictly on the basis of the evidence presented at trial.

The Court discovered Judge Connelly's memorandum opinion independently, as it was not cited by either counsel during the trial or in any memoranda. The Court is troubled by the failure of Ms. Smith's counsel to disclose the existence of Judge Connelly's decision, which the Court must conclude was an intentional omission given that Ms. Smith was represented by the same attorneys in both adversary proceedings. HN6 Rule 2090-1(I) of the Local Rules of the United States Bankruptcy Court for the Eastern District of Virginia adopts the Virginia Rules of Professional Conduct as the ethical standards relating to the practice of law in this Court. Virginia Rules of Professional Conduct, Va. Sup. Ct. R.

Pt. 6, §II, 3.3(a)(3) provides that "[a] lawyer shall not knowingly fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel;" The Court must also assume that the failure of Debtor's counsel, who was apparently not involved in the adversary proceeding involving Melissa Bowen, to bring Judge Connelly's memorandum opinion to the attention [17] of this Court was due to his being unaware of its existence. **Notwithstanding any suggestion that Judge Connelly's findings may not be "controlling legal authority in the subject jurisdiction" or may not amount to dispositive adverse authority under applicable standards involving collateral estoppel, counsel's failure to disclose Judge Connelly's adverse ruling is, at best, disingenuous.** [emphasis added. In an American Bar Association (ABA) 1949 formal opinion, which discussed a 1908 predecessor rule to Model Rule 3 of the Model Rules of Professional Conduct, the following test was enunciated:

Is the decision which opposing counsel has overlooked one which the court should clearly consider in deciding the case? Would a reasonable judge properly feel that a lawyer who advanced, as the law, a proposition adverse to the undisclosed decision, was lacking in candor and fairness to him? Might the judge consider himself misled by an implied representation that the lawyer knew of no adverse authority? [emphasis added]

ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 280 (1949). HN7 Under Model Rule 3.3, counsel has a duty not only to cite adverse authority but also must bring to the attention of the deciding court another court's ruling against the lawyer's client on the same issue. See *Borowski v. DePuy, Inc.*, 850 F.2d 297, 304-05 (7th Cir. 1988) (noting that Counsel's [18] "ostrich like tactic of pretending that potentially dispositive authority against [his] contention does not exist [is] precisely

the type of behavior that would justify imposing . . . sanctions."(internal citation omitted); *Matthews v. Kindred Healthcare, Inc.* No. 05-1091-T-AN, 2005 U.S. Dist. LEXIS 38295, 2005 WL 3542561, at *4-5 (W.D. Tenn. Dec. 17, 2005) (citing the Tennessee version of Model Rule 3.3 to address parties who failed to disclose prior adverse rulings). Judge Connelly's decision, in particular her finding concerning the adequacy of consideration for the transfer of the Property, amounts to a ruling against Ms. Smith on a key issue in this case and is therefore appropriate for this Court to consider, even if it may not necessarily control the ultimate disposition of this case. See also *Tyler v. State*, 47 P.3d 1095, 1104-05 (Alaska Ct. App. 2001) (discussing ABA Formal Op. 280).

As of the date of this program (April 29, 2015), counsel for Ms. Persistent has filed a Motion for Reconsideration asking Judge Phillips to remove the above language which is Footnote 10 in Judge Phillips' opinion. The Motion for Reconsideration is set for hearing in early May of 2015.

Virginia Rule 3.3 (a) states:

Candor Toward The Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal;

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, subject to Rule 1.6;

(3) fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

Comment

[1] The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

Misleading Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. Furthermore, the complexity of law often makes it difficult for a tribunal to be fully informed unless pertinent law is presented by the lawyers in the cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose controlling adverse authority in the subject jurisdiction which has not been disclosed by the opposing party.

CHAPTER 7 ISSUES & PERSPECTIVES – 10:40 A.M.

MATERIALS FOLLOW

Reviewing Unsecured Claims for Compliance with Fed. R. Bankr. P. 3001(c)(3) and Monitoring Compliance with Obligations to Protect PII Under Fed. R. Bankr. P. 9037

United States Trustee



Debt collection is a “broken system.”

– The Federal Trade Commission

FTC, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* (July 2010). Available at: <http://www.ftc.gov/opa/2010/07/debtcollect.shtm>.

The Debt Collection Industry

- Debt holders often resell their debts in bulk to debt buyers. The same debt may be resold several times.
- Debt buyers may have limited information and documentation about debts.
- Debts that are sold may include invalid debts, previously discharged debts or “stale” debts, *i.e.* debts beyond the applicable statute of limitations.

FTC, *The Structure and Practices of the Debt Buying Industry* (Jan. 2013).

Available at: <http://www.ftc.gov/opa/2013/01/debtbuyer.shtm>.

Invalid Debt Undermines the Integrity of the Bankruptcy System

“The Bankruptcy Code is not a set of suggestions to be followed when adherence is convenient. We are all well advised to respect the Code and thereby enhance public confidence in the system that we serve.”

Clifford J. White III, Director

Executive Office for United States Trustees

ABI Journal, Vol. XXXII, No. 2, March 2013

Unsecured Claims and the Role of Trustees and Other Parties in Interest

- Trustees have a duty to object to improper POCs if a purpose would be served.

11 U.S.C. §§ 704(a)(5), 1202(b)(1), 1302(b)(1); *Handbook for Chapter 7 Trustees* at 4-26 – 4-27; *Handbook for Chapter 12 Standing Trustees* at 3-19 – 3-21, 5-6; *Handbook for Chapter 13 Standing Trustees* at 3-23 – 3-27, 5-6.

- Other parties in interest may also object to improper POCs.

11 U.S.C. § 502(a), (b)(1).

2012 Changes to Fed. R. Bankr. P. 3001(c)(3)

- Effective December 1, 2012.
- Apply to POCs based on an “open-end or revolving consumer credit agreement.”
- For such POCs, creditor is no longer required to include a copy of the underlying writing.
- Creditor must file a statement with POC that includes five categories of information.

“Open-End or Revolving Consumer Credit Agreement”

- Typically a credit card or a line of credit.
- Does not include lump sum debt (*e.g.*, utility bills, hospital bills), even if paid off in fixed amounts over time (*e.g.*, mortgage or auto loan).
- Does not include a business agreement.
- Rule specifically excludes an agreement for which a security interest is claimed in the debtor’s real property (*e.g.*, home equity line of credit).

Five New Categories of Required Information

Creditor must provide all that apply:

- Name of the entity from whom the creditor purchased the account;
- Name of the entity to whom the debt was owed at the time of an account holder's last transaction on the account;
- Date of an account holder's last transaction;
- Date of the last payment on the account; and
- Date on which the account was charged to profit and loss.

Fed. R. Bankr. P. 3001(c)(3)(A)(i)-(v).

The Underlying Writing Can Be Requested by a Party in Interest

- On written request by a party in interest, the holder of the claim must provide a copy of the underlying writing within 30 days.

Fed. R. Bankr. P. 3001(c)(3)(B).

- The underlying writing may include choice-of-law provisions.

How Does the Revised Rule Help?

Transparency and More Information

- Is the POC asserted against the correct debtor?
- Does the POC appear to be valid (*e.g.*, how does it compare to the debtor's schedules)?
- Are there affirmative defenses or objections (*e.g.*, prior discharge, statute of limitations)?

Discharged Debt

- Debt buyers may sometimes purchase and seek to collect on discharged debt.
- When a debtor has had prior bankruptcy filings, was the debt discharged in a prior case?
- A debt buyer that files a claim for discharged debt can be sanctioned for a discharge injunction violation. *See* 11 U.S.C. § 524(a)(2).

Stale Debt

- Debt buyers often purchase stale debt.

FTC, *The Structure and Practices of the Debt Buying Industry* (Jan. 2013) at 42-43.

- Statute of limitations is an affirmative defense that trustees have standing to raise; other parties in interest may also have standing.

11 U.S.C. §§ 502(b)(1), 558.

- Consider objections to time-barred debt when appropriate.

Potential Sanctions For Not Providing Required Information

Court may:

- Preclude presentation of the omitted information as evidence.
- Award other appropriate relief, including expenses and attorney's fees.

Fed. R. Bankr. P. 3001(c)(2)(D).

Claim Not Disallowed Solely For Failure to Comply with Rule

- “Failure to provide the required information does not itself constitute a ground for disallowance of a claim. *See* [11 U.S.C.] § 502.”

2011 Advisory Committee Note to Fed. R. Bankr. P. 3001.

- But if the POC is deficient, it does not have *prima facie* validity.

Fed. R. Bankr. P. 3001(f).

- And if the court bars the claimant from introducing evidence (Fed. R. Bankr. P. 3001(c)(2)(D)(i)), the creditor may be unable to prove up the POC.

What if the Claim Was Scheduled by the Debtor?

- In some courts, it is bad faith for a debtor to object on procedural grounds if the debtor scheduled the debt.
- Parties in interest can always object on available substantive grounds. *See* 11 U.S.C. § 502.

What if the Creditor Does Not Provide the Underlying Writing After Request?

- If the POC itself complies with the rule, it will continue to have *prima facie* validity even if the creditor later fails to provide the underlying writing after a written request.
- Consider asserting appropriate substantive objections (if known).
- Other appropriate relief?

Potential Options Regarding Non-Compliant or Questionable Claims

- Request information.
- Request POC amendment.
- Seek discovery.
- Consider potential objections under § 502.
- Other appropriate relief?

Does a POC Comply with Rule 3001(c)?

YES

Is claim potentially subject to challenge pursuant to § 502?

- Previously Discharged Debt
- Invalid Debt
- Stale Debt (beyond applicable statute of limitations)

NO

No action

YES

- Consider requesting underlying writing
- Consider inquiry letter or discovery
- Consider potential objections under § 502

Does a POC Comply with Rule 3001(c)?

NO

Consider sending written inquiry requesting:

- Compliance with FRBP 3001
- Underlying writing, if appropriate

Creditor responds properly
Consider potential objections
under § 502

Creditor's response is inadequate

- Consider discovery
- Consider potential objections under § 502
- Consider other appropriate relief

Pattern or practice?

- Other appropriate relief?
- Alert U.S. Trustee

Protecting PII – Creditors’ Obligations and Debtors’ Rights

- Bankruptcy filings such as proofs of claim are now available electronically.
- Creditors and other parties in interest have obligations to protect debtors’ PII when filing proofs of claim and other documents with the court.
- Debtors’ counsel should be vigilant because their clients have rights if their PII is improperly disclosed.

Rule 9037 Protection Against Disclosure of PII

- Under Fed. R. Bankr. P. 9037(a), anyone filing a POC or other document with the bankruptcy court must protect and prevent the disclosure of:
 - An individual's full SSN;
 - An individual's full TIN;
 - An individual's full birth date;
 - A minor's full name; or
 - A full financial account number.
- An individual waives the protections of Fed. R. Bankr. P. 9037(a) by filing his or her own PII not under seal.

See Fed. R. Bankr. P. 9037(g).

What PII May Be Disclosed

- A POC or other document filed with the bankruptcy court may disclose the following:
 - The last four digits of an individual's SSN or TIN;
 - The year of an individual's birth;
 - A minor's initials; or
 - The last four digits of a financial account number.

Fed. R. Bankr. P. 9037(a).

Remedies for Improper Disclosure of PII

- If PII is improperly disclosed in a POC or other document, options include:
 - Notifying the filer of the document and requesting that the filer take prompt action to restrict public access. *See* 11 U.S.C. § 107(c)(1). The filer should not seek to delete the document.
 - Seeking corrective action by the bankruptcy court to restrict access.
- Any motion seeking to restrict access may need to be filed under seal, so as not to draw further attention to the PII breach before it is corrected.

Referrals to the United States Trustee

- Systemic or egregious rule violations.
- Claims filed on discharged debt.
- Pattern or practice of filing invalid claims.
- Pattern or practice of improper PII disclosures.

HOW TO MAKE YOUR TRUSTEE HAPPY

General everyone wants the system to work and this requires coordination between the debtor, his counsel and the trustee. Full disclosure is the rule

- I. Prior to §341 meeting NOTIFY TRUSTEE IN FOLLOWING INSTANCES:
 - A. Translator is needed
(Note: must use translator service, not friend or relative)
 - B. Complex case/large number of potential creditors appearing
 - C. If client or attorney will be significantly late
 - D. Active corporation or corporate assets (notify trustee ASAP)

- II. SEND 5 DAYS PRIOR TO §341:
 - A. Trustee Questionnaire
 - B. Domestic Support Form
 - C. Bank Statements for each account
 - 1. 3 months prior to filing
 - 2. Especially need amount in account on date of filing
 - D. Retirement policy
 - 1. Show documentation policy is exempt
 - E. Cash Surrender on Life Insurance
 - 1. Need documentation of amount
 - 2. If exempt, need documentation of exemption
 - F. Homestead Deed with a recording date or copy if not filed
 - G. Prior Homestead Deed
 - H. Separation/Divorce Agreement
 - I. Vehicles:
 - 1. Value (based on average trade in value from NADA or Kelley Blue Book)
 - 2. Documentation of amount of payoff
 - 3. DMV transcript form showing lien. If no transcript, a copy of the title and security agreement
 - J. Taxes:
 - 1. Most recent state and federal return showing income and refunds
 - K. Pay stubs:
 - 1. For all debtors for stipulated time period before filing
 - L. Property:
 - 1. Deed
 - 2. Deed(s) of Trust
 - 3. Amount of payoff
 - M. Corporation Filing
 - 1. Most recent tax return
 - 2. Most recent financial statement
 - 3. Buy-sell agreement
 - 4. Liens/unpaid bills

5. Insurance coverage and expiration date
- N. When sending documents by e-mail please send the above as separate labeled documents.

III ATTORNEY BRING TO §341 MEETING:

- A. Copy of schedules with "wet" signature
- B. Copy of most recent tax return
- C. Any of the documents not supplied in II above

IV. AT §341 MEETING

- A. Social security card/W-2/medicaid card or IRS transcript to confirm social security number
- B. Photo ID
- C. Information regarding potential fraudulent or preference claims
 1. asset transferred
 2. consideration (if any)
 3. copy of deed
 4. date of transfer
 5. name and address of transferee
- D. Substitute Counsel
 1. get client's approval
 2. review file with substitutes
 3. notify panel trustee prior to meeting if possible
 4. do not abuse
- E. Continuances
Trustee cannot grant
- F. Waiver of appearance requires a court order
- G. Unlisted assets
 1. personal injury cases
 2. after discovered assets/ immediate notification and amendment of schedules
 3. tax returns - which cannot be totally exempted
- H. Amended Exemptions
 1. multiple cars
 2. multiple guns
 3. earned income tax-credit
 4. child support/alimony

V. OTHER ISSUES

- A. Form of Homestead Deed- Substantial Compliance with §34-4 and §34-14
- B. Amended Homestead statute
 1. vehicles

2. guns
3. Earned Income Credit tax refund
4. child and spousal support
- C. Corporation/LLC
 1. valuation
 2. operation post petition
 3. list of name of other shareholders/address/contact data
- D. Case time frames
 1. designation as asset case
 2. claims bar date
- E. Re-noticing
- F. Supreme Court
 1. Lein Stripping (Bank of America v. Caulkett and BOA v. Toledo-Cardona)
 2. funds from converted chapter 13 (Harris v. Viegulation)
- G. Forgiveness of second mortgages

VI. DUE DILIGENCE IN BANKRUPTCY SCHEDULE PREPARATION

A bankruptcy practitioner has numerous parties to satisfy in preparation of schedules. First there are statutory requirements (see 11USC§527), requirements from the US Justice and the Chapter 7 Trustee and finally the debtor(s).

I will focus on your duty to the debtor and what actions should you do. Failing to meet these duties can expose the attorney to sanctions; loss of face or possible malpractice claims. Common problems in this area are:

- A. Failure to file or untimely filing of a homestead deed or failure to claim exemptions.
- B. Failure to identify or disclose assets that are exempt but lose that exemption if not properly disclosed or could cause a denial of discharge.
- C. Inappropriate pre bankruptcy and exemption planning.
- D. Insure that the answers under oath at the §341 meeting properly disclose assets on potential assets.
- E. Verify the type of ownership (is recorded deed TE/ROS)
- F. Verify perfection of liens - real estate (recorded copy deed of trust or judgment).
Vehicle (title security agreement or transcript)
- G. Verify bank balances and value of stock on date of filing
- H. Verify income is consistent with Schedule I, SOFA and means test.
- I. Be sure SOFA #1 contains current year and two prior years income.
- J. Valuation methods for real estate
 1. appraisal
 2. tax valuations
 3. recent sale
 4. Is home a trailer or double-wide?

Problems seen by Chapter 7 Trustees

HOMESTEAD DEED ISSUES:

Even by moving the deadline for filing a homestead deed to 5 days after the Section 341 meeting is ended (§34-17 Code of Virginia) – numerous problems arise from improperly filed homestead deeds.

The simple answer is to file the homestead deed at the same time you file the bankruptcy.

Avoid being pushed by deadlines:

You will know more about your case when your client is signing schedules than six weeks later at the creditors meeting and less likely to miss property that needs to be included on the homestead deed. There is no reason the attorney has to sweat the five day deadline.

Complete your case:

What you are looking for is to close out your case immediately after the Section 341 meeting. Otherwise you are working for free.

Some homestead exemption errors:

1. If the debtor has filed previously, get a copy of any homestead deed.
2. Personal injury exemption §34-28.1 does not include damages to automobiles.
3. Real Estate:
 - A. Homestead deed is filed where real estate is located - §34-6 Code of Virginia.
 - B. Tenants by the entirety property:
 1. Get billheads early.

- 2. Income tax liens.
- C. Problems at time of conveyance.
- D. Cross collateralized debt.

It is important to get all real estate documentation early to be able to deal with any real estate problem before filing.

PROBLEM OF VOIDABLE JUDGMENTS ON REAL ESTATE:

If the debtor owns real estate subject to judgment liens that are greater than the value of the property, the judgments may be voided pursuant to 11 U.S.C. 522 (f) (1). If this is not done the lien remains and must be paid when the real estate is sold. A wise bankruptcy attorney will do a partial search of title or obtain a release from the client stating that there are no recorded judgments.

TWO PROBLEM CASES:

***Kocher v. Campbell* 282 Va. 113; 2011 Va. LEXIS 133:**

Mr. Campbell the debtor had a cause of action arising from an automobile accident that occurred April 6, 2004. He filed for bankruptcy on October 1, 2005 and was discharged on January 6, 2006. His case was a no asset bankruptcy. In the bankruptcy Campbell did not list his personal injury case as an asset under Schedule B or claim it as exempt under Schedule C. Campbell filed his personal injury case on February 3, 2006. After two non-suits and by the statutes of limitations had run, defendant filed a motion for summary judgment asserting lack of standing and statute of limitations. The Virginia Supreme Court overruled the lower Court and dismissed Mr. Campbell's personal injury case stating Campbell had no standing to file the case.

When a debtor files bankruptcy, all the legal and equitable interest of debtor becomes property of the estate 11 U.S.C. §541. This includes the debtor's interest in the exempt property.

There are two ways the property is returned to the debtor:

1. trustee abandons the property during the case.
2. trustee closes the case and the unadministered assets are automatically abandoned.

If an asset such as the personal injury claim is not listed on the schedules it is not abandoned when the trustee closes the case.

The Virginia Supreme Court concluded that since the personal injury claim remained property of the estate, only the trustee was the proper party to bring the suit.

While the case was pending in Circuit Court, Campbell discovered the problem, the bankruptcy case was re-opened and the claim was abandoned to the trustee, but this did no good since the statute of limitations had run.

Possible Help: Look at 11 U.S.C. 108. When a trustee acquires a cause of action, his limitation period is the limitation period of the cause of action or two years whichever is longer. Of course, if the trustee brings the action, the trustee will want part of the proceeds.

Query: Even if the personal injury claim is listed but the case remains open, does the trustee have to abandon the claim so the suit can be filed?

Tavener V. Smoot 257 S. 3d 401(4th cir. 2001); 2001 U.S. App. LEXIS 15901 cert. denied 534 U.S.C. 1116, 2002 U.S. LEXIS 556.

The debtor, Mr. Smoot received \$217,059.25 in proceeds from a personal injury claim.

The same day he transferred \$210,000.00 from his personal account into the corporate account of his home repair business. From that account he made numerous transfers of funds to family members. Within one year he filed a Chapter 7 bankruptcy. On his schedules he listed \$217,000.00 personal injury proceeds which he claimed as exempt. The trustee filed a fraudulent transfer proceeding under 11 U.S.C. 548.

For purposes of our discussion:

- A. There was fraudulent transfer which was avoided by the trustee under 11 U.S.C. 548.
- B. There is no dispute that had the personal injury proceeds remained with the debtor, they would have been exempt.

The court found the transferred proceeds subject to the avoidance powers of the trustee and when the proceeds were returned, they remained in the bankruptcy estate despite the fact that they were originally exempt property. In its finding the Court noted that some lower courts have made opposite rulings on the theory of “no harm no foul.”

The Court did not accept this argument and based its findings on two reasons.

1. The 1978 revision of 11 U.S.C. 522(g) holds that a debtor in very limited circumstances can exempt property recovered by the trustee. This creates a premise that in all other circumstances a trustee can avoid transfer and retain the property even though it would have been exempt if it would not have been transferred from the estate.
2. The court stated that no property is exempt until the debtor claims it as exempt. Consequently the transfer of possible exempt property could hurt creditors, since if it were in the estate the debtor may not have chosen to exempt it.

Caveat: Since the time of this case, the one year limitation under 11 U.S.C. 548 has been amended to 2 years. Also, trustees can use Va. Code 55-80 (limitation period laches) and Va. Code 55-81 (limitation period 5 years) to avoid improper transfers with their longer limitation times.

Caveat: The reasoning in the Tavenner cases of can be used in preferential transfers to creditors under 11 U.S.C. 11 U.S.C. 547.

INCORPORATING TECHNOLOGY IN A BANKRUPTCY PRACTICE

11:35 A.M.

MATERIALS FOLLOW

Incorporating Technology in a Bankruptcy Practice

Malissa Giles
Don Burks
David Cox

Part I. Technology Tips: Software, Hardware & Websites

By Malissa Giles – mgiles@gileslambert.com

A. MOST USEFUL SOFTWARE PROGRAMS

1. Adobe Acrobat Pro DC

Monthly: \$19.99 with free cloud back up

PDF tools let you create, edit, sign, and track PDFs from anywhere.

- **Access powerful print production and digital publishing tools.** Preview, preflight, correct, and prepare PDF files.
- **Work anywhere.** Create, export, and sign PDFs from your computer or the Acrobat DC mobile app.
- **Take your files with you.** Use Mobile Link to access recent files across desktop, web, and mobile.
- **Edit anything.** Instantly edit PDFs and scanned documents — as naturally as any other file.
- **Make last-minute changes.** Edit text and organize PDF pages on your iPad.
- **Replace ink signatures.** Send, track, manage, and store signed documents with a built-in e-signature service.
- **Protect important documents.** Prevent others from copying or editing sensitive information in PDFs.
- **Eliminate overnight envelopes.** Send, track, and confirm delivery of documents electronically.

Primary Uses:

Edit exhibits and add labels in color

Edit pdf orders and track changes

Secure redaction

Allows user to add notes to scanned documents, label maps, etc.

2. Log me In

Remote Access to Desktop over the Web

Free trial, app. \$100 per year for 2 devices, more for additional devices

Secure anywhere, anytime access to your PC or Mac from your browser, desktop and mobile devices, plus premium features like file transfer, remote printing and cloud data access.

Multi-screen toggle.

Primary Uses

Desktop access anytime almost any place. The comfort of having screens look like they do when you are sitting at your desk creates ease of use and access. Allows me to toggle between multiple screens. I use from home computer (MAC), laptop (PC) and ipad.

When asked a question in court allows me to access all my files (since I have my wireless card and computer with me) in order to fully answer the Court's question. This can mean the difference between getting a case confirmed or having it continued.

3. ECF Capture Program (I use Best Case, MY ECF)

Captures ECFs from court and saves in an organized way.
Costs vary per program.

Primary Uses:

Everyday review of dockets, claims, etc. Cuts PACER bill significantly! By saving all documents automatically, you have access to them any time and do not have to pay every time you review the document.

4. Slateboard QuickCalc Amortization

Create custom flexible amortization schedules. Premium Edition, \$99.95 (Free demo available for about 2 weeks.)

Primary Uses:

Use to calculate bump-ups in payment, reduction of interest and projected distribution of funds on secured debts.

Use to determine payments if adjusting to have lower adequate protection payments.

Can be helpful in calculating funding for more sophisticated plans.

Useful schedules to demonstrate to clients the impact of loan modifications and options.

B. CRITICAL HARDWARE

1. Hi Speed Wireless Card and Laptop

Work wherever you are.

2. Scanner and printer.

Toss out the expensive copier!

So, with the cost-effectiveness of high-speed desktop scanners and printers, copiers and copier salesmen can be a thing of the past! Need multiple copies -- just scan and print. This is key to reducing paper documents and converting to a paperless office.

3. Multiple Screens - How many is too many?

Multiple screens allow you to treat information like it is laid out on a conference table. You can see all aspects without having important information hidden away under another program.

Article by Wired in 2013 stated that "*The dual monitor configuration was found to be 29 percent more effective, 24 percent more comfortable, and 39 percent easier when performing tasks that involved moving information around.*"

C. MOST USEFUL WEBSITES

1. National Data Center

The National Data Center lets debtors track their Chapter 13 case. It offers debtors the easiest way to access case information. It is a must to help your clients manage their cases. It allows

24-hour a day access to the records regarding their case. It tells them who has filed claims, who has been paid, and what receipts the trustee has.

I try to make all clients sign up within the first week of their case. It greatly reduces (but does not eliminate) the clients emailing counsel repeatedly about claims, payoffs, etc.

It also includes a portfolio of all of your cases as an attorney.

2. Bankruptcy Software Specialists (BSS)

This is the Chapter 13 Trustee's website for attorneys to track cases and see what has been paid, what payments have been made, status of the case, etc.

No amended plan should be done without reviewing the case on BSS.

This site remains up 100% of the time on one of my screens daily and is critical in reviewing cases after the bar date.

You can also access the calendar to print out all cases on 341s.

3. PACER

Uses for Pacer:

- a) National Pacer to check for prior filings
- b) Claims review
- c) Docket review for individual cases
- d) Filing numbers for jurisdictions
- e) Research or find representative pleadings
- f) Hearings scheduled for particular location

4. US Bankruptcy Court, WD of VA website

This is the Court's new and improved website. See court calendars for upcoming months, News and Announcements (including court cancellations), Local Rules, Opinions, Forms, etc.

5. Trustee's websites (www.ch13wdva.com and www.cvillech13.net)

- a) Calendar of whether Trustee or staff attorney will be at 341s/court hearings.
- b) Epay info. (GREATEST WAY TO MAKE TRUSTEE PAYMENTS OTHER THAN WAGE DEDUCTION!)
- c) Forms
- d) Instructional Videos
- e) Office contacts, etc.

Part II. Web Tools and Mobile Apps

By David Cox - david@coxlawgroup.com

A. Web Tools for the Bankruptcy Practice

1. Telephone Number Hosting and Analytics – www.hostednumbers.com

- a. Call Forwarding. No software to install or hardware required. Point to where you want your calls to ring (cell, office, home, etc).
- b. Online Reporting. Analytics that show call times, durations, locations, numbers dialed, and caller IDs.
- c. Call Forwarding Schedules. Configure your phone numbers ring to different locations based on the day of week or time of day (or holidays).
- d. Test Marketing. This is a great way to use a “tracking” number to see how a particular type of advertising is working without losing “ownership” of your phone number.

2. Conference Calls -- www.freeconference.com

- a. Free. No fees but long distance fees
- b. Online Meeting capabilities
- c. Available on Demand. Retain your own conference number to distribute.
- d. Calls are recorded.

3. Texting. www.textnow.com

- a. Desktop or Smartphone. Use on desktop or phone app platforms (or both). The TextNow app is supported on iOS, Android, and Windows devices.
- b. Syncs Conversations Across Platforms. Wherever you log in, your messages and conversations will be automatically synced so you can continue where you left off.
- c. Clients Often Prefer Texts. Texting is a convenient way to remind clients of their appointments or to request that they contact you when home numbers and email addresses fail.

4. Faxing. www.myfax.com

- a. Real Number. Myfax.com provides an actual fax number you can share with clients and others.
- b. Local and Toll Free Numbers. MyFax offers toll free and local fax numbers at no additional cost.
- c. Easy as Email. MyFax requires no hardware or software. All you need is Internet access, an email address, and a MyFax account.
- d. Save Money. MyFax eliminates the need for a fax machine, fax supplies (paper, ink, toner), a separate phone line for faxing, and costly maintenance.
- e. Free Trial. 30 day free trial then \$10 per month.
- f. How It Works. Simple as sending an email and attaching the document to fax.
- g. iPhone and Blackberry apps available.
- h. Also consider www.pinger.com

5. **Sending Large PDFs by Link** -- <https://cloud.acrobat.com/send>
 - a. Adobe "send now" for sending large files by link – like questionnaire, initial disclosures, fee agreement, etc.
 - b. Free of charge. Emails a link so you do not have to worry about mailbox or server limitations.

6. **Getting Tax Documents (transcripts, returns, W2s, 1099s, etc.) – IRS e-Services**
 - a. Registration Process.
 - i. Go to irs.gov
 - ii. Click For tax pros
 - iii. Register. You will need your Name, Social Security Number, Date of Birth, and the Adjusted Gross Income from your most recent tax return. You will choose a Username, Password, and Personal Identification Number (PIN) while completing the Registration form.
 - iv. Receive a Confirmation Code. A string of letters and numbers in a letter through the U.S. mail.
 - v. Confirm Registration. If you do not complete this step, your registration is not complete and your password will expire. Registration confirmation is accessed through the Registration Services page after you have logged in to the IRS registered user portal.
 - b. Transcript Delivery Services. Fax Form 8821 without cover to 855-214-7519, wait 5 days then access the transcripts, returns, and income documents online.

7. **Automate the Tax Dischargeability Analysis.** www.taxdischargedeterminator.com

B. Mobile Apps for the Bankruptcy Practice

1. Office Time

Track time by project and category
 Multiple hourly rates
 Run multiple timers
 Keep time in the background
 No monthly fees
 Work offline. No need for WiFi or 3G
 Pay version allows you to Export to Excel or Numbers
 and to Sync to OfficeTime on your Mac or PC (sold separately)



2. Scan snap Connect Application

Use with desktop or mobile scanner.
 Scanned images can be saved to mobile devices such as tablet and smartphone, using wireless LAN.
 You can receive the scanned image via your computer, or scan directly to a mobile device.



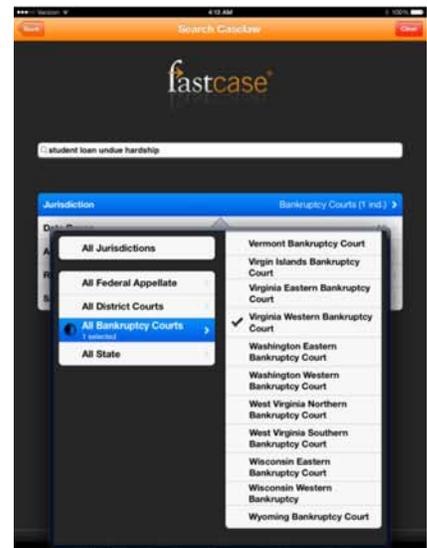
3. NADA Vin Scan

NADA VIN Barcode Scanner is designed for online subscribers. Makes vehicle appraisals faster and easier. Can use VIN barcode and scan with App. Get to the NADA guidebook values in seconds, including features and adjustments for mileage and equipment

Used Cars/Trucks			
2011 FORD Taurus-V6 Sedan 4D Limited			
MSRP: \$31,770	Weight: 0		
Mileage	75000		
Select Options			
Trade-In			
	Rough	Avg	Clean
Base \$	12,375	13,650	14,675
Mil Adj \$	-725	-725	-725
Opt Adj \$	0	0	0
Total \$	11,650	12,925	13,950
Loan & Retail			
	Clean Loan	Clean Retail	
Base \$	13,225	17,700	
Mil Adj \$	-725	-725	
Opt Adj \$	0	0	
Total \$	12,500	16,975	
Auction 4/20/2015 - 4/26/2015			

4. Fastcase HD

App is free and requires no paid subscription. Searchable library of cases and statutes. Keyword (Boolean), natural language, and citation search. Browse or search statutes. Save documents for use later. Subscription required for more robust website/desktop version, but free through VSB and other groups such as NACBA. Bug in the app: users need to click "Go" instead of "Login" after entry of use credentials. Also consider paid subscriptions with LEXIS Advance and WESTLAW Next apps.



5. LawStack

Includes the following: - US Constitution
 Federal Rules of Civil Procedure
 Federal Rules of Criminal Procedure
 Federal Rules of Appellate Procedure
 Federal Rules of Evidence
 Federal Rules of Bankruptcy Procedure
 Users can also browse the app's embedded collection and add items to the "stack," such as:
 Code of Federal Regulations, United States Code and certain state codes (not Virginia yet).
 Text search or header only search options
 Bookmark and email relevant results.

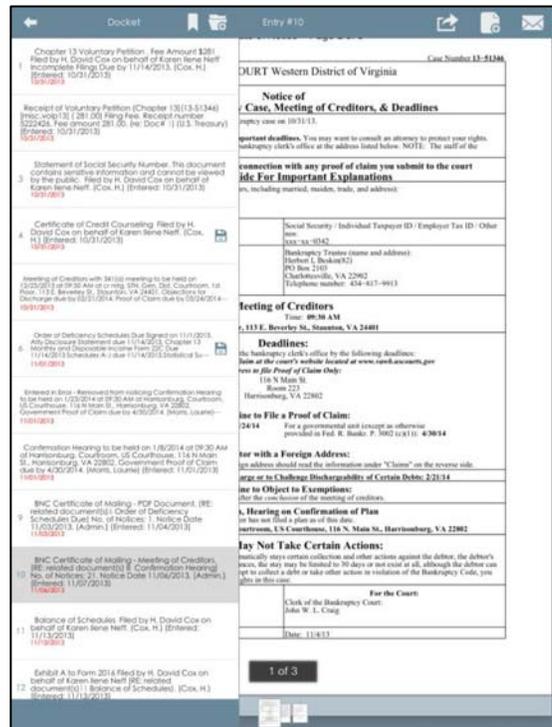
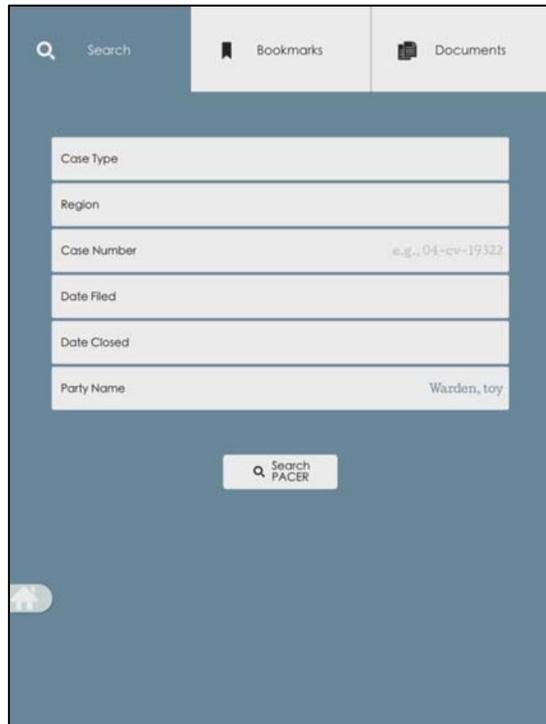
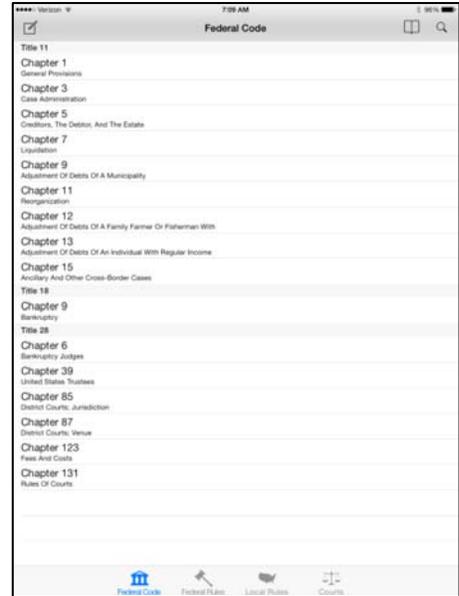


6. Bankruptcy+

Includes Bankruptcy Code, Bankruptcy Rules, and Local Rules
 Contact information for all Bankruptcy Courts,
 Appellate Courts, and Trustees.
 Browse or search by keyword, section number, or rule number.
 Auto-dial a Court or Trustee directly by touching the phone
 number linked in the App.
 Links to all the Bankruptcy Court web pages.

8. DKT

Pacer access.
 Bookmark cases for quick reference.
 Add documents to a briefcase for quick reference.
 Save, print, and email dockets and documents.
 All District, Appellate, and Bankruptcy courts.
 Normal PACER charges apply.
 Appears to update each evening (not real time).



9. Scanner Pro (Scanner PDF)

Mobile scanner.

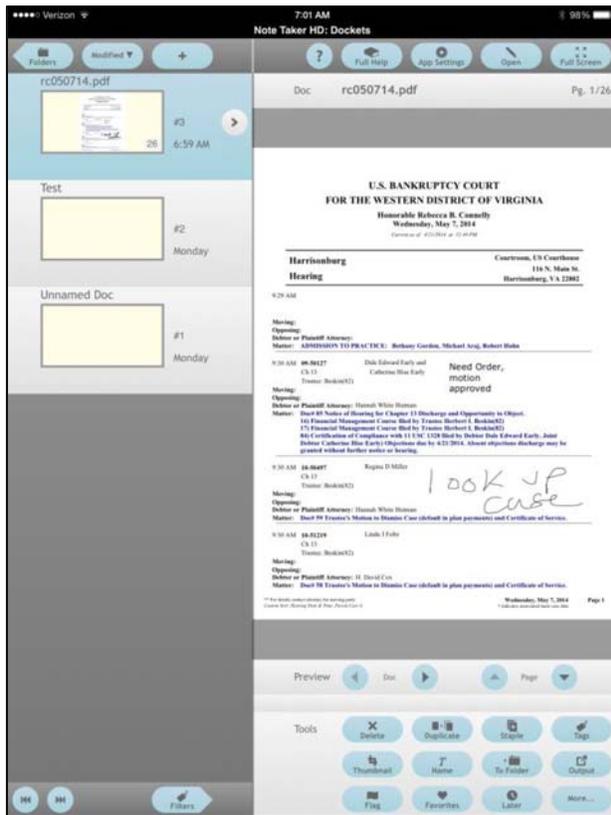
OCR (optical character recognition) search capabilities.

Create multiple page PDF documents.

Modify, delete, or change page order.

Save documents to cloud or email them.

Fax documents for charge, linked to iTunes account.



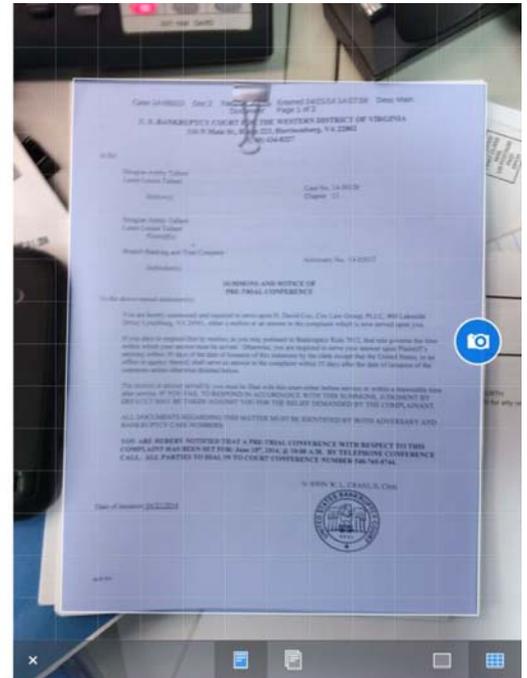
11. Evernote

Organizational notebook that syncs across all devices and desktops and lets the user take notes, capture photos, create documents, and record audio files.

Organize notes by notebooks and tags.

In addition to business applications, excellent for special projects & use outside of the office.

Premium features: take notebooks offline to access them anytime, allow others to edit your notebooks, and add a PIN for security.



10. Notetaker

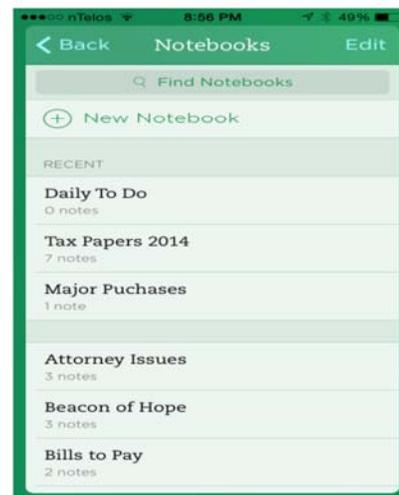
Handwriting application.

Allows user to make quick notes, memos, and to do lists.

Save and email documents.

Convert notes to pdf.

Import and write over pdf documents with handwriting or typed characters

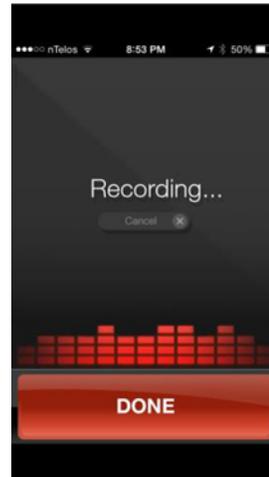


12. Loan Calc

Also consider **LoanSimMobile**

Simple loan amortization calculator.

Also consider bookmarking: www.bretwhissel.net, which permits "missing field" calculators.



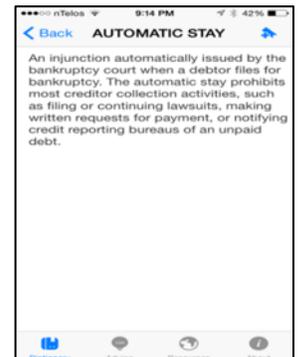
13. Dragon Dictation

Voice recognition and transcription application. Edit and email transcription results.

14. The Law Dictionary & Guide

Free simple legal dictionary.

Also consider Black's Law Dictionary, 9th Edition (\$54.99), or Law Dictionary (\$1.99) which includes the entire Black's Law Dictionary, 2nd Edition as published in 1910 (\$1.99).



15. ABI Journal

Download, save and read journal editions on mobile devices.

Easy format for paging through the magazines.

Saves back issues.

Search capabilities within individual issues (but not across the library).

Also consider Law Practice journal.



WDVA Courtroom WIFI

1. Connect to VAWBDSL
2. No password, not encrypted
3. May need to check "connect to a non-broadcasting network"

Part II. Paperless Office

By Don Burks - bankruptcy@donburkslaw.com

Tasks:

1. Digitize
2. Make it usable
3. Storage & Access
4. Protect

1. SCANNER

Desktop v. Large

2. PDF/Text

Naming
Searchable
Filing
Notes

3. STORAGE & ACCESS

Cloud/Personal Cloud/Hard drive
Organization
 Centralized
 Consistent
 Enforced
Security

4. BACKUP

Multiple
Frequent
Automatic
History

5. Software

Backup
PDF manipulation
Document Management
 Filing
 Moving
 Creating
Search

CHAPTER 13 TRUSTEES AND STAFF PANEL – 1:45 P.M.

MATERIALS FOLLOW

RECENT CHAPTER 13 CASES OF INTEREST (04/30/14 TO 04/13/15)
WD OF VA. BANKRUPTCY CONFERENCE, ROANOKE, 04/29/15

BANKRUPTCY COURT AND DISTRICT COURT

B160. **In re Rachel Ulrey**, Bankr. W.D. Va., #13 70645, 6/2/14 (Black). **Debtor's rights to her residence still property of the estate even if a foreclosure sale was completed before the case was filed; bank bound by the confirmation order allowing her to cure the default.** Mortgagee moved to revoke confirmation and to obtain relief from the stay. Foreclosure of debtor's home was held ("knocked down") 45 minutes before the debtor filed her pro se case; the creditor bid in the property. The foreclosing trustee completed a brief memorandum of sale on the bidding instructions he had received from the mortgagee. *Held*: (1) Debtor and the Trustee allege that the memorandum of sale was legally deficient, so that the debtor's legal or equitable interest was still in effect when this case was filed. (*In re Wolfe*, 39 B.R. 260, Bankr. W.D. VA. 1983.) Based on the standards laid down in *Holston v. Pennington*, 225 Va. 551 (1983), the Court finds that there was a sufficient memorandum of sale, and it was completed before the bankruptcy case was filed. (2) Trustee further argues that the creditor's motion is too late, that it is bound by the confirmation order (*Espinosa*). The Court, "by the thinnest of margins," finds that "the necessary circumstances sufficient to challenge the confirmation order are not present here." (3) Even though there's case law saying her property did not become property of the estate, she still had a possessory interest in the property and the right to challenge the validity of the sale; those rights survived the bankruptcy filing. Had Suntrust raised these sale issues before confirmation, the plan may not have been confirmed, but the Court does have jurisdiction in this matter. (4) Once the confirmation order was entered, debtor had obligations to the bank, and she is in default of those. She will be given 30 days to bring her plan payments current; if she fails to do that, the stay will be automatically lifted without further order of the Court. The filing of a modified plan to cure this arrearage will not be permitted.

B161. **In re Anthony Williams**, Bankr. W.D. Va., #10 60519, 7/10/14 bench ruling (Connelly). **Debtor can quitclaim real estate to the mortgagee in a clearly worded and properly noticed plan.** Issue was whether or not a debtor could re-convey his real estate in the plan back to the mortgagee either by language in the plan and confirmation order or via a quitclaim deed. The mortgagee (Ocwen) held first (\$361K) and second (\$24K) lien deeds of trust on real estate valued at \$250K; the second lien had been previously avoided under sec. 506 in an adversary proceeding and made an unsecured claim. There were no other lien-holders on the property. The mortgagee failed to respond to the proposed conveyance language in the plan, despite the attorney having taken great care to notice every possible party. The attorney cited a Hawaii case (*In re Madeline Rosa*, 13-00630, 6/26/13) which granted the requested relief in a similar situation where the mortgagee failed to respond, and 1322(b)(9), which does seem to authorize the vesting of property in another party. Taking note of the thorough service of process, and the clarity of the plan language, the Judge held that the Court would authorize the debtor to execute and record a quitclaim deed conveying the property to the mortgagee.

B162. **In re Christopher Martin**, Bankr. W.D. Va., # 12 60576, 11/10/14 order (Connelly). **Court denies debtor's attempt to avoid mortgagee's lien after stay lifted and two years after plan was confirmed paying arrears on this claim as secured.** In March, 2012, the Debtor's schedules showed the Bank of America ("BOA") first lien was less than the value of the Debtor's home and the creditor's second lien had some equity on which it could attach. The Debtor's proposed plan, which proposed that the Trustee would make cure payments on both of BOA's liens, was confirmed. But BOA's claims showed that the first lien was really less than the value of the real estate. The Trustee began disbursing on the mortgage arrears for both liens. Two years later, in July, 2014, BOA filed a motion to lift stay--all but 5 post-petit. payments were in default--and the Court granted it when the Debtor didn't respond. Two days later the Debtor filed a motion to avoid BOA's first lien based on sec. 506. BOA failed to respond. No one appeared at the scheduled pre-trial conference on the motion for a default judgment. *Held*: The relief requested by the Debtor is "inappropriate" because:

it is contrary to the terms of the confirmed plan; finding now that BOA is not a secured creditor would violate the res judicata of the plan's confirmation; the Debtor has not explained why he waited 24 months after confirmation and the bar date to bring this motion; the Debtor had the necessary information to take this action prior to confirmation; the Trustee has been making disbursements on the mortgage arrears claims, and has been allocating funds to the general unsecured creditors based on that; to rule favorably on the Debtor's motion would make the plan unfeasible and call into question the Trustee's disbursements to BOA; this may result in "impossibility" because the Debtor may not be able to amend his plan to deal with the additional \$44,301.14 in unsecured claims; and the Debtor (attorney) failed to appear at the pre-trial conference. Debtor's complaint against BOA is *dismissed*.

B162. **In re David Vatter**, Bankr. W.D. Va., # 14 50370, 12/23/14 order (Connelly). **Creditor attorney fees of \$150 for plan review and \$275 for filing a proof of claim are allowed.** Debtor's objection to claim of creditor attorney fees on a 3002.1 notice for \$150 for attorney review of plan and \$275 for filing a proof of claim are overruled. (Court indicated from the bench that such an objection should have been under sec. 3002.1 procedures, not under 506; that if the claim is filed "in house," attorney fees should not normally be allowed; and that attorney fees for plan review should not normally be allowed where the mortgage is being paid by the debtor or Trustee and there are no arrears.)

B163. **In re Jeffrey and Kelly Kiser**, Bankr. W.D. Va., # 14 71331, 1/15/15 opinion (Black). **Secured creditor failed to carry its burden to prove its entitlement to post-petition, pre-confirmation fees.** Secured creditor Ally filed a claim for \$16,300. Car valued on schedules at \$16,000. Debtor provided for claim in para. 3.C. and 3.D., adequate protection payments at \$250/mo. and then \$15,000 at 5% interest to be paid at \$250/mo. x 60 mos. Nothing put in para. 3.A. Ally objected, saying it was entitled to post-petition pre-confirmation attorney fees of \$375 based on its sales contract and because it is a "910 creditor"; no evidence was presented of it being an over-secured creditor. Ally later filed an affidavit saying its actual attorney time in this matter was \$1,617. *Issue: is Ally entitled to post-petition, pre-confirmation attorney's fees?* **Held:** (1) Ally's objection is not well taken. (2) Debtors failed to cram down the claim in para. 3.A., so creditor is entitled to balance owed on its debt. *In re Cassell*, 13 71980, 2014 W.L. 1017622 (Bankr. W.D. Va. 3/14/14). (3) Ally had the burden of showing the fees are reasonable. Court will look at the lodestar figure (reasonable number of hrs. x reasonable rate) using the twelve Johnson factors. (4) Ally failed to provide a detailed description of its services or put on evidence to justify its fee, and its proposed resolution provides for the same terms the plan already gave it. It therefore failed to carry its burden of proof. *Ally's request for fees is denied, and the plan is confirmed.*

B163A. **In re Michael Chidester (Cincinnati Insurance Co. v. Chidester)**, Adv. Proceed 12-05008 (Case 11 51591) (Bankr. W.D. Va., 1/28/15 (Connelly). **[Chapter 7 case] Interpreting defalcation under Code sec. 523(a)(4).** Court grants Insurance Company's motion for summary judgment, finding that the debt owed it by the Debtor was a breach of his fiduciary relationship as guardian for his stepfather, and therefore it was non-dischargeable for defalcation under Code sec. 523(a)(4) Such a finding requires proof of subjective recklessness akin to criminal recklessness per the Bullock decision of the U.S. Supreme Court. The Court found in this case that the Debtor had "consciously disregarded a risk his actions could violate a fiduciary duty" and that such disregard was "substantial and unjustified."

B165. **In re Phillip & Cindy Guertler**, #14 50483, Bankr. W.D. Va., 2/20/15 (Connelly). **Joint liability on a credit union account; applying the doctrine of merger and bar, and application of Va. Code 8.01-30.** Debtors objected to the credit union's claim as not being a joint claim and asserted that it was a claim only against the husband. Court overruled the objection and rule that it was in fact a joint claim. The credit union had obtained a judgment against the husband, and amended its initial claim in this case to reflect an unsecured debt for a jointly held credit card. The wife initially opened an account with the credit union. After the debtors were married the husband joined her account as a secondary member, and they maintained joint checking and savings accounts under this account. The husband later opened a separate business account; the wife was listed as a secondary member on that account. The husband obtained a credit card under this account. The credit union sued the husband when the credit car went into default; it did not also sue the wife because its internal records did not list her as jointly liable on this account until sometime later. Debtors testified that it was not their intention that the wife be liable for the credit card; she was only to be a user to incur expenses on

behalf of the business. (1) Under the Falwell framework for objecting to claims, the Debtors' objection sufficiently called into question the validity of the claim, shifting the burden back to the credit union to prove a joint claim by a preponderance of the evidence. (2) The common law doctrine of "merger and bar" was changed by Va. Code sec. 8.01-30 to allow a creditor to obtain a judgment against one co-obligor without releasing its right against other co-obligors. Here the credit union retained its contractual rights and remedies against the wife even after obtaining the judgment against the husband. (3) The credit card is a joint obligation: the application was signed by both Debtors, had both of their Social Security numbers, and indicates it was for a joint account. (4) The judgment against the husband has no effect on the joint liability of the Debtors, and cannot attach to the T by Es residence; it is not a secured debt, and the credit union's claim against the Debtors is therefore a joint unsecured claim. **[Note: as of 4/21/15, this decision has been appealed to the District Court.]**

B166. **In re Doris Tucker**, 12 71910, Bankr. W.D. Va., 2/27/15 opinion (Black). **[Chapter 7 case] Discharge injunction violated, but no damages awarded.** *Pro se* Debtor filed a motion for post-discharge violations of the automatic stay against the mortgage company. After the debtor had received her Chapter 7 discharge, the mortgage creditor sent to the Debtor a notice of foreclosure which incorrectly stated that she was liable on the account. When the creditor discovered the mistake, it corrected its internal records to ensure that no such notices would be sent in the future. (1) The Court will treat her motion as a request for damages under Code sec. 524(a). (2) The Fourth Circuit has set a two part test to determine whether contempt sanctions are appropriate in such situations: was the injunction violated, and was it done willfully? Code sec. 105 authorizes civil contempt for violating such orders, but the Debtor must prove, by clear and convincing evidence, that the creditor violated the discharge injunction willfully. Bradley v. Fina, 550 F. App'x 150, 154 (4th Cir. 2014). (4) In this case, the creditor did violate the discharge injunction. (5) But the record does not contain any evidence that the Debtor is entitled to damages, because emotional distress is not an appropriate item of damages for civil contempt, and being *pro se* she has incurred no attorney's fees. (6) Punitive damages are not appropriate in this case: there was no "egregious or vindictive conduct" by the creditor. Damages do not automatically flow from a violation of the discharge injunction. Held: the discharge injunction of sec. 524 was violated, but an award of damages is not appropriate under these facts.

B167. **In re Catherine Hall**, # 13 61956, Bankr. W.D. Va., 3/12/15 bench ruling (Connelly). **Creditor attorney fees for motions to lift stay: 3-tiered fee structure announced by Judge Connelly.** An \$850 fee is appropriate in a case that is contested and the attorney has to travel to Court for a hearing. A \$500 fee is appropriate where there is a default order. Where the attorney works toward a negotiated settlement and a consent order results, a fee of \$700 would be appropriate.

B168. **In re William Fisher**, Bankr. W.D. Va., # 14 61076, 03/19/15 (Black). **Debtor has absolute right to dismiss case under 1307(b), but Court can impose conditions on the dismissal.** In 10/14, Court lifted the stay for two secured creditors. Debtor later filed an adversary proceeding against one of the creditors, and began proceedings in state court. After adverse rulings in both courts, and facing multiple objections to his proposed plan, the debtor moved to dismiss his case under 1307(b). A creditor moved to convert the case to Chapter 7, and the Trustee advocated for dismissal. Debtor argued his right to dismiss is absolute; the creditor says it may be limited by bad-faith conduct or abuse of the bankruptcy process. Held: Debtor's motion to convert is granted via 1307(b), but, applying 109(g)(2), there will be a bar to refile for 180 days from dismissal. (1) Courts were split on this issue, but Law v. Siegel "changed the playing field." (2) A Bankruptcy Court does not have discretion when ruling on a 1307(b) motion if the debtor makes the request and the case has not been previously converted. (3) Bad faith concerns do not curb the debtor's right to dismiss; courts cannot graft a bad-faith exception if the statute itself contains no such basis. (4) Sanctions for bad faith exist independent of 1307(b). See, e.g., 109(g)(2), 362(c)(3) and (4), 349(a). And nothing in 1307(b) prohibits dismissal on terms and conditions. (5) To allow a creditor to convert a Chapter 13 case to Chapter 7 would allow the creditor to

effectuate an involuntary petition without satisfying Code sec. 303. (6) This situation is different from that in Marrama, where the Supreme Court interpreted 706(d) to say that a debtor's bad faith conduct barred him from being eligible to be a debtor in Chapter 13, and such eligibility was an express condition of that section. (7) Regarding opinions that have held otherwise (e.g, Mitrano), 706(d) is different from 1307(b) because of "may" vs. "shall," and because of the eligibility requirement that is not present in 706(d),so this situation is distinguishable from that in Marrama. (8) Applying a bad faith exception to 1307(b) would contravene the code and exceed the authority of the Bankruptcy Court, and would contravene the Supreme Court's guidance in Law v. Segal for the Court not to contravene specific statutory provisions. (9) The Court finds a sufficient causal nexus between the order granting relief and the motion to dismiss to warrant the application of sec. 109(g)(2).

B169. **In re John and Donna Randall**, Bankr. W.D. Va., # 14 61552, 3/31/15 opinion (Connelly). **Debtors cannot use Code sec. 522 to avoid a judgment lien against one debtor if property owned as tenants by the entirety.** Debtors filed a motion to avoid two judgment liens under 522. The two judgments were against only the husband, and their property is owned by them as Tenants by the Entireties. Debtors argued that these judgment liens impair their T by Es exemption." Held: "When a party owns property as a tenancy by the entirety, a lien against one tenant is not a lien on the property." So these liens do not attach to the debtors' property. See In re Smith, #10 50687, Bankr. W.D. Va. 12/22/10 (Krumm opinion). Debtors' motion to avoid the liens is denied.

FOURTH CIRCUIT

F51. **Covert, Haworth, Ayele, and Brown v. LVNV Funding, Resurgent Capital Services, and Sherman Originator**. #14 1016; 3/3/15 opinion. **Where Chapter 13 debtors failed pre-confirmation to object to creditors' allowed unsecured claims or to raise issues of statutory violations, the res judicata effect of plan confirmation bars debtors from bringing a class action post-confirmation for alleged violations of the FDCPA and state law.** Creditors filed unsecured claims against all four Debtors in Chapter 13 cases filed in 2008, and all the Debtors made payments on these claims in their cases. In 3/13 the Debtors filed a putative class action against the creditors alleging a violation of the Fair Debt Collection Practices Act ("FDCPA") and various Maryland laws for filing these claims in Maryland without a Maryland debt collection license. Held: Fourth Circuit affirms lower court's dismissal of all claims on *res judicata* ground: (1) LVNV acquired from Sherman Originator default judgments against each debtor; it filed a claim in each case through its servicer, Resurgent Capital Services. None of the defendants was licensed to collect debts in Maryland. (2) The District Court dismissed all the statutory claims, finding that filing a claim was not a "collection activity" within the meaning of these statutes. (3) The prior bankruptcy judgment has *res judicata* effect here because all three conditions for applying the concept have been met: it was final [confirmation of the plan], on the merits, and rendered by a court of competent jurisdiction; the parties are identical or in privity; and the claims in the second matter are based upon the same cause of action as the earlier proceeding. (4) Even claims that do not directly contradict confirmed orders, but merely assert rights that are inconsistent with those orders, are sufficient to satisfy the third requirement. (5) Once a bankruptcy plan is confirmed, its terms are not subject to collateral attack through suits that raise claims inconsistent with the confirmed plan. (6) Res judicata bars not just the claims that were actually raised during prior litigation, but also those claims that could have been raised; here, the debtors could have objected to the filed proofs of claims in the bankruptcy proceedings. (7) Debtors do not claim that there was any information unavailable to them at confirmation, so they should have raised these statutory claims prior to confirmation. (8) To allow these kinds of post-confirmation collateral attacks would destroy the finality that bankruptcy confirmation is intended to provide. (9) In deciding that these statutory claims were not barred by res judicata, the District Court relied upon Cen-Pen, 58 F.3d 89 (1995). That reading of the case is "too broad." That case dealt with secured claims, which generally pass through bankruptcy unaffected; and in that case the creditor did not participate in the case, its liens were not mentioned anywhere in the

debtor's plans, and there was no adversary proceeding filed to avoid its lien as required by the Code. There is no lack of notice here, because it's the Debtors bringing the collateral attack.

U.S. SUPREME COURT

S47. **Executive Benefits Insurance Agency v. Arkison (In re Bellingham)** 2014 WL 2560461, _____ S. Ct. _____ (S.Ct. June 9, 2014) (Thomas). **When a bankruptcy court is called upon to adjudicate a “core” matter, as defined by the statute, as to which the Bankruptcy Court is not given Constitutional authority to decide per *Stern v. Marshall*, 564 U.S. _____, 131 S.Ct. 2594 (2011), the statute will be construed to treat such matters as “non-core” subject to de novo review by an Article III court.** Nicholas Paleveda and his wife owned and operated several businesses, including Bellingham Insurance Agency. Shortly after Bellingham ceased operations, Paleveda utilized Bellingham funds to incorporate Executive Benefits Insurance Agency. When Bellingham filed a voluntary Chapter 7 petition, the trustee initiated an action to recover the funds transferred to Executive Benefits. The bankruptcy court initially granted summary judgment for the trustee on all claims including the fraudulent conveyance claims against Executive Benefits. This was appealed to the district court which conducted a *de novo* review and affirmed the bankruptcy court's decision and entered a judgment for the trustee.

The issue before the Supreme Court was whether the bankruptcy court had any jurisdiction to consider the fraudulent conveyance action brought against an entity, Executive Benefits, which was not a claimholder in the bankruptcy case. Executive Benefits argued, on appeal, following *Stern v. Marshall*, that Article III of the Constitution did not permit Congress to authorize bankruptcy courts to adjudicate such claims and that there was no mechanism in the statute that would permit the bankruptcy court to refer initial findings to an Article III court.

In *Stern*, the Supreme Court had held that Article III prohibited Congress from giving a bankruptcy court the authority to adjudicate certain matters. Some matters, generally acknowledged as “non-core,” were statutorily established to be decided, in the first instance, by the bankruptcy court which would make proposed findings of fact and conclusions of law and remit these findings to the district court, an Article III court, for a final adjudication. For some matters, statutorily defined as being “core”, however, the bankruptcy court was given jurisdiction to make a final determination.

In *Stern*, the Supreme Court decided some things, although included in “core matters”, were nonetheless beyond the reach of a non-Article III court. The parties in the Bellingham case assumed, and the court assumed without deciding, that the trustee's fraudulent conveyance action was such a “*Stern*” matter. “Put simply: If a matter is core, the statute empowers the bankruptcy judge to enter final judgment on the claim, subject to appellate review by the district court. If a matter is non-core, and the parties have not consented to final adjudication by the bankruptcy court, the bankruptcy judge must propose findings of fact and conclusions of law. Then, the district court must review the proceeding *de novo* and enter final judgment.”

Now, the Supreme Court was forced to decide what to do when a “core matter” cannot be decided by a bankruptcy judge and there was not a statutory mechanism for Article III review. The court held that the 1984 Bankruptcy Amendments and Federal Judgeship Act contained a severability clause that would permit “*Stern* claims” to proceed as if they were non-core, following the procedure outlined in 28 U.S.C. 157(c)(1) where a bankruptcy judge could submit proposed findings to the district court.

In the instant case, the district court did conduct a *de novo* review of the summary judgment award and independently found that the trustee's actions were appropriate and endorsed the judgment. Accordingly, there had been de novo Article III court review and this review satisfied the requirements of *Stern v. Marshall* and Article III. [This summary is from Chapter 13 Trustee Hank Hildebrand on the NACTT Academy website. Used with expressed permission. Published June 15, 2014 www.ConsiderChapter13.org.]

S48. Clark v. Rameker, #13-299, 134 S. Ct. 2242 (6/12/14 opinion). Funds held in an inherited IRA are not “retirement funds” and may not be exempted under 522(b)(3)(C). Chapter 7 debtors sought to exclude about \$300K in an inherited IRA from their bankruptcy estate under the sec. 522(b)(3)(C) “retirement funds” exemption.

Bankruptcy Court: no exemption allowed; District Court: exemption allowed; 7th Circuit: no exemption allowed. *Held:* Funds held in an inherited IRA are not “retirement funds” within the meaning of 522(b)(3)(C). (1) Such inheriting holders may withdraw the entire balance at any time; are required to withdraw money from the account no matter how far they are from retirement; and may never invest additional money. (2) Since such holders can use the entire balance immediately, there are no retirement policy objectives achieved by exempting such funds. (3) Petitioners’ other arguments regarding the wording of the Code section (absence of the phrase “debtor’s funds,” effect of “to the extent that,” etc.) are unpersuasive.

Everything a Bankruptcy Lawyer Should Know About
Personal Injury Claims and Disability Law

Hon. Keith L. Phillips, Judge
Bankruptcy Court for the Eastern District of Virginia
Richmond Division

Paul M. Curley, Esquire
Allen, Allen, Allen & Allen
Fredericksburg, VA

Mark C. Leffler, Esquire
Boleman Law Firm, P.C.
Virginia Beach, VA

George Neskis, Esquire
The Decker Law Firm
Norfolk, VA

Angela Scolforo, Esquire
Office of Herb Beskin, Chapter 13 Trustee
Charlottesville, VA

- I. Scheduling Causes of Action in a Bankruptcy Case
 - a. Disclose it up front - Statute requires disclosure
 - i. The commencement of a bankruptcy case creates an estate that includes all legal and equitable interests of the Debtor in property as of the commencement of the case. 11 U.S.C. Section 541 (hereafter "Section")
 - ii. The Debtor is required to file schedules listing all of the Debtor's assets and all of the Debtor's liabilities. Section 521(a)(1)(B)(i). The Debtor is required to use the official forms to comply with Section 521 pursuant to the Federal Rules of Bankruptcy Procedure, Rule 1007 (hereafter "Rule"). Official form 6B (Schedule B) is to be used for reporting all of the Debtor's interests in personal property.
 - iii. If the Debtor "acquires or becomes entitled to acquire any interest in property, the debtor shall within 14 days after the information comes to the debtor's knowledge ... file a supplemental schedule ..." Rule 1007(h).
 - iv. "Debtor has the affirmative duty to disclose all causes of action in her Schedules." Rivera v. JP Morgan Chase Bank (In re Rivera) 2014 WL 287517 (Bankr. E.D. Va., 2014).
 - b. Failure to disclose may be a federal crime.
 - i. 18 USC Section 152 provides that: "A person who [does the following] shall be fined under this title, imprisoned not more than 5 years, or both."
 - (1) knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor;
 - (2) knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11;
 - (3) knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11;
 - ii. US v. Butler, 704 F. Supp 1338, 1345 (E.D. Va 1989)(upholding conviction for 9 counts of bankruptcy fraud for failing to disclose and transferring assets and finding that "each separate act of transfer or concealment is a separate violation of the statute")
 - c. It is property of the estate
 - i. Section 541 "creates an estate" which is "comprised of all the following property, wherever located and by whomever held ... all legal or equitable interests of the debtor in property as of the commencement of the case ..."
 - ii. For Chapter 13 cases, Section 1306 expands Section 541 by including all property listed in Section 541 "that the debtor acquires *after the commencement of the case* but before the case is closed, dismissed, or converted ... whichever occurs first"
 - a. In Carroll v. Logan, 735 F.3d 147 (4th Cir. 2013), the Fourth Circuit Court of Appeals held that an interest in an inheritance acquired by Chapter 13 debtors more than 180 days after the petition date is property of the Chapter 13 estate. This follows a growing trend in case law that interprets the Bankruptcy Code in keeping with BAPCPA's intent to maximize debtor payments to creditors. *See, e.g., Ransom v. FIA Card Servs., N.A.*, — U.S. —, 131 S.Ct. 716, at 724 (2011) (interpreting the

Bankruptcy Code to reflect congressional intent that debtors should “repay creditors the maximum they can afford”); and *Baud v. Carroll*, 634 F.3d 327, at 356 (6th Cir. 2011) (holding that the applicable commitment period is temporal because it is “the interpretation that has the best chance of fulfilling BAPCPA’s purpose of maximizing creditor recoveries”).

- b. In *Carroll*, the 4th Circuit included a straightforward formula for determining whether property acquired during a Chapter 13 case becomes property of the estate pursuant to § 1306:

A Chapter 13 Bankruptcy Estate	=	Property described in Section 541	+	The kind of property (e.g., inheritances) described in Section 541 and acquired before the Chapter 13 case is closed, dismissed, or converted
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- iii. Not only is tangible property included in property of the estate, but intangible and inchoate interests such as causes of action, are also property of the estate. See, *Wilson v. Dollar Gen. Corp.* 717 F.3d 337, 342 (4th Cir., 2013); *Kocher v. Campbell*, 282 Va. 113, 115 712 S.E.2d 477, 479 (Va. 2011).
1. The U.S. District Court for the Western District of Virginia has held: “[U]nder federal bankruptcy law, the bankruptcy estate comprises, with exceptions not applicable here, ‘all legal or equitable interests of the debtor in property as of the commencement of the case.’ 11 U.S.C. § 541(a)(1); *see also* 11 U.S.C. §§ 301–303. This definition ‘has been construed broadly to encompass all kinds of property, including intangibles.’ ‘More specifically, property of the estate under § 541(a) has uniformly been interpreted to include causes of action.” *Canterbury v. J.P. Morgan Acquisition Corp.*, 958 F.Supp 2d 637 (W.D. Va. 2013) (*quoting Logan v. JKV Real Estate Servs.*, 414 F.3d 507, 512 (4th Cir. 2005) (internal citations omitted).
- iv. “State law determines the particular features of this property interest.” *Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979). See also, *In re Bradby*, 455 B.R. 476, 479 (Bankr. E.D. Va. 2011)(noting with respect to the tenants by entirety interest and related exemption rights that state law determines the rights).
- v. The issues were detailed in *Vanderheyden v. Peninsula Airport Comm'n*, 2013 WL 30065 (E.D. Va., 2013)(most citations omitted).
- ...when a debtor initiates a bankruptcy action, a bankruptcy estate is created that includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). The Fourth Circuit has observed that "[t]he meaning of 'property of the estate' under the Code has been construed 'broadly to encompass all kinds of property, including intangibles.'" *Logan v. JKV Real Estate Servs. (In re Bogdan)*, 414 F.3d 507, 512 (4th Cir. 2005) ... And, "[m]ore specifically, 'property of the estate' under § 541(a) has 'uniformly been interpreted to include causes of action.'" ... Such causes of action are not limited to active lawsuits; they include EEOC charges

"and even the underlying facts that might support a[n employment] discrimination claim." ... "[T]he debtor need not know all the facts or even the legal basis for the cause of action; rather, if the debtor has enough information . . . prior to confirmation to suggest that it may have a possible cause of action, then that is a 'known' cause of action such that it must be disclosed ... Therefore, Vanderheyden's EEOC charge and the facts supporting her Title VII claims are property of her bankruptcy estate

Because all of a debtor's assets and liabilities, including any actual or potential legal claims, are property of the bankruptcy estate, the debtor has an affirmative duty to disclose such assets and liabilities to the bankruptcy court ... This duty does not end when the debtor files her bankruptcy petition; it continues through the pendency of the debtor's bankruptcy proceedings, requiring the debtor to update the bankruptcy court as her financial situation changes ... A debtor's full and complete compliance with her disclosure obligation "is required to preserve the integrity of the judicial function of bankruptcy courts" because both the court and creditors rely on the accuracy of such disclosures in determining how to proceed in a bankruptcy action ... Because Vanderheyden's EEOC charge and related claims constitute property of the bankruptcy estate and debtors have a continuing affirmative duty to disclose such property, Vanderheyden was required to disclose her EEOC charge and the facts supporting such charge to the bankruptcy court.

- vi. A cause of action which is "sufficiently rooted in the prebankruptcy past" may be considered property of the estate even if the prosecution and recovery are all postpetition. Segal v. Rochelle, 382 U.S. 375, 380 (1966). See also, In re Plumlee, 236 B.R. 606 (E.D. Va. 1999)(finding a state law causes of action for breach of employment contract and fraud were an estate asset even though breach occurred postpetition); In re Jenkins, 410 B.R. 182, 191-92 (Bankr. W.D. Va. 2008)(finding the "claims are 'sufficiently rooted' in pre-petition conduct, they are appropriately considered property of the estate).
- vii. If the cause of action did not accrue, under non-bankruptcy law, until after the filing of the petition, it is not property of the estate in a chapter 7 case. In re Rivera, 2014 WL 287517 (Bankr. E.D. Va., 2014). "The timing of the events is critical in this case because the Debtor lacks standing only as to causes of action that had accrued as of the filing date of her prior Chapter 7 petition. To determine whether a cause of action has accrued for standing purposes, the Court looks to applicable non-bankruptcy law."

d. Duty to Disclose Postpetition Causes of Action

i. Postpetition Causes of Action are property of chapter 13 estate

1. Carroll v. Logan, 735 F.3d 147, 151-152 (4th Cir. 2013)("The repayment plan remains subject to modification for reasons including a debtor's decreased ability to pay according to plan, as well as the debtor's increased ability to pay. See 11 U.S.C. § 1329. As we have stated before, "[w]hen a [Chapter 13] debtor's financial fortunes improve, the creditors should share some of the wealth." In re Arnold, 869 F.2d 240, 243 (4th Cir.1989) ... The Supreme Court has

eschewed interpreting the Bankruptcy Code such that it “would deny creditors payments that the debtor could easily make.” *Hamilton v. Lanning*, 560 U.S. 505, 130 S.Ct. 2464 2476, 177 L.Ed.2d 23 (2010). The plain language of Section 1306(a) blocks the Carrolls from depriving their creditors a part of their windfall acquired before their Chapter 13 case was closed, dismissed, or converted.”)

- ii. Debtors have a duty to disclose such postpetition causes of action or income
 1. If the Debtor “acquires or becomes entitled to acquire any interest in property, the debtor shall within 14 days after the information comes to the debtor’s knowledge ... file a supplemental schedule ...” Rule 1007(h).
 2. Virginia Cases:
 - a. Robertson v. Flowers Baking Co. of Lynchburg, 2012 WL 830097 (W.D. Va., 2012) (noting that the duty to disclose “continues through the pendency of the bankruptcy proceeding and requires the Plaintiff to amend his financial statements if his situation changes.”)
 - b. “Debtor has the affirmative duty to disclose all causes of action in her Schedules.” In re Rivera, 2014 WL 287517 (Bankr. E.D. Va., 2014).
 - c. In re Criscuolo, 2014 WL 1910078 (Bankr. E.D. Va. 2014)(Debtor’s failure to honestly report substantial increases in postpetition income resulted in dismissal with prejudice with a one year bar to refiling)
 - d. Vanderheyden v. Peninsula Airport Comm'n, 2013 WL 30065 (Bankr. E.D. Va., 2013)(citations omitted) (“Because all of a debtor's assets and liabilities, including any actual or potential legal claims, are property of the bankruptcy estate, the debtor has an affirmative duty to disclose such assets and liabilities to the bankruptcy court ... This duty does not end when the debtor files her bankruptcy petition; it continues through the pendency of the debtor's bankruptcy proceedings, requiring the debtor to update the bankruptcy court as her financial situation changes.”)
 - e. In re DelConte, 2012 WL 1739788 (Bankr. E.D. Va. 2012) (page 4-5)(finding that the debtor’s failure to disclose the postpetition inheritance and the transfer of such property “violate the court’s order of confirmation” and debtor must amend to pay 100%, or convert, or the case will be dismissed)
 - f. Beskin v. Knupp (In re Knupp), 461 B.R. 351 (Bankr. W.D. Va 2011)(failure to disclose postpetition inheritance resulted in revocation of discharge)
 3. Circuit Cases on Duty to Disclose:
 - a. In re Waldron, 536 F.3d 1239, 1242, 244 (11th Cir. 2008)(Affirming the bankruptcy court’s ruling that the Debtor must amend the schedules to disclose underinsured motorist benefits paid as a result of a postpetition automobile accident which are property of the estate. “A debtor seeking shelter under the bankruptcy laws must disclose all assets, or potential assets, to the bankruptcy court. The duty to disclose is a continuing one

that does not end once the forms are submitted to the bankruptcy court; rather, a debtor must amend his financial statements if circumstances change.”). See also, Robinson v. Tyson Foods, Inc., 595 F.3d 1269, 1274 (11th Cir 2010); Burnes v. Pemso Aeroplex, Inc., 291 F.3d 1282, 1288 (11th Cir. 2002). However, the Court qualified its holding: “We do not hold that a debtor has a free-standing duty to disclose the acquisition of any property interest after the confirmation of his plan under Chapter 13. Neither the Bankruptcy Code nor the Bankruptcy Rules mention such a duty, *cf.* Fed. R. Bankr.P. 1007(h) (requiring a debtor to supplement his schedule regarding interests acquired after petition under section 541(a)(5) of the Code) But the bankruptcy court has the discretion, under Rule 1009, to require a debtor to amend his schedule of assets to disclose a new property interest acquired after the confirmation of the debtor’s plan.”

- b. Kimberlin v. Dollar General Corp, 2013 WL 1136563 (6th Cir 2013) (page 6) (debtor has an “affirmative and ongoing duty to disclose assets, including unliquidated litigation interests” and her failure to amend schedules to disclose a postpetition cause of action for wrongful termination resulted in application of judicial estoppel to bar her recovery)
- c. Fulgence v. Axis Surplus Ins. Co. (In re Flugence), 738 F.3d 126, 128 (5th Cir 2013)(finding there is a “continuing duty to disclose in a Chapter 13 proceeding” the personal injury action in a chapter 13 case and the failure to disclose resulted in application of estoppel and Debtor could not recover, but the Chapter 13 Trustee could pursue the claim)
- e. Failure to disclose may result in judicial estoppel barring the claim
 - i. If a cause of action or potential claim is not scheduled, the Debtor may be precluded from any recovery.
 - ii. Kimberlin v. Dollar General Corp, 2013 WL 1136563 (6th Cir 2013)
 - 1. Kimberlin worked for Dollar General for 9 years in a distribution center until her termination. She attributed her termination to retribution for having filed a complaint against her supervisor for assault for berating her and throwing “a stack of Totes” at her. She alleged that, afterward, she was “singled out” for “adverse and discriminatory” treatment, including a “humiliating” level of supervision and observation. She was terminated by Dollar General on June 9, 2010.
 - 2. Nearly five years before her termination, Kimberlin and her husband had filed Chapter 13. Her Plan paid secured creditors in full and unsecured creditors a dividend of 3 percent. On July 20, 2010, Kimberlin and her husband made the final payment to the Trustee under their 5-year Chapter 13 plan. She received her discharge on September 7, 2010, and the case was closed on November 24,

2010. About one year later, she filed suit against Dollar General alleging unlawful termination.

3. During the 41 days between her termination from Dollar General and the final payment to the Trustee, Kimberlin did not amend her Schedules to disclose her post-petition cause of action for unlawful termination.
4. In response to Dollar General's argument that Kimberlin should be judicially estopped, Kimberlin argued that she lacked any motive to fail to disclose the cause of action because it would have been impractical to modify the Chapter 13 plan during the remaining 41 days before her plan was complete.
5. The court held judicial estoppel barred Kimberlin from pursuing the lawsuit because "the bankruptcy court still had options for protecting the estate's and creditors' potential interest in the retaliation claim" and "[h]ad Kimberlin notified the court of her potential claim within the 41-day period, it could have modified her Chapter 13 plan to grant creditors some percentage of any future recovery." Emphasizing that the court could have even converted the case to Chapter 7, the Court stated: "Because Kimberlin never amended her filings or otherwise disclosed the potential claim, she deprived the bankruptcy trustee, court, and creditors of any opportunity to consider possible options."

iii. Robinson v. Tyson Foods, Inc., 595 F.3d 1269 (11th Cir 2010).

1. About two years before she completed her Chapter 13 by paying all of her creditors at 100%, Robinson resigned from her employment at Tyson Foods, alleging she was the victim of racial discrimination. Before the completion of her plan, she filed suit against Tyson. She never disclosed her cause of action to the bankruptcy court.
2. Citing the U.S. Supreme Court's decision New Hampshire v. Maine, 532 U.S. 742 (2001), the Court explained when judicial would be applied: "[W]hile the circumstances under which a court might invoke judicial estoppel will vary, three factors typically inform the decision: (1) whether the present position is clearly inconsistent with the earlier position; (2) whether the party succeeded in persuading a court to accept the earlier position, so that judicial acceptance of the inconsistent position in a later proceeding would create the perception that either the first or second court was misled and; (3) whether the party advancing the inconsistent position would derive an unfair advantage.
3. Robinson argued that she was not required by the Bankruptcy Code or Rules to amend her Schedules to disclose any post-petition change in her assets, including the accrual of the cause of action against Tyson. The 11th Circuit cited its own previous decisions and held that Robinson had such a continuing duty: "[W]hen Robinson filed her claim against Tyson while her bankruptcy was still pending, the claim vested in the bankruptcy estate and Robinson had a duty to notice the suit to all creditors."

4. The Court found Robinson took inconsistent positions “[b]y failing to update her bankruptcy schedule to reflect her pending claim” The Court also rejected Robinson’s argument that her 100% Chapter 13 Plan removed any motive for her to fail to disclose, noting that she had voluntarily dismissed a previous Chapter 13 case. The Court suggested that, because she could have taken the proceeds of the cause of action and failed to complete her payments—and further, that she did not always maintain on-time payments to the trustee under her 100% plan—she had sufficient motive to withhold disclosure of her cause of action. These factors convinced the Court that Robinson’s failure to disclose was not a mistake.
- iv. Flugence v. Axis Surplus Ins. Co., 738 F.3d 126 (5th Cir 2013).
1. Flugence was in Chapter 13 with a confirmed plan when she was injured in an auto accident. One month after the accident, she hired a personal injury attorney. A couple of months later, she had an amended Chapter 13 plan approved. She filed suit in March 2008 and receipt the discharge of her debts in November 2008. She did not disclose her cause of action to the bankruptcy court at any time prior to the entry of her discharge.
 2. After the personal injury defendants reopened the bankruptcy court, the court held that Dunn was judicially estopped from pursuing the cause of action but that the Chapter 13 trustee had the right to pursue Dunn’s claim for the benefit of the creditors.
 3. Among other things, Dunn argued that she relied upon her legal counsel in failing to disclose her post-confirmation personal injury cause of action. The appellate court rejected Dunn’s argument that her counsel’s failure to tell her of the duty to disclose excused her non-disclosure: “[S]he must show not that she was unaware that she had a duty to disclose her claims but that . . . she was unaware of the facts giving rise to them. In other words, the controlling inquiry, with respect to inadvertence, is the knowing of facts giving rise to inconsistent positions [A] lack of awareness of a statutory disclosure duty for [] legal claims is not relevant.”
 4. The defendant argued the trustee’s right to pursue Dunn’s personal injury claim must be limited to the amount necessary to satisfy the claims in the bankruptcy case. The Court noted its agreement with allowing the trustee to pursue the cause of action because the equitable remedy of judicial estoppel should not be used to create an inequitable result for creditors: “That wrongful tortfeasors would be favored over innocent creditors by the mere happenstance of the debtor’s independent non-disclosure turns equity on its head.” The Court refused to impose such limits because it would result in trustees having difficulty finding legal counsel to pursue such claims.
- v. Collucci v. Tyson Farms, 2014 WL 6879927 (E.D.Va. 2010)

1. Debtor filed an employment discrimination complaint prior to filing Chapter 13, but he did not list his cause of action. After his Chapter 13 plan was confirmed, he amended his Schedules to include the cause of action among his listed assets. About one year after filing bankruptcy, he filed suit for employment discrimination.
 2. The Court set forth the 4th Circuit's 4-part test to determine whether judicial estoppel would apply:
 - (1) the party to be estopped must be advancing an assertion that is inconsistent with a position taken during previous litigation;
 - (2) the position must be one of fact instead of law;
 - (3) the prior position must have been accepted by the court in the first proceeding; and
 - (4) the party to be estopped must have acted intentionally, not inadvertently. Folio v. City of Clarksburg, 134 F.3d 1211, 1217 (4th Cir.1998) (citing Lowery v. Stovall, 92 F.3d 219, 224 (4th Cir.1996), cert. denied, 519 U.S. 1113, 117 S.Ct. 954 (1997)).
 3. The Court agreed that the first two prongs of the test were met by Collucci's failure to list the cause of action initially. However, it cited Royal v. R & L Carriers Shared Services, LLC, 2013 WL 1736658 (E.D.Va. Apr. 22, 2013), for the proposition that a bankruptcy court does not accept a party's inconsistent position until it enters a discharge of the debts.
- vi. Royal v. R & L Carriers Shared Services, LLC, 2013 WL 1736658 (E.D.Va. Apr. 22, 2013)
1. In April 2008, Royal was terminated. In January 2009, he filed a complaint with the EEOC alleging racial discrimination. In late 2009, he filed Chapter 13 and failed to disclose his cause of action against his former employer. Through the process of modifying his plan and obtaining confirmation, he did not disclose his cause of action. He did not receive his right to sue letter from the EEOC until 2012, and he filed suit soon thereafter. It was only during discovery—about 18 months before his Chapter 13 was due to complete—that Royal disclosed to his counsel that he was in Chapter 13.
 2. The Defendant first argued the cause of action belonged to the estate and, therefore, the Debtor lacked standing to sue. The Court responded, "The great weight of authority, however, expressly rejects the defendant's position. Although the U.S. Court of Appeals for the Fourth Circuit has not taken a position on the issue, every federal appeals court to rule on it—not to mention a large number of bankruptcy courts—has held that Chapter 13 debtors have standing to sue on their own, even though their pre-petition causes of action belong to the bankruptcy estate. See Smith v. Rockett, 522 F.3d 1080, 1081 (10th Cir.2008) (citing Crosby v. Monroe County, 394 F.3d 1328, 1331 n. 2 (11th Cir.2004); Cable v. Ivy Tech State College, 200 F.3d 467, 472–74 (7th Cir.1999); Olick v. Parker &

Parsley Petroleum Co., 145 F.3d 513, 515–16 (2d Cir.1998); Maritime Elec. Co. v. United Jersey Bank, 959 F.2d 1194, 1209 n. 2 (3d Cir.1992)). [Note: About one month after this decision, the 4th Circuit Court of Appeals agreed with the above circuit-level decisions and held, in Wilson v. Dollar Gen. Corp. 717 F.3d 337 (4th Cir., 2013), that Chapter 13 debtors have standing to bring suit on causes of action that are property of the estate.]

3. Judicial estoppel did not apply because the third prong—acceptance by the court—was not met. “Courts have repeatedly emphasized that ‘acceptance’ in this context means that the bankruptcy court has not merely confirmed the debtor’s bankruptcy plan but has also taken the ultimate step of granting the debtor relief (*i.e.*, discharge or repayment).”
- vii. Note the different outcome in Chapter 7, as shown by Robertson v. Flowers Baking Co. of Lynchburg, 2012 WL 830097 (W.D. Va., 2012).
1. Robertson was terminated by his employer one month before filing Chapter 13. Several months after the bankruptcy was filed, Robertson filed a complaint with the EEOC against his former employer. He did not amend his Schedules or Statements of Financial Affairs to disclose the cause of action for wrongful termination. About one month after filing the EEOC complaint, Robertson converted his case to Chapter 7, but he again failed to amend his Schedules or Statements of Financial Affairs.
 2. “Plaintiff’s position that he had no contingent or unliquidated claims was accepted by the bankruptcy court when [after conversion to Chapter 7] it issued an order discharging Plaintiff’s debts, discharging the trustee, and closing the case.” Robertson at *6.
- f. Exempt it up front, if you can, for full value
- i. The Debtor is required to list the property claimed as exempt under Section 522 on official form 6C (Schedule C) within the time specified in Rules 1007 (generally 14 days) and 4003(a) (dependents may have another 30 days if debtor does not timely file).
 1. Rule 1009 allows any schedule to be “amended by the debtor as a matter of course at any time before the case is closed” with proper notice.
 2. Pursuant to Rule 9006(b)(1), you can file a motion and try to amend after the case is closed only if you can prove “excusable neglect.” See, In re Wilmoth, 412 B.R. 791, 796-799 (Bankr. E.D.Va., 2009).
 3. A “party in interest” may object to exemptions within 30 days (with some exceptions) after the conclusion of the meeting of creditors or any amendment, whichever is later. Rule 4003(b).
 - ii. Section 522(b)(1) states that “an individual debtor may exempt from property of the estate the property listed in either paragraph 2 or, in the alternative, paragraph (3) of this subsection” Pursuant to Section 522(b)(2), States are allowed to “opt out” of

the federal exemptions scheme, and Virginia has done so pursuant to Virginia Code § 34-3.1.

- iii. Exemption rights relevant to causes of action or disability benefits include the following:
 1. Virginia Code Section 34-28.1. - Personal injury and wrongful death actions exempt.

Except for liens created under Article 7.1 (§ 8.01-66.2 et seq.) of Title 8.01, Article 5 (§ 54.1-3932 et seq.) of Title 54.1, and Chapter 19 (§ 63.2-1900 et seq.) of Title 63.2, all causes of action for personal injury or wrongful death and the proceeds derived from court award or settlement shall be exempt from creditor process against the injured person or statutory beneficiary as defined in Article 5 (§ 8.01-50 et seq.) of Title 8.01. It shall not be required that a householder designate any property exempt under this section in a deed in order to secure such exemption. The provisions of this section shall not be construed to affect any voluntary assignment of the proceeds or anticipated proceeds of a personal injury or wrongful death award or settlement as permitted by §8.01-26. [ENACTED IN 1990]
 2. Virginia Code Section 34-4 - \$5,000 per “householder” (\$10,000 if 65 or older) plus \$500 per dependent.
 3. Virginia Code Section 34-4.1 – another \$10,000 for disabled veterans
 4. 42 U.S.C. 407 – social security income or benefits granted until Title 42 “shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment or other legal process, or to the operation of any bankruptcy or insolvency law.”
- iv. Exemption Cases to consider
 1. White v. Stump, 266 U.S. 310 (1924)(The federal bankruptcy laws said that the debtor is entitled to the exemptions “prescribed by the state laws in force at the time of the filing of the petition,” and must claim his exemptions in a schedule filed with the petition. So the debtor was not allowed to set aside an Idaho homestead exemption two months after he filed his case.)
 2. Taylor v. Freeland & Kronz, 503 U.S. 638 (1992)(If Trustee fails to object to exemptions claimed by the debtor within the statutorily prescribed time limits, the debtor may claim the exemptions even if the exemption’s value exceeds what the Code permits.)
 3. Schwab v. Reilly, 130 S. Ct. 2652 (2009)(Holding that because the debtor’s exemption claim was within the range allowed by the Code, the Trustee was not required to object to the exemptions in order to preserve his right to retain any value beyond the value of the exempt interest. Under Code 522(l), the value of the property claimed exempt should be judged on the dollar value the debtor

assigns to her interest in the property, not the value the debtor assigns the asset.)

4. In re Webb, 210 B.R. 266 (Bankr. E.D.Va. 1997) contains a detailed discussion of Virginia's unique personal injury exemption statute, Va. Code §34-28.1. Judge Mitchell wrote on the legislative history behind the passage of Va. Code § 34-28.1, which he described as "the sole indication of legislative intent, apart from what can be gleaned from the bare language of the statute itself":

"Finally, the joint subcommittee considered the adoption of a statutory exemption of personal injury causes of action. The Fourth Circuit Court of Appeals found in *Tignor v. Parkinson*, 729 F.2d 977 (1984), that because of changes in federal bankruptcy law, personal injury causes of action and their proceeds are (i) property of the bankrupt estate and (ii) entitled to exemption only under the homestead exemption statute. Earlier bankruptcy court decisions had allowed the exemption of such causes of action under § 8.01-26 and common law.

"The joint subcommittee decided that the Commonwealth's policy on this issue should reflect the intent of § 8.01-26 (prohibiting the assignment of personal rights of action) and the premise of personal injury awards which is to return the injured party to his pre-injury status. Under current law, the members offered, a creditor may have a right to the personal injury award compensating a debtor for the loss of his hand even where the creditor has no right to levy on the hand. The joint subcommittee's recommendation, therefore establishes a statutory exemption for all causes of action for personal injury and the proceeds derived from any court award or settlement."

In re Webb, 210 B.R. at 270-271, *citing* REPORT OF THE JOINT SUBCOMMITTEE STUDYING VIRGINIA'S EXEMPTION STATUTES, House Doc. No. 77, at 10-11 (1990).

Further, Judge Mitchell surveyed the personal injury exemptions provided in other states and remarked upon the uniqueness of Va. Code § 34-28.1:

"Virginia is one of 25 states that allow some form of exemption in personal injury or wrongful death actions. Some states (e.g., California) limit the exemption to the extent necessary for support; some (e.g., Missouri) provide an exemption only for the wrongful death of a person of whom the debtor was dependent; some set a cap on the amount that may be exempt, ranging anywhere from \$7,500 (e.g., Georgia) to \$50,000 (e.g., Oklahoma); some allow exemptions only for personal *bodily* injury (e.g., New York). Suffice it to say there are a wide range of limitations that the various states have put on an exemption to proceeds arising from a personal injury. The Virginia statute, by contrast, contains no language limiting the dollar amount of the exemption or specifically restricting it to bodily injury."

5. In Re Williamson, 337 B.R. 846 (Bankr. E.D. VA, 2005)(court allowed amendment of schedules to disclose and exempt prepetition personal injury proceeds and the mobile home and van purchased with such proceeds)
6. In re Walley, --- B.R. ---, 2015 WL 589907(Bankr. E.D. Va., 2015)
 - a. Debtors filed Chapter 13 in 2011 and were in an auto accident in 2012. Without disclosure to the Court, the Debtors settled a personal injury claim arising out of the accident and used the proceeds to purchase a replacement vehicle and pay related medical bills. They put the remaining funds in a money market account. They subsequently amended their Schedule B and C to claim the vehicle and the money market account as exempt as proceeds of a personal injury claim under Va. Code § 34-28.1. The Trustee objected to the exemption, asserting that the Debtor had no right to claim an exemption in a post-petition asset.
 - b. The Court found the proceeds were post-petition assets and that the exemptions were appropriate: “Under *Carroll v. Logan*, the Insurance Proceeds and the assets acquired therefrom are property of the Debtors’ estate, since property of the estate includes, pursuant to § 1306, property acquired after the filing of the petition but before the case is closed or dismissed. Therefore, under § 522(b), which specifically provides that a debtor may exempt property from property of the estate, the Debtors may claim an exemption in the Altima and the Money Market Account.”
 - c. Judge Huennekens had the same issue pending and cited Judge Phillips’ In re Walley holding in overruling the Chapter 13 trustee’s objection to the debtor’s claim of exemption in a post-petition cause of action for personal injury. See Order entered February 13, 2015, In re Barnett, Bank. E.D. Va. Case No. 11-36220-KRH.
7. In re Custis, 87 BR 415, 416, 418 (Bankr. E.D. Va 1988)(allowing exemption of postpetition life insurance proceeds and noting that “this Court has held that when a debtor does not own or have an interest in property that is properly exemptable under Virginia Code § 34-4 at the time the exemption must be asserted, then an amendment may be allowed to include new property so long as the maximum exemptions have not been taken. In re Smith, 45 B.R. 100 (Bankr. E.D.Va.1984).”) Compare In re Strickland, 2010 WL 1332657 (Bankr. E.D. Va. 2010) (holding the debtor could not amend his homestead deed more than 5 days after the 341 meeting to add property he owned pre-petition that had not been included in any amount).
8. In re Stephens, 265 B.R. 335 (Bankr. M.D. Fla. 2001) – Debtor scheduled a pre-petition worker’s compensation claim as exempt. The Trustee objected to the exemption and to the failure to commit the proceeds as disposable income. The Court held that, although the proceeds are exempt under Florida law, the Trustee’s objection to the exemption

meant the Court could require payment of the proceeds into the case as disposable income. Note that this case is pre-BAPCPA.

9. In re Springer, 338 BR 515 (Bankr. N.D. Ga. 2005) – Debtor scheduled a pre-petition personal injury cause of action and claimed the proceeds thereof as exempt. The Trustee objected to the Plan for failing to commit the proceeds as disposable income and also objected to the claim of exemption. The Court stated, “Here, because the Trustee has filed a timely objection [to the exemption], the Court will consider the issue of whether exempt property may also constitute disposable income, and, if so, whether the settlement at issue in the instant case is reasonably necessary for the support of the Debtor or her dependents.” Note that this case was pre-BAPCPA and Georgia’s exemption differs from Virginia’s.
10. Wissman v. Pittsburgh Nat. Bank, 942 F.2d 867, 872(C.A.4 (W.Va.), 1991) (“The trustee would, however, have to abandon the estate's interest in order for the debtors to have an interest in any recovery above their exemptible interest.”).

II. Filing a Personal Injury Action While in Bankruptcy

- a. Jurisdiction - Jurisdiction to pursue the personal injury cause of action does not lie in the bankruptcy court, but may be pursued in the District Court where the bankruptcy case is pending. 28 U.S.C. § 157(b)(5). See also, In re White, 410 B.R. 195, 203-204 (Bankr. W.D. Va 2008) (observing that “this bankruptcy court cannot liquidate the [plaintiff’s] tort claims against the Debtor, it is equally clear that the district court does have jurisdiction to hear and determine such claims. The relevant jurisdictional statute accords to the district court "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b).”)
- b. Administrative Remedies – Certain Types of Causes of Action
 - i. If a party believes they have been discriminated against by an employer because of race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information, they can file a “Charge of Discrimination”. All of the laws enforced by EEOC, except for the Equal Pay Act, require a “Charge of Discrimination” to be filed first with the EEOC before a party may file a lawsuit against the employer. If an investigation finds no violation of the law, the party will be given a Notice of Right to Sue.
<http://www.eeoc.gov/employees/lawsuit.cfm>
 - ii. In re White, 410 B.R. 195, 205 (Bankr. W.D. Va 2008)(noting that “several courts have held that the right to file an administrative complaint and the right to file a civil action are alternative paths to relief.”)
- c. Who has standing? Is it the Trustee’s cause of action now? How does the debtor get it back?
 - i. Chapter 7
 1. Causes of action that belong to the debtor's bankruptcy estate may only be pursued by the chapter 7 trustee, as representative of the bankruptcy estate. Wilson v. Dollar Gen. Corp., 717 F.3d 337, 342 (4th Cir. 2013); Robertson v. Flowers Baking Co. of Lynchburg (W.D. Va., 2012).

- ii. The issue of standing is jurisdictional and the Court must examine its own jurisdiction. In Robertson v. Flowers Baking Co. of Lynchburg (W.D. Va., 2012), Judge Moon explained the issues when a defendant filed a motion to dismiss under Rule 12(b)(1) alleging that “Plaintiff’s intervening bankruptcy action caused him to lose standing to pursue the claims he alleges in this lawsuit, as those claims now belong exclusively to the bankruptcy trustee” saying:
- A motion to dismiss for lack of standing attacks the district court’s subject matter jurisdiction. See Allen v. Wright, 468 U.S. 737, 750 (1984) (federal courts are under an independent obligation to examine their own jurisdiction, and standing “is perhaps the most important of [the jurisdictional] doctrines”). Rule 12(b)(1) permits a party to move for dismissal of an action based on lack of subject matter jurisdiction. Whether a court retains subject matter jurisdiction over an action is an issue that can be raised at any time. United States v. Beasley, 495 F.3d 142, 147 (4th Cir. 2007). As with a motion to dismiss pursuant to Rule 12(b)(6), a court considering a motion to dismiss pursuant to Rule 12(b)(1) must accept as true all material factual allegations in the complaint and must construe the complaint in favor of the plaintiff. Worth v. Seldin, 422 U.S. 490, 501 (1975); see also Falwell v. City of Lynchburg, Virginia, 198 F. Supp. 2d 765, 772 n. 6 (W.D. Va. 2002). However, when considering a challenge to the factual basis for subject matter jurisdiction, “the burden of proving subject matter jurisdiction is on the plaintiff.”³ Richmond, Fredericksburg & Potomac R.R. v. United States, 945 F.2d 765, 768 (4th Cir. 1991). A court “may consider evidence outside the pleadings without converting the proceeding into one for summary judgment,” but “[t]he moving party should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law.” *Id.* (citation omitted).
- iii. Debtor must have standing when the lawsuit is filed, or it may be a “legal nullity” and the statute of limitations may continue to run.
1. Kocher v. Campbell, 282 Va. 113, 712 S.E.2d 477, 480 (Va., 2011)(although leave was granted to reopen the bankruptcy case and amend to assert the cause of action and exempt it without objection, the lawsuits filed before such relief was granted were “void” and therefore they did not toll the statute of limitations.)
 2. In re Wilmoth, 412 B.R. 791, 799 (Bankr.E.D.Va.2009) (an exemption granted by the bankruptcy court does not relate back to the time of filing so as to toll the statute of limitations by conferring standing retroactively.)
 3. Contra, White v. BB&T Ins. Servs. Inc., (W.D. Va. 2012)(granting 60 days for plaintiff to “reopen the bankruptcy case to permit the trustee to determine whether to adopt or abandon the remaining claim.”); Vanderheyden v. Peninsula Airport Comm’n, 2013 WL 30065 (E.D. Va., 2013)(citations omitted) (said that an abandonment or exemption order might “revert back to [debtor] as if no bankruptcy action had been filed” and implied that “abandonment or exemption may restore a plaintiff’s standing”)
- iv. Debtor may pursue the cause of action if the Trustee abandons it.

1. Section 554(c) – The Trustee abandons property after notice and hearing, or, if “properly scheduled” and “not otherwise administered at the time of the closing” it is abandoned back to the Debtor at closing.
2. Section 554(d) – If not abandoned or administered, the asset remains property of the estate.
3. The Debtor can pursue the claim only if “the trustee abandons it” per Section 554(a) or the “court exempts it.” Vanderheyden v. Peninsula Airport Comm'n, 2013 WL 30065 (E.D. Va., 2013)(citations omitted):

By filing a bankruptcy petition, the debtor not only creates a bankruptcy estate comprised of all her assets and liabilities, she also relinquishes control over that estate to the bankruptcy trustee ... More specifically, “[when] a cause of action is part of the estate of the bankrupt then the trustee alone has standing to bring that claim.” ... The trustee's exclusive standing extends to all legal claims constituting assets of the estate, regardless of whether the debtor complied with her obligation to disclose such claims ... A debtor may pursue a claim belonging to the bankruptcy estate only if the trustee abandons it pursuant to 11 U.S.C. § 554(a) or if the bankruptcy court exempts it under the applicable exemption scheme.
- v. Debtor may pursue the cause of action if it is properly scheduled and exempted.
 1. In re Wilmoth, 412 B.R. 791 (Bankr. E.D.Va., 2009) (n. 9)(“Thus, any monetary proceeds received by a debtor resulting from a cause of action for personal injury are exempt from creditors and shall not be administered by the trustee for the benefit of the estate if and only if properly claimed as exempt by the debtor. See, e.g., In re Webb, 210 B.R. 266, 270 (Bankr.E.D.Va.1997).”)
 2. Canterbury v. J.P. Morgan Acquisition Corp., 958 F.Supp 2d 637 (W.D. Va. 2013) also explains the consequences of failing to include in the debtor’s Schedules a cause of action in a Chapter 7 case, even if the debtor does not know the cause of action exists:

“Causes of action that belong to the debtor’s bankruptcy estate may only be pursued by the trustee, as representative of the bankruptcy estate. Nat’l American Ins. Co. v. Ruppert Landscaping Co., 187 F.3d 439, 441 (4th Cir.1999).

“Line 21 of Plaintiff’s bankruptcy Schedule B required Plaintiff to list all of his personal property, including ‘other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims.’ But Plaintiff indicated ‘None.’ He did not list any claims against GMAC or J.P. Morgan, nor did he identify any violation of the Truth in Lending Act or make reference to any alleged right to rescind the Note or Deed of Trust. [].

“It is settled law that, unless and until a cause of action, contingent or matured, is properly scheduled, and subsequently abandoned, the claim remains property of the bankruptcy estate, even if the case has been closed, and the debtor lacks standing to pursue the claim.”

ii. Chapter 13

1. Wilson v. Dollar General Corp., 717 F.3d 337, 339 (4th Cir. 2013) (citing to Sections 1303 and 1306 and Rule 6009) – “We align ourselves with our sister circuits and conclude that because of the powers vested in the Chapter 13 debtor and trustee, a Chapter 13 debtor may retain standing to bring his pre-bankruptcy petition claims.”
2. “Chapter 13 debtors have standing to sue on their own, even though their pre-petition causes of action belong to the bankruptcy estate.” Royal v. R&L Carriers Shared Servs., L.L.C. (E.D. Va., 2013), page 5 (citations omitted) (denying a Rule 12(b)(1) motion as to standing).
3. In re Henneghan, 2005 WL 2267185, at *6 (Bankr. E.D. Va. June 22, 2005) (emphasis in original)(“In a chapter 13 case ... the debtor has, *exclusive of the trustee*, the rights and powers of a trustee under sections 363(b), 363(d), 363(e), 363(f), and 363(1).” §1303, Bankruptcy Code (emphasis added). These include the power in § 363(b) to “use, sell, or lease” property of the estate. The only way to “use” a cause of action is to bring suit upon it or settle it. It therefore follows that a chapter 13 debtor has standing to bring suit on his or her own causes of action.”)
4. Rule 6009 provides that: “With or without court approval, the trustee or debtor in possession may prosecute or may enter an appearance and defend any pending action or proceeding by or against the debtor, or commence and prosecute any action or proceeding in behalf of the estate before any tribunal.” The court in Royal noted that although technically a chapter 11 term this section may also apply to chapter 13 debtors. Royal v. R&L Carriers Shared Servs., L.L.C. (E.D. Va., 2013) page 7.

iii. Beware of Statute of Limitations

1. Virginia provides a two-year limitation period for causes of action for personal injury. Va. Code Section 8.01–243.
2. Virginia provides two year limit for injury that is not bodily injury. Va. Code Section 8.01-248
3. Bankruptcy Code Section 108 (a) - If the time to bring an action by Debtor has not expired when the bankruptcy case is filed, the Trustee has the right to bring the action within the later of “such period” or “two years after the order for relief.” See, In re Wilmoth, 412 B.R. 791, 799 (Bankr.E.D.Va.2009)

iv. Relief from the Automatic Stay or Discharge Injunction -- obtain relief from stay per Section 362 before pursuing claim AGAINST the debtor, and limit recovery to insurance proceeds?

1. In re Mann, 58 B.R. 953 (Bankr. W.D. Va. 1986)(defendant debtor received chapter 7 discharge, then plaintiff was allowed to reopen the case to obtain relief from the provisions of Section 524 solely for the purpose of pursuing recovery against the uninsured motorist insurance company)
2. In re Jones, 348 B.R. 715, 716 (Bankr. E.D.Va., 2006)(treating a “request from the Circuit Court of Loudoun County, Virginia” to “determine the effect of the discharge injunction on a personal injury suit brought against the debtor” and finding that “unless [the] judgment is determined to be excepted from discharge under 11 U.S.C. § 523(a)(9), any such judgment may be collected only from available policies of insurance and may not be enforced as a personal liability of the [chapter 7] debtor, such as by demanding payment from the debtor, docketing the judgment as a lien against the debtor's real property, causing any writ of execution or garnishment summons to be issued against the debtor or property of the debtor, or failing to mark the judgment as satisfied (or discharged in bankruptcy) after the full amount of available insurance has been paid.”)
3. In re Atlantic Ambulance Associates, Inc., 166 B.R. 613, 615 (Bankr. E.D. Va. 1994)(“acts in violation of the automatic stay are generally held void” and therefore the Court will rarely “annul” the stay)
4. The automatic stay of 11 U.S.C. Section 362(a) is temporary and can be modified, conditioned or terminated pursuant to 11 U.S.C. Section 362(d). The more important question in a personal injury context relates to the bankruptcy discharge and the effect such a discharge has on the liability of other applicable entities, *i.e.* insurance companies. A discharge in bankruptcy, regardless of the chapter under which the individual debtor files, does not extinguish the personal injury claim (debt); rather, it merely releases the debtor from personal liability. The debt still exists and can be collected from any other entity that might be liable, including insurance carriers. Thus, a suit against a discharged debtor is not barred when the purpose of the suit is to establish the nominal liability of the debtor in order to collect from an insurance policy. (See 11 U.S.C. Section 524(a)(2) and (3), “any such debt as a personal liability of the debtor” and 524(e) “discharge of a debt of a debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt”. See also, In re: Jones, 348 B.R. 715 (EDVA 2006).

III. Once the cause of action settles – who gets the money

- a. In a typical situation, a personal injury attorney will pay the remaining balances from medical bills related to a personal injury claim, as well as reimbursable amounts to health insurance plans, from the proceeds of a settlement or verdict. However, there is no absolute requirement that the remaining balances from such bills be paid from the proceeds of a settlement or verdict, except in cases of properly perfected liens, some of which are perfected by operation of law, *e.g.* Medicare, Medicaid, health care providers of the Commonwealth; some of which are perfected by proper notice from the health care provider for a statutorily limited amount (see Virginia Code Section 8.01-66.2 *et seq.*); and others by notice from an ERISA qualified self-funded health plan. Attorneys handling personal injury claims are also required to reimburse

health care providers who have treated the client under an assignment of proceeds signed by the client. In the case of a compromised settlement or verdict, it is routine to negotiate a reduction in the amount owed to the health care provider, Medicare, Medicaid or ERISA qualified self-funded health plan, if the amount of the settlement or verdict is insufficient to fairly compensate the client.

- b. What impact does settlement have on treatment and payment of claims in a chapter 13
 - i. Do any providers have liens on the proceeds – by contract or by statute? Should the schedules and plan treat such claims as secured?
 1. In re Jones Const. & Renovations, Inc., 337 B.R. 579, 586 (Bankr. E.D. Va. 2006)(“This court has found that pre-petition assignments are valid, and the proceeds of any assignment that vests rights in the assignee pre-petition are not property of the estate.”)
 2. In re Carpenter, 252 B.R. 905, 913, 916 (E.D. Va 2000) (finding that the employer has an equitable lien on the chapter 7 debtor’s personal injury settlement proceeds under the terms of the health insurance plan, which is a “security interest” in the proceeds (the “res”) and ordering the debtor to pay the employer the proceeds up to the amount that the debtor received under the Plan.)
- c. Are awards considered disposable income in chapter 13 cases
 - i. If paid from social security benefits – NO, never. Mort Ranta v. Gorman, 721 F.3d 241 (4th Cir. 2013).
 - ii. If recovered lost wages, probably not exempt and probably disposable income.
 1. US v. Burke, 504 U.S. 229, 242 (1992)(holding that “back pay awards received by respondents in settlement of their Title VII claims are not excludable from gross income as ‘damages received ... on account of personal injuries’ ”)
 2. In re Webb, 214 B.R. 553, footnote 8 (E.D. Va. 1997)(“No part of the debtor's settlement here is attributable to back or front pay. Thus, neither presented nor resolved here is the question whether a Title VII recovery for back pay or front pay would be exempt from creditor process under Virginia Code § 34-28.1”)
 - iii. Lump sum personal injury settlement may have to be paid to the Chapter 13 Trustee for distribution to creditors
 1. Virginia Cases
 - a. In re Walley, (Bankr. E.D. Va 2015)(Page 6)(overruling the Trustee’s objection to exemption of the personal injury settlement, and agreeing such proceeds are property of the estate; however, in footnote 5 the Court pointed out that the issue of plan modification was not before it and therefore it would not reach the issue)
 - b. In re Solomon, 67 F3d 1128 (4th Cir. 1995)(Refusing to require a debtor to pay over exempt IRA funds to fund a chapter 13 plan because they were exempt, saying, “a debtor's choice to proceed under Chapter 13 [should not] entitle creditors to more than they would receive in Chapter 7...” , and

remanding to the bankruptcy court to review the plan in light of the Code's "good faith" requirement – there is a strong dissent)

- c. In re DelConte, 2012 WL 1739788 (Bankr. E.D. Va. 2012) (Requiring debtors to amend chapter 13 plan to pay over an amount sufficient to compensate for the value of the real estate the debtor inherited post-petition and then transferred without court permission or face dismissal.)

2. Other Circuit Opinions

- a. In re Hagel, 184 B.R. 793 (9th Cir BAP 1995)(holding that social security disability payment are included in determining disposable income, even though exempt and saying, "Debtors who refuse to use all of their projected disposable income to pay off their debts have no right to the benefits provided in a Chapter 13 bankruptcy.")
- b. In Re Koch, 109 F.3d. 1285, 1289-1290 (8th Circuit, 1997)(holding that "Chapter 13 contains no language suggesting that exempt post-petition revenues are not Chapter 13 "income," and § 1325(b)(2) expressly defines "disposable income" to mean income not needed for debtor's support ... the ability to claim an exemption is an independent issue from whether debtors have the ability to repay their debts" and so requiring payment of exempt worker's compensation benefits to fund a plan)
- c. In Re Freeman, 86 F.3d 478, 480 (6th Cir. 1996) (noting that " courts in the Sixth Circuit that have addressed this issue have found that the 'projected disposable income' language of section 1325(b) does not expressly or implicitly qualify income by reference to its exempt status under state law" and finding that tax refunds must be paid over as disposable income, even though exempt)

3. Other Court Opinions

- a. In re Waters, 384 B.R. 432 (Bankr. N.D. W.Va. 2008) – "With the enactment of BAPCPA in 2005, the split of authority over whether or not exempt assets are to be included in the calculation of disposable income has been statutorily answered by Congress." The Court then held exempt VA disability income is not excluded from "current monthly income" in § 101(10A) and, accordingly, was includable as part of the calculation of projected disposable income.
- b. In re McAllister, 510 B.R. 409, 425 (Bankr. N.D. Ga., 2014)(Rejecting the Trustee's motion to modify a 0% Chapter 13 plan to 100% upon the debtor's receipt of post-petition life insurance proceeds. This court, it must be noted, held (in the absence of controlling circuit-level authority to the contrary) that the post-petition insurance proceeds were not property of the estate under § 1306. *Contra Carroll v. Logan*, 735 F.3d 147 (4th Cir. 2013). The court noted that pre-BAPCPA case law often treated the proceeds of exempt assets as disposable income, but it rejected the Trustee's argument in this case that the proceeds were disposable income

because BAPCPA materially changed the definition of disposable income. Specifically, disposable income is now defined by reference to the debtor's "current monthly income", which is income received by the debtor during the 6-month period preceding the month of the bankruptcy filing, less appropriate deductions for living expenses.

- c. In re Hunton, 253 B.R. 580 (Bankr. N.D. Ga. 2000) (Debtor properly scheduled a prepetition personal injury claim and exempted it without objection. Plan was confirmed without objection. Upon the debtor settled the claim, the Trustee moved for turnover of the proceeds on the theory that the proceeds were disposable income. The Court denied the Trustee's motion based primarily on 11 U.S.C. § 522(c): "[E]xempt property, with two exceptions not applicable here, is 'not liable during or after the case for any debt of the debtor that arose ... before the commencement of the case'").
- d. In re Springer, 338 BR 515 (Bankr. N.D. Ga. 2005) – Pre-BAPCPA disposable income case held that exemptions do not work in Chapter 13 to protect the proceeds of exempt assets from being treated as disposable income. "Although Chapter 13 debtors are entitled to claim property as exempt, the purpose of those exemptions is not the same for Chapter 13 debtors as for Chapter 7 debtors. By choosing to file a Chapter 13 rather than a Chapter 7 case, debtors are seeking the benefits of being allowed to retain their non-exempt property, while also obtaining a discharge of what is often a large portion of a significant amount of unsecured debt. Chapter 13 debtors also receive the benefit of a more liberal discharge (the so-called "superdischarge") and often the option of curing defaults and arrearages on their secured debts, which enables them to save their homes and vehicles. The price for doing so is committing to pay all creditors all income that is not reasonably necessary for support received during a thirty-six month period. Because the operative statute does not indicate that this price is to be reduced by the amount of income that may also be exempt, this Court is inclined to adopt the reasoning and holding of the majority decisions and conclude that exempt income may constitute disposable income."
- d. Does "good faith" require debtor to pay over award and/or modify plan per 1329
 - i. Deans v. O'Donnell, 692 F.2d 968 (4th Cir.1982)(establishing a non-exclusive list of factors to consider in determining whether a debtor has filed a Chapter 13 plan in good faith)
 - ii. Neufeld v. Freeman, 794 F.2d 149 (4th Cir.1986)(providing additional good faith factors, including the pre-filing conduct of the debtor and the nondischargeability of a debt if the case were proceeding under Chapter 7)

- iii. Murphy v. O'Donnell (In re Murphy) and O'Donnell v. Goralski (In re Goralski), 474 F3d 143 (4th Cir. 2007)(must be a “substantial and unanticipated changes in circumstances” to justify modification under 1329)
- iv. In re Walker, 165 B.R. 994, 1001 (E.D. Va. 1994)(noting that “the failure of a debtor to use the full reach of its disposable resources to repay creditors is evidence that a plan is not proposed in good faith because such conduct frustrates this objective”)
- v. In re Swain, 509 B.R. 22 (Bankr. E.D. Va. 2014) – Disposable income test does not apply to § 1329 plan modifications.

IV. A Primer on Disability Claims

- a. There are multiple types of disability insurance benefits. Here are the big ones:
 - i. Social Security Disability (SSDI) - Supplemental Security Income (SSI). 42 U.S.C. Section 1381 *et seq.*
 - ii. Virginia Retirement System (VRS) Disability. Virginia Code Sections 51.1-124.1 *et seq.*
 - iii. Long Term Disability (LTD) Policies and Plans including ERISA Plans. 29 U.S.C. Sections 1001 *et seq.*
 - iv. Virginia Workers' Compensation (VWC-Virginia Code Sections 65.2-100 *et seq.*) and Federal Longshore and Harbor Workers' Compensation (LHWCA- 33 U.S.C. Sections 901 *et seq.*)
- b. Social Security Disability Insurance (SSDI)
 - i. Social Security Disability Insurance (SSDI) is a government insurance program that many people in the United States count on when they become disabled or are unable to work. The monthly disability benefit is based upon the amount of money and the number of years payments were made into the Social Security system. Payments are only made for total disability. No benefits are payable for partial disability or short-term disability.
 - ii. Benefits are available to:
 - 1. A disabled worker who has earned enough credits to become "insured."
 - 2. A disabled widow or widower between 50 and 60 years of age and the deceased spouse earned enough credits to become "insured."
 - 3. A disabled child over the age of 18 who is not married and became disabled before age 22, and either of his/her parents is deceased or disabled, and earned enough credits to become "insured."
- c. Supplemental Security Income (SSI)
 - i. Supplemental Security Income (SSI) is a disability assistance program that provides payments to disabled individuals with low personal and family income, and who have very little in financial assets. SSI benefits are usually substantially less than what is available to an insured individual who qualifies for Social Security Disability. These payments in some cases can fill in for the first five (5) month of disability during the Social Security Disability waiting period.
- d. How is Disability Determined?
 - i. To qualify for Social Security Disability Insurance benefits (SSDI) and Supplemental Security Income benefits (SSI) a person must meet the definition of disability.
 - ii. A person is disabled under Social Security Rules if because of a physical or mental condition(s) the person:
 - 1. cannot do the work they did before;

2. cannot adjust to other work after evaluation of their physical or mental limitations, past work experience, education, skills and age; and
 3. has a disability that has lasted or is expected to last for at least 12 months or to result in death.
- e. Listing of Impairments (SSDI and SSI)
- i. Some conditions meeting certain strict medical criteria are described in the Listing of Impairments. These conditions are presumed to be disabling and no further evaluation of the claim is necessary.
 - ii. The Listing of Impairments describes, for each major body system, impairments considered severe enough to prevent an individual from doing any gainful activity. Most of the listed impairments are permanent or expected to result in death, or the listing includes a specific statement of duration. For all other listings, the evidence must show that the impairment has lasted or is expected to last for a continuous period of at least twelve (12) months.
- f. Virginia Retirement System (VRS) Disability Retirement?
- i. A VRS-covered employee working for a school division or a VRS-participating political subdivision is eligible to file a claim. A state employee hired before January 1, 1999 who did not elect to transfer to the Virginia Sickness and Disability Program (VSDP) is also eligible to be considered for disability retirement. A person is not eligible to retire on disability if he or she is a state employee covered under VSDP, has deferred retirement or has taken a refund of member contributions and interest.
 - ii. How is Disability Determined?
 1. To qualify for Virginia Retirement System (VRS) Disability Retirement, a VRS-covered employee must meet the definition of disability.
 2. A person is disabled under VRS rules, if because of a physical or mental condition(s) the person:
 - a. Becomes unable to perform his or her VRS covered position; and
 - b. The medical condition that prevents the further performance of the VRS covered position is likely to be permanent.
 3. If the person suffered from the disabling medical condition before becoming employed in a VRS covered position, it must have significantly worsen while in a VRS-covered position to be considered for disability retirement.
 4. If the VRS employee is disabled from work, but has a disability that is not likely to be permanent, he or she will not qualify for benefits.
- g. ERISA Disability
- i. Most ERISA disability plans provide for an appeal procedure that places the disability decision in the hands of the insurance company managing the plan. In most cases, after the second denial there is a right to file a suit in Federal Court.
 - ii. No new evidence will be reviewed by the judge, and only the evidence in the record submitted to the company before the suit was filed will be considered by the court. It is critical to the success of the claim that all the proof of disability be presented early in the appeal process.
- h. The Virginia Workers' Compensation Act
- i. The Act generally covers anyone injured on a job in Virginia or while working for a Virginia business, a city or state government. (Federal government employees and longshoremen are not covered under the state Act). Any employer who has 3 or more

regular employees should have workers' compensation insurance. If the employer does not, then the injured worker may be able to recover from a special fund call the Uninsured Employers' Fund. The Act also covers occupational diseases.

- ii. In most cases the employer has an insurance company who must pay damages to the injured worker. In the appropriate case, compensation may be paid for the following:
 - 1. Loss of earning
 - 2. Medical expenses
 - 3. Permanent Impairment
 - 4. Vocational Rehabilitation
- iii. Loss of income benefits are normally paid weekly or biweekly. In some cases when benefits are likely to be paid over many years, the workers' compensation insurance company may be willing to settle for a lump sum.
- i. The Federal Longshore and Harbor Workers' Compensation Act ("LHWCA")
 - i. The Longshore and Harbor Workers' Compensation Act, commonly referred to as the "Longshore Act" or "LHWCA" is a federal statute providing medical benefits and compensation to workers injured on ship terminals, shipyards, docks, piers, and marine ways or who work on or near the water. Workers are covered if they are involved in ship building or ship repair or loading and unloading ships. Benefits under the Longshore Act are often better than those available under the Virginia Workers' Compensation Act.

Recent Updates and Proposed Changes to Bankruptcy Rules
by Jason B. Shorter, Staff Attorney
Office of Chapter 13 Trustee Christopher T. Micale

I. Amendments to Local Bankruptcy Rules in the Western District of Virginia

- a. As of October 1, 2014, the Bankruptcy Court has updated local rules.
- b. Revised “Affidavit of Debtor(s) Requesting Confirmation of Plan”
 - i. Generally referred to as the “pre-confirmation” affidavit
 - ii. Attorney for debtor is no longer required to certify the affidavit
 - iii. *Pro se* debtors are no longer required to certify
- c. Addition to Local Rule 1006-1 – Extension of Time to Pay Filing Fees
 - i. New subsection D provides that if a debtor failed to pay filing fees in a prior case, an application for extension of time to pay filing fees for a current case must first be noticed for hearing and then good cause shown.
- d. Amendment to Local Rule 2090-1 – Admission to Practice
 - i. In court presentation no longer mandatory for attorney admission as long as a motion to waive appearance is filed and good cause shown for waiver.
- e. New Rule 3010 Authorizes Small Dividend Distribution
 - i. Chapter 7: In a chapter 7 case, the chapter 7 trustee is authorized to distribute dividends to any creditor in amounts less than five dollars (\$5.00).
 - ii. Chapter 12 & 13: In a chapter 12 or 13, the trustee is authorized to distribute payments to any creditor in amounts less than fifteen dollars (\$15.00).
- f. Amendment to Chapter 13 Confirmation Requirements – Local Rule 3015-3
 - i. The Court’s video and written instructions are to be given to debtors, but viewing now considered optional (although still highly encouraged) unless a party in interest files a request for the Court to instruct that the video and written instructions be viewed and read.
 - ii. The affidavit regarding the instructions is no longer required to be filed
 - iii. Pre-Confirmation Affidavit can be filed prior to a confirmation hearing or entry of an initial confirmation order.

- g. Amendments to Local Rule 4001-2 – Pre-Confirmation Adequate Protection & Lease Payments in Chapter 13
 - i. Removes requirement to provide pre-confirmation notice of adequate protection (no change to special notice for cramdown though)
- h. Local Rule 4004-1 Amended – Discharge Hearing in Chapter 13 Cases
 - i. Provides negative notice for disputing final report or debtor’s certification

II. Analysis of Select Proposed Changes to Federal Rules of Bankruptcy Procedure

a. Current Status of Proposed Amendments

- i. Public Comment Period on Proposed Rules ended February 17, 2015
- ii. Next Step: Advisory Committee will decide whether to submit the proposed rules to the Committee on Rules of Practice and Procedure
- iii. Assuming Advisory Committee approves the proposals, the proposals are sent for approval as follows:
 - 1. The Committee on Rules of Practice and Procedure; then
 - 2. The Judicial Conference of the United States; and then to
 - 3. The Supreme Court of the United States for final approval.
- iv. If approval is obtained at each step, and Congress does not act to defer, modify, or reject the rules, they will be effective December 1, 2016.

b. Proposed Amended Rule 2002(a)

- i. Amendment would provide that the Clerk of the Bankruptcy Court give at least twenty-one (21) days’ notice of the time fixed for filing an objection to confirmation of a Chapter 13 Plan.
 - 1. Compare with current rule that provides for 28 days’ notice.
 - 2. However, notice of the hearing itself will remain 28 days

c. Proposed Amended Rule 3002

- i. 3002(a) would now state: “A lien that secures a claim against the debtor is not void due only to the failure of any entity to file a proof of claim.”

1. Does not change the *White v. FIA Card Services, Inc.*, 494 B.R. 227 (W.D. Va. 2012) analysis where a creditor simply filed an unsecured claim rather than secured claim.
 - ii. 3002(c) changes the bar dates for proofs of claim in chapter 7, chapter 12 and chapter 13 cases from 90 days after the first date of the § 341 meeting to 60 days after the petition date.
- d. Proposed Amended Rule 3002.1
- i. Would expressly state that unless the court orders otherwise, once a creditor obtains stay relief, the 3002.1 notices are not required to be filed.
- e. Proposed Amended Rule 3007
- i. Would Clarify the Manner of Service of an Objection to Claim
 - ii. If approved, an objection to claim would have to be served on:
 1. The claimant by first class mail to the person most recently designated on the original or amended proof of claim as the person to receive notices at the address indicated; and
 - a. If the claimant is the United States, in the manner provided for service of a summons under Rule 7004(b)(4) or (5); or
 - b. If the claimant is an FDIC institution, in the manner provided under Rule 7004(h)
- f. Proposed Amended Rule 3012
- i. Revises rule to clarify procedure for determining the amount of secured and priority claims
- g. Proposed Amended Rule 3015
- i. If an Official Form Ch. 13 Plan is adopted, the Official Form must be used
- h. Proposed Amended Rule 5009(d)
- i. Provides that in chapter 12 and 13, a debtor can request an order stating that a secured claim is satisfied and the lien released under the terms of the plan.

CURRENT DRAFT PROPOSALS FOLLOW OUTLINE

1 **Rule 2002. Notices to Creditors, Equity Security**
2 **Holders, Administrators in Foreign**
3 **Proceedings, Persons Against Whom**
4 **Provisional Relief is Sought in Ancillary**
5 **and Other Cross-Border Cases, United**
6 **States, and United States Trustee**

7 (a) TWENTY-ONE-DAY NOTICES TO PARTIES
8 IN INTEREST. Except as provided in subdivisions (h), (i),
9 (l), (p), and (q) of this rule, the clerk, or some other person
10 as the court may direct, shall give the debtor, the trustee, all
11 creditors and indenture trustees at least 21 days' notice by
12 mail of:

13 * * * * *

14 (7) the time fixed for filing proofs of claims
15 pursuant to Rule 3003(c); and

16 (8) the time fixed for filing objections and the
17 hearing to consider confirmation of a chapter 12 plan;
18 and

19 (9) the time fixed for filing objections to
20 confirmation of a chapter 13 plan.

21 (b) TWENTY-EIGHT-DAY NOTICES TO
22 PARTIES IN INTEREST. Except as provided in
23 subdivision (l) of this rule, the clerk, or some other person
24 as the court may direct, shall give the debtor, the trustee, all
25 creditors and indenture trustees not less than 28 days'
26 notice by mail of the time fixed

27 (1) for filing objections and the hearing to
28 consider approval of a disclosure statement or, under
29 §1125(f), to make a final determination whether the
30 plan provides adequate information so that a separate
31 disclosure statement is not necessary;~~and~~

32 (2) for filing objections and the hearing to
33 consider confirmation of a chapter 9, or chapter 11, ~~or~~
34 ~~chapter 13~~ plan; and

1 **Rule 3002. Filing Proof of Claim or Interest**

2 (a) NECESSITY FOR FILING. ~~An~~A secured
3 creditor, unsecured creditor, or an equity security holder
4 must file a proof of claim or interest for the claim or
5 interest to be allowed, except as provided in Rules 1019(3),
6 3003, 3004, and 3005. A lien that secures a claim against
7 the debtor is not void due only to the failure of any entity to
8 file a proof of claim.

9 (b) PLACE OF FILING. A proof of claim or
10 interest shall be filed in accordance with Rule 5005.

11 (c) TIME FOR FILING. In a voluntary chapter 7
12 liquidation case, chapter 12 family farmer's debt
13 adjustment case, or chapter 13 individual's debt
14 adjustment case, a proof of claim is timely filed if it is filed
15 not later than 9060 days after the order for relief or the date
16 of the order of conversion to a case under chapter 12 or
17 chapter 13. In an involuntary chapter 7 case, a proof of

14 FEDERAL RULES OF BANKRUPTCY PROCEDURE

18 ~~claim is timely filed if it is filed not later than 90 days after~~
19 ~~the order for relief is entered. the first date set for the~~
20 ~~meeting of creditors called under § 341(a) of the Code,~~
21 ~~except as follows: But in all these cases, the following~~
22 ~~exceptions apply:~~

23 * * * * *

24 (6) ~~If notice of the time to file a proof of claim~~
25 ~~has been mailed to a creditor at a foreign address, o~~On
26 ~~motion filed by the~~a ~~creditor before or after the~~
27 ~~expiration of the time to file a proof of claim, the~~
28 ~~court may extend the time by not more than 60 days~~
29 ~~from the date of the order granting the motion. The~~
30 ~~motion may be granted if the court finds that the~~
31 ~~notice was insufficient under the circumstances to~~
32 ~~give the creditor a reasonable time to file a proof of~~
33 ~~claim~~

34 (A) the notice was insufficient under the
35 circumstances to give the creditor a reasonable
36 time to file a proof of claim because the debtor
37 failed to timely file the list of creditors' names
38 and addresses required by Rule 1007(a); or

39 (B) the notice was insufficient under the
40 circumstances to give the creditor a reasonable
41 time to file a proof of claim, and the notice was
42 mailed to the creditor at a foreign address.

43 (7) A proof of claim filed by the holder of a
44 claim that is secured by a security interest in the
45 debtor's principal residence is timely filed if:

46 (A) the proof of claim, together with the
47 attachments required by Rule 3001(c)(2)(C), is
48 filed not later than 60 days after the order for
49 relief is entered; and

50 (B) any attachments required by
51 Rule 3001(c)(1) and (d) are filed as a supplement
52 to the holder's claim not later than 120 days after
53 the order for relief is entered.

Committee Note

Subdivision (a) is amended to clarify that a creditor, including a secured creditor, must file a proof of claim in order to have an allowed claim. The amendment also clarifies, in accordance with § 506(d), that the failure of a secured creditor to file a proof of claim does not render the creditor's lien void. The inclusion of language from § 506(d) is not intended to effect any change of law with respect to claims subject to setoff under § 553. The amendment preserves the existing exceptions to this rule under Rules 1019(3), 3003, 3004, and 3005. Under Rule 1019(3), a creditor does not need to file another proof of claim after conversion of a case to chapter 7. Rule 3003 governs the filing of a proof of claim in chapter 9 and chapter 11 cases. Rules 3004 and 3005 govern the filing of a proof of claim by the debtor, trustee, or another entity if a creditor does not do so in a timely manner.

Subdivision (c) is amended to alter the calculation of the bar date for proofs of claim in chapter 7, chapter 12, and chapter 13 cases. The amendment changes the time for filing a proof of claim in a voluntary chapter 7 case, a chapter 12 case, or a chapter 13 case from 90 days after the

§ 341 meeting of creditors to 60 days after the petition date. If a case is converted to chapter 12 or chapter 13, the 60-day time for filing runs from the order of conversion. In an involuntary chapter 7 case, a 90-day time for filing applies and runs from the entry of the order for relief.

Subdivision (c)(6) is amended to expand the exception to the bar date for cases in which a creditor received insufficient notice of the time to file a proof of claim. The amendment provides that the court may extend the time to file a proof of claim if the debtor fails to file a timely list of names and addresses of creditors as required by Rule 1007(a). The amendment also clarifies that if a court grants a creditor's motion under this rule to extend the time to file a proof of claim, the extension runs from the date of the court's decision on the motion.

Subdivision (c)(7) is added to provide a two-stage deadline for filing mortgage proofs of claim secured by an interest in the debtor's principal residence. Those proofs of claim must be filed with the appropriate Official Form mortgage attachment within 60 days of the order for relief. The claim will be timely if any additional documents evidencing the claim, as required by Rule 3001(c)(1) and (d), are filed within 120 days of the order for relief. The order for relief is the commencement of the case upon filing a petition, except in an involuntary case. See § 301 and § 303(h). The confirmation of a plan within the 120-day period set forth in subdivision (c)(7)(B) does not prohibit an objection to any proof of claim.

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

4 (a) IN GENERAL. This rule applies in a chapter 13
5 case to claims (1) that are (1) secured by a security interest
6 in the debtor's principal residence, and (2) for which the
7 plan provides that either the trustee or the debtor will make
8 contractual installment payments provided for under
9 § 1322(b)(5) of the Code in the debtor's plan. Unless the
10 court orders otherwise, the notice requirements of this rule
11 cease to apply when an order terminating or annulling the
12 automatic stay becomes effective with respect to the
13 residence that secures the claim.

14 * * * * *

Committee Note

Subdivision (a) is amended to clarify the applicability of the rule. Its provisions apply whenever a chapter 13 plan provides that contractual payments on the debtor's home mortgage will be maintained, whether they

will be paid by the trustee or directly by the debtor. The reference to § 1322(b)(5) of the Code is deleted to make clear that the rule applies even if there is no prepetition arrearage to be cured. So long as a creditor has a claim that is secured by a security interest in the debtor's principal residence and the plan provides that contractual payments on the claim will be maintained, the rule applies.

Subdivision (a) is further amended to provide that, unless the court orders otherwise, the notice obligations imposed by this rule cease on the effective date of an order granting relief from the automatic stay with regard to the debtor's principal residence. Debtors and trustees typically do not make payments on mortgages after the stay relief is granted, so there is generally no need for the holder of the claim to continue providing the notices required by this rule. Sometimes, however, there may be reasons for the debtor to continue receiving mortgage information after stay relief. For example, the debtor may intend to seek a mortgage modification or to cure the default. When the court determines that the debtor has a need for the information required by this rule, the court is authorized to order that the notice obligations remain in effect or be reinstated after the relief from the stay is granted.

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1 **Rule 3007. Objections to Claims**

2 (a) ~~OBJECTIONS TO CLAIMS~~TIME AND
3 MANNER OF SERVICE. An objection to the allowance
4 of a claim and a notice of objection that substantially
5 conforms to the appropriate Official Form shall be ~~in~~
6 ~~writing and filed;~~ and served at least 30 days before any
7 scheduled hearing on the objection or any deadline for the
8 claimant to request a hearing. ~~A copy of the objection with~~
9 ~~notice of the hearing thereon shall be mailed or otherwise~~
10 ~~delivered to the claimant, the debtor or debtor in~~
11 ~~possession, and the trustee at least 30 days prior to the~~
12 ~~hearing.~~The objection and notice shall be served as follows:
13 (1) on the claimant by first-class mail to the
14 person most recently designated on the claimant's
15 original or amended proof of claim as the person to
16 receive notices, at the address so indicated; and

17 (A) if the objection is to a claim of the
18 United States, or any of its officers or agencies,
19 in the manner provided for service of a summons
20 and complaint by Rule 7004(b)(4) or (5); or

21 (B) if the objection is to a claim of an
22 insured depository institution, in the manner
23 provided by Rule 7004(h); and

24 (2) on the debtor or debtor in possession and on
25 the trustee by first-class mail or other permitted
26 means.

27 * * * * *

Committee Note

Subdivision (a) is amended to specify the manner in which an objection to a claim and notice of the objection must be served. It clarifies that Rule 7004 does not apply to the service of most claim objections. Instead, a claimant must be served by first-class mail addressed to the person that the claimant most recently designated on its proof of claim to receive notices, at the address so indicated. If, however, the claimant is the United States, an officer or

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agency of the United States, or an insured depository institution, service must also be made according to the method prescribed by the appropriate provision of Rule 7004. The service methods for the depository institutions are statutorily mandated, and the size and dispersal of the decision-making and litigation authority of the federal government necessitate service on the appropriate United States attorney's office and the Attorney General, as well as the person designated on the proof of claim.

As amended, subdivision (a) no longer requires that a hearing be scheduled or held on every objection. The rule requires the objecting party to provide notice and an opportunity for a hearing on the objection, but, by deleting from the subdivision references to "the hearing," it permits local practices that require a claimant to timely request a hearing or file a response in order to obtain a hearing. The official notice form served with a copy of the objection will inform the claimant of any actions it must take. However, while a local rule may require the claimant to respond to the objection to a proof of claim, the court will still need to determine if the claim is valid, even if the claimant does not file a response to a claim objection or request a hearing.

1 **Rule 3012. ~~Valuation of Security~~Determining the**
2 **Amount of Secured and Priority Claims**

3 The court may ~~determine the value of a claim secured~~
4 ~~by a lien on property in which the estate has an interest on~~
5 ~~motion of any party in interest and after a hearing on notice~~
6 ~~to the holder of the secured claim and any other entity as~~
7 ~~the court may direct.~~

8 (a) DETERMINATION OF AMOUNT OF CLAIM.

9 On request by a party in interest and after notice—to the
10 holder of the claim and any other entity the court
11 designates—and a hearing, the court may determine

12 (1) the amount of a secured claim under §
13 506(a) of the Code, or

14 (2) the amount of a claim entitled to priority
15 under § 507 of the Code.

16 (b) REQUEST FOR DETERMINATION; HOW

17 MADE. Except as provided in subdivision (c), a request to

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18 determine the amount of a secured claim may be made by
19 motion, in a claim objection, or in a plan filed in a
20 chapter 12 or chapter 13 case. When the request is made in
21 a chapter 12 or chapter 13 plan, the plan shall be served on
22 the holder of the claim and any other entity the court
23 designates in the manner provided for service of a
24 summons and complaint by Rule 7004. A request to
25 determine the amount of a claim entitled to priority may be
26 made only by motion after a claim is filed or in a claim
27 objection.

28 (c) CLAIMS OF GOVERNMENTAL UNITS. A
29 request to determine the amount of a secured claim of a
30 governmental unit may be made only by motion or in a
31 claim objection after the governmental unit files a proof of
32 claim or after the time for filing one under Rule 3002(c)(1)
33 has expired.

Committee Note

This rule is amended and reorganized.

Subdivision (a) provides, in keeping with the former version of this rule, that a party in interest may seek a determination of the amount of a secured claim. The amended rule provides that the amount of a claim entitled to priority may also be determined by the court.

Subdivision (b) is added to provide that a request to determine the amount of a secured claim may be made in a chapter 12 or chapter 13 plan, as well as by a motion or a claim objection. When the request is made in a plan, the plan must be served on the holder of the claim and any other entities the court designates according to Rule 7004. Secured claims of governmental units are not included in this subdivision and are governed by subdivision (c). The amount of a claim entitled to priority may be determined through a motion or a claim objection.

Subdivision (c) clarifies that a determination under this rule with respect to a secured claim of a governmental unit may be made only by motion or in a claim objection, but not until the governmental unit has filed a proof of claim or its time for filing a proof of claim has expired.

1 **Rule 3015. Filing, Objection to Confirmation, Effect of**
2 **Confirmation, and Modification of a Plan**
3 **in a Chapter 12 Family Farmer's Debt**
4 **Adjustment or a Chapter 13 Individual's**
5 **Debt Adjustment Case**

6 (a) FILING OF CHAPTER 12 PLAN. The debtor
7 may file a chapter 12 plan with the petition. If a plan is not
8 filed with the petition, it shall be filed within the time
9 prescribed by § 1221 of the Code.

10 (b) FILING OF CHAPTER 13 PLAN. The debtor
11 may file a chapter 13 plan with the petition. If a plan is not
12 filed with the petition, it shall be filed within 14 days
13 thereafter, and such time may not be further extended
14 except for cause shown and on notice as the court may
15 direct. If a case is converted to chapter 13, a plan shall be
16 filed within 14 days thereafter, and such time may not be
17 further extended except for cause shown and on notice as
18 the court may direct.

19 (c) ~~DATING.~~ ~~Every proposed plan and any~~
20 ~~modification thereof shall be dated.~~ FORM OF CHAPTER
21 13 PLAN. If there is an Official Form for a plan filed in a
22 chapter 13 case, that form must be used. Provisions not
23 otherwise included in the Official Form or deviating from it
24 are effective only if they are included in a section of the
25 Official Form designated for nonstandard provisions and
26 are also identified in accordance with any other
27 requirements of the Official Form.

28 (d) ~~NOTICE AND COPIES.~~ ~~If the plan~~ The plan or
29 ~~a summary of the plan shall be~~ is not included with ~~the~~ each
30 notice of the hearing on confirmation mailed pursuant to
31 Rule 2002, the debtor shall serve the plan on the trustee and
32 all creditors when it is filed with the court. ~~If required by~~
33 ~~the court, the debtor shall furnish a sufficient number of~~
34 ~~copies to enable the clerk to include a copy of the plan with~~
35 ~~the notice of the hearing.~~

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36 (e) TRANSMISSION TO UNITED STATES
37 TRUSTEE. The clerk shall forthwith transmit to the
38 United States trustee a copy of the plan and any
39 modification thereof filed pursuant to subdivision (a) or (b)
40 of this rule.

41 (f) OBJECTION TO CONFIRMATION;
42 DETERMINATION OF GOOD FAITH IN THE
43 ABSENCE OF AN OBJECTION. An objection to
44 confirmation of a plan shall be filed and served on the
45 debtor, the trustee, and any other entity designated by the
46 court, and shall be transmitted to the United States trustee,
47 ~~before confirmation of the plan~~ at least seven days before
48 the date set for the hearing on confirmation. An objection
49 to confirmation is governed by Rule 9014. If no objection
50 is timely filed, the court may determine that the plan has
51 been proposed in good faith and not by any means

52 forbidden by law without receiving evidence on such
53 issues.

54 (g) EFFECT OF CONFIRMATION. In a chapter 12
55 or chapter 13 case, any determination made in accordance
56 with Rule 3012 of the amount of a secured claim under §
57 506(a) of the Code is binding on its holder, even if the
58 holder files a contrary proof of claim under Rule 3002 or
59 the debtor schedules that claim under § 521(a) of the Code,
60 and regardless of whether an objection to the claim has
61 been filed under Rule 3007.

62 (g)(h) MODIFICATION OF PLAN AFTER
63 CONFIRMATION. A request to modify a plan pursuant to
64 § 1229 or § 1329 of the Code shall identify the proponent
65 and shall be filed together with the proposed modification.
66 The clerk, or some other person as the court may direct,
67 shall give the debtor, the trustee, and all creditors not less
68 than 21 days notice by mail of the time fixed for filing

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69 objections and, if an objection is filed, the hearing to
70 consider the proposed modification, unless the court orders
71 otherwise with respect to creditors who are not affected by
72 the proposed modification. A copy of the notice shall be
73 transmitted to the United States trustee. A copy of the
74 proposed modification, or a summary thereof, shall be
75 included with the notice. ~~If required by the court, the~~
76 ~~proponent shall furnish a sufficient number of copies of the~~
77 ~~proposed modification, or a summary thereof, to enable the~~
78 ~~clerk to include a copy with each notice.~~If a copy is not
79 included with the notice and the proposed modification is
80 sought by the debtor, a copy shall be served on the trustee
81 and all creditors in the manner provided for service of the
82 plan by subdivision (d) of this rule. Any objection to the
83 proposed modification shall be filed and served on the
84 debtor, the trustee, and any other entity designated by the
85 court, and shall be transmitted to the United States trustee.

- 86 An objection to a proposed modification is governed by
87 Rule 9014.

Committee Note

This rule is amended and reorganized.

Subdivision (c) is amended to require use of an Official Form if one is adopted for chapter 13 plans. The amended rule also provides that nonstandard provisions in a chapter 13 plan must be set out in the section of the Official Form specifically designated for such provisions and identified in the manner required by the Official Form.

Subdivision (d) is amended to ensure that the trustee and creditors are served with the plan in advance of confirmation. Service may be made either at the time the plan is filed or with the notice under Rule 2002 of the hearing to consider confirmation of the plan.

Subdivision (f) is amended to require service of an objection to confirmation at least seven days before the hearing to consider confirmation of a plan. The seven-day notice period may be altered in a particular case by the court under Rule 9006.

Subdivision (g) is amended to provide that the amount of a secured claim under § 506(a) may be determined through a chapter 12 or chapter 13 plan in accordance with Rule 3012. That determination controls over a contrary proof of claim, without the need for a claim

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objection under Rule 3007, and over the schedule submitted by the debtor under § 521(a). The amount of a secured claim of a governmental unit, however, may not be determined through a chapter 12 or chapter 13 plan under Rule 3012.

Subdivision (h) was formerly subdivision (g). It is redesignated and amended to clarify that service of a proposed plan modification must be made in accordance with subdivision (d) of this rule. The option to serve a summary of the proposed modification has been retained. Unless required by another rule, service under this subdivision does not need to be made in the manner provided for service of a summons and complaint by Rule 7004.

1 **Rule 5009. Closing Chapter 7 ~~Liquidation~~, Chapter 12**
2 **~~Family Farmer's Debt Adjustment~~,**
3 **~~Chapter 13 Individual's Debt Adjustment~~,**
4 **and Chapter 15 ~~Ancillary and Cross-~~**
5 **Border Cases; Order Declaring Lien**
6 **Satisfied**

7 (a) CLOSING OF CASES UNDER CHAPTERS 7,
8 12, AND 13. If in a chapter 7, chapter 12, or chapter 13
9 case the trustee has filed a final report and final account
10 and has certified that the estate has been fully administered,
11 and if within 30 days no objection has been filed by the
12 United States trustee or a party in interest, there shall be a
13 presumption that the estate has been fully administered.

14 * * * * *

15 (d) ORDER DECLARING LIEN SATISFIED. In a
16 chapter 12 or chapter 13 case, if a claim that was secured
17 by property of the estate is subject to a lien under
18 applicable nonbankruptcy law, the debtor may request entry
19 of an order declaring that the secured claim has been

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20 satisfied and the lien has been released under the terms of a
21 confirmed plan. The request shall be made by motion and
22 shall be served on the holder of the claim and any other
23 entity the court designates in the manner provided by
24 Rule 7004 for service of a summons and complaint.

Committee Note

Subdivision (d) is added to provide a procedure by which a debtor in a chapter 12 or chapter 13 case may request an order declaring a secured claim satisfied and a lien released under the terms of a confirmed plan. A debtor may need documentation for title purposes of the elimination of a second mortgage or other lien that was secured by property of the estate. Although requests for such orders are likely to be made at the time the case is being closed, the rule does not prohibit a request at another time if the lien has been released and any other requirements for entry of the order have been met.

Other changes to this rule are stylistic.

BANKRUPTCY JUDGES PANEL – 3:30 P.M.

MATERIALS FOLLOW

**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: *Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency)*, 134 S. Ct. 2165 (2014).

Date Decided: June 9, 2014

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

Background: Shortly before Bellingham Insurance Agency, Inc. (“BIA”) filed for voluntary chapter 7 bankruptcy, the company assigned the insurance commission from one of its largest clients to Peter Pearce, a long-time employee. Additionally, a co-owner 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 the owners of BIA. The chapter 7 trustee, Peter Arkison, filed a claim against EBIA in the BIA bankruptcy proceeding. Arkison alleged fraudulent conveyances and that EBIA, as a successor corporation, was liable for BIA’s debts.

Procedural History: 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 claims was unconstitutional based on the Supreme Court’s ruling in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). 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.

Issue: How should a bankruptcy court proceed when faced with a “*Stern* claim,” a claim labeled by Congress as “core” but may not be adjudicated by a bankruptcy court in a manner designated by 28 U.S.C. § 157(b).

Holding: When the Constitution does not authorize a bankruptcy court to issue a final judgment on a bankruptcy related claim, the bankruptcy court may issue proposed findings of fact and conclusions of law to be reviewed *de novo* by the district court.

Case: *Clark v. Rameker*, 134 S. Ct. 2242 (2014).

Date Decided: June 12, 2014

Code Section: 11 U.S.C. § 522(b)(3)(C)

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.

Procedural History: 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 the district court decision.

Issue: Whether an individual retirement account that a debtor has inherited is exempt from the debtor's bankruptcy estate.

Holding: The funds which the debtor inherited which were held in an individual retirement account were not "retirement funds" as the term is used in the bankruptcy exemption statute. A bankruptcy court should look to the legal characteristics of the account in which the funds are held asking as an objective matter if the account is one set aside for the day when the individual stops working; bankruptcy courts should not engage in a determination of whether the debtor planned to use the funds for retirement purposes.

Pending Decisions of the Supreme Court of the United States

Case: *Wellness Int'l Network Ltd. v. Sharif*

Date Decided: TBD

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: (1) Whether the presence of a subsidiary state property law issue in a § 541 action brought against a debtor means that such action does not "stem[] from the bankruptcy itself" and thus that the bankruptcy court may not enter a final order; (2) 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.

Case: *Bank of Am., N.A. v. Caulkett*

Date Decided: TBD

Code Section: 11 U.S.C. § 506(d)

Background: This is identical in substance to *Bank of America v. Toledo-Cardona*, which is also pending before the Supreme Court. David B. Caulkett had two mortgages on his house, and the outstanding balance on the first exceeded the house's current market value. He filed a chapter 7 petition and moved to strip off the junior lien under 11 U.S.C. § 506(d).

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

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.

Case: *Bank of Am., N.A. v. Toledo-Cardona*

Date Decided: TBD

Code Section: 11 U.S.C. § 506(d)

Background: This is identical in substance to *Bank of America v. Caulkett*, which is also pending before the Supreme Court. Edelmiro Toledo-Cardona, the debtor, had two mortgages on his house, and the outstanding balance on the first exceeded the house's current market value. He filed a chapter 7 petition and moved to strip off the junior lien under 11 U.S.C. § 506(d).

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

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.

Case: *Baker Botts LLP v. ASARCO LLC*

Date Decided: TBD

Code Section: 11 U.S.C. § 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 vehemently 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 reversed, 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.

Case: *Harris v. Viegelahn*

Date Decided: TBD

Code Section: 11 U.S.C. §§ 348, 1307(a), 1327(b)

Background: Charles E. Harris fell behind on his mortgage and filed for relief under chapter 13. The debtor proposed a plan under which he would resume paying the mortgage directly and the chapter 13 trustee would pay the mortgage arrears and other debts in full over sixty months out of funds garnished from the debtor's wages each month. The bankruptcy court confirmed his plan. 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. It is undisputed that the conversion was in good faith. At the time of conversion, the chapter 13 trustee held \$4,319.22 of the debtor's post-petition garnished wages, which she distributed to the debtor's creditors instead of returning them 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.

Case: *Bullard v. Hyde Park Sav. Bank*

Date Decided: TBD

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 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.

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

Case: *Pliler v. Stearns (In re Pliler)*, 747 F.3d 260 (4th Cir. 2014).

Date Decided: March 28, 2014

Code Section: 11 U.S.C. § 1325(b)

Background: The debtors’ household income exceeded North Carolina’s median family income for the comparable household, but their disposable income was negative. The proposed chapter 13 plan set out payments for fifty-five months to pay attorneys’ fees, the trustee’s commission, and secured creditors, but no money was to go to the unsecured creditors. The trustee filed an objection to confirmation and a motion to dismiss for failure to file a plan in good faith and failure to pay an amount necessary during the applicable commitment period under 11 U.S.C. § 1325.

Procedural History: Similar motions were filed in other cases, and a joint hearing was conducted to consider these matters. Chief Bankruptcy Judge Randy Doub entered an order denying the objection and motion to dismiss. He further directed the trustee to file a motion for confirmation that would require the payments to go for 60 months, which would result in an 84% dividend to unsecured creditors. There was a direct appeal to the Court of Appeals for the Fourth Circuit.

Issue: Whether above-median-income debtors with negative disposable income are obligated to propose chapter 13 plans that last for five years when their unsecured creditors have not been paid in full.

Holding: The Court of Appeals held that the “applicable commitment period” is a temporal requirement and that above-median-income debtors must propose a chapter 13 plan for five years unless all unsecured creditor claims are paid in full, irrespective of a debtor’s disposable income.

Case: *Anderson v. Architectural Glass Constr., Inc. (In re Pfister)*, 749 F.3d 294 (4th Cir. 2014).

Date Decided: April 17, 2014

Code Section: 11 U.S.C. §§ 544(b), 548(a)

Background: The debtor and her husband purchased land to be utilized by the husband’s company, Architectural Glass Construction, Inc. (“AGC”). The intention was to lease the land to the husband’s company; however, AGC never paid any rent to the debtor and her husband.

Although the company paid for the land and subsequent mortgages directly, the title remained in the name of the debtor and her husband. Before the debtor filed bankruptcy under chapter 7, she transferred her interest in the property to AGC. The bankruptcy trustee filed a motion to set aside the transfer.

Procedural History: The bankruptcy court concluded that the conveyance was fraudulent and ordered the company to reimburse the bankruptcy estate \$43,500. The district court found no fault with the bankruptcy court's findings of fact but reversed concluding that, since AGC used the property and made the mortgage payments, AGC held equitable title to the property and the debtor only held bare legal title. The district court thus held that the debtor had not made a constructively fraudulent transfer because the transfer lacked value at the time she conveyed it. The trustee appealed.

Issue: Whether there was a resulting trust to sever the debtor's legal and equitable interests in the property.

Holding: Relying on South Carolina trust law, the Court of Appeals held that the bankruptcy court did not clearly err in concluding that there was not a resulting trust, because AGC did not intend to own the property on the original date of acquisition.

Case: *Gold v. Robbins (In re Rowe)*, 750 F.3d 392 (4th Cir. 2014).

Date Decided: April 28, 2014

Code Section: 11 U.S.C. §§ 326, 330(a)

Background: The chapter 7 trustee requested a fee of \$17,254.61. The bankruptcy court reduced the fee to \$8,020 finding that the trustee failed to properly or timely complete his duties. The bankruptcy court determined the amount based on the trustee's hourly rate and not on the compensation schedule in the Bankruptcy Code.

Procedural History: The trustee moved for a stay of the order reducing his fees, and the bankruptcy court granted the motion. The district court affirmed the bankruptcy court but also stayed the order pending appeal to the Court of Appeals.

Issues: Whether a bankruptcy court is required, absent extraordinary circumstances, to compensate chapter 7 trustees on a commission basis.

Holding: Starting with the plain meaning of 11 U.S.C. § 330(a)(7), the Court of Appeals concluded that, absent extraordinary circumstances, chapter 7 trustees must be paid on a commission basis. The Court of Appeals, however, clarified that § 330(a)(7) creates a presumption, but not a right, to the statutory maximum commission-based fee. A bankruptcy court must first determine the statutory commission before determining whether it is in fact unreasonable and thus should be reduced.

Case: *Branch Banking & Trust Co. v. Constr. Supervision Servs., Inc. (In re Constr. Supervision Servs., Inc.)*, 753 F.3d 124 (4th Cir. 2014).

Date Decided: May 22, 2014

Code Section: 11 U.S.C. § 362(a)(4), (b)(3)

Background: Construction Supervision Services, Inc. ("CSS"), a full-service construction company, placed orders with a number of subcontractors for materials. The subcontractors delivered materials on an open account and then sent invoices to CSS. After CSS filed for bankruptcy under chapter 11, the subcontractors sought to serve notice of, and thereby perfect, liens on funds due to CSS. The subcontractors asked the bankruptcy court to clarify the extent of the automatic stay to determine whether the post-petition perfection of their liens was within the

scope of the stay. BB&T objected, claiming that the subcontractors lacked an interest in the property because the subcontractors failed to notice their liens on funds before CSS filed for bankruptcy. The subcontractors claimed that their perfection fell within an exception to the automatic stay for property interests that predate bankruptcy petitions, the post-petition perfection of which would be effective against third parties who acquired a pre-perfection interest.

Procedural History: The bankruptcy court held that the subcontractors gained an interest in the property as soon as they delivered the materials to CSS and thus the perfection of the security interest post-petition fell within the exception to the automatic stay. The district court affirmed, and BB&T appealed.

Issue: Whether construction subcontractors entitled to a lien on funds under North Carolina law had an interest in property when the debtor contractor filed for bankruptcy, by which time the subcontractors had not yet served notice of, and thereby perfected, their liens.

Holding: Under North Carolina law, the subcontractors' entitlement to a lien arose upon delivery of materials and equipment, and thus they had an interest in property pre-petition despite not having yet served notice of their liens. The post-petition perfection by the subcontractors, therefore, was not barred by the automatic stay.

Case: *Nat'l Heritage Found., Inc. v. Highbourne Found.*, 760 F.3d 344 (4th Cir. 2014).

Date Decided: July 25, 2014

Background: National Heritage Foundation ("NHF") was a non-profit public charity that administered and maintained Donor-Advised Funds, in which donors relinquish all rights and interest in assets they donate but retain the right to make non-binding recommendations regarding their use. Following the entry of a state court multimillion dollar judgment, NHF filed for bankruptcy under chapter 11. The court-approved plan contained a release provision to protect the non-debtor officers and directors of NHF. NHF donors challenged confirmation of the plan on the ground that the release was invalid. The bankruptcy court confirmed the plan. The district court affirmed that decision.

Procedural History: The district court affirmed the bankruptcy court's decision. The Court of Appeals vacated the portion of the judgment confirming the release provision because the bankruptcy court failed to make sufficient factual findings to support the conclusion that the release provision was essential. The Court of Appeals directed the bankruptcy court on remand to consider the six factors enumerated in *Class Five Nevada Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 658 (6th Cir. 2002). On remand, the bankruptcy court ruled that the non-debtor release provision was unenforceable, and the district court affirmed. NHF appealed.

Holding: The Court of Appeals agreed with the bankruptcy court's finding on remand that only one factor (that an identity of interests existed between the released parties and NHF because of an indemnity obligation) weighed in favor of the release provision being enforceable. The Court of Appeals concluded that "an indemnity obligation is not, by itself, sufficient to justify a non-debtor release" and expressed concern over a release provision when there was no mechanism outside of bankruptcy to satisfy donor claims. The Court of Appeals thus held that NHF failed to carry its burden of proving that the facts and circumstances justified an enforceable release provision in its chapter 11 plan.

Case: *Guttman v. Constr. Program Grp. (In re Railworks Corp.)*, 760 F.3d 398 (4th Cir. 2014).

Date Decided: July 28, 2014

Code Section: 11 U.S.C. §§ 547, 550

Background: TIG Insurance Company (“TIG”) provided general liability, automobile, and workers’ compensation insurance to the debtor, Railworks Corporation. Construction Program Group (“CPG”) was TIG’s managing general underwriter and would collect, receive, and account for the premiums on the insurance policies. The chapter 11 litigation trustee for the debtor’s estate attempted to avoid and recover premium payments transferred to CPG by the debtor. The payments were made within ninety days before the debtor filed bankruptcy and were later transferred to TIG by CPG. The parties agreed that CPG was not an initial transferee. Instead, the trustee argued that CPG was an entity for whose benefit the premium payment transfers were made.

Procedural History: The bankruptcy court granted summary judgment in favor of CPG, and on appeal the district court vacated the bankruptcy court’s grant and remanded. CPG then appealed to the Court of Appeals for the Fourth Circuit.

Issue: Whether the litigation trustee satisfied the requirements of both 11 U.S.C. §§ 547 and 550.

Holding: The Court pointed out that a party cannot be an entity for whose benefit the transfer was made if it is a mere conduit for the party that had a direct business relationship with the debtor. All parties agreed that CPG was a mere conduit, because CPG’s agreement with TIG created an express trust in which CPG had physical control over the payments but no legal right to them. Therefore, “unwilling” to “eviscerate the conduit defense,” the Court of Appeals held that the trustee was unable to recover the premium payments under § 550. Since this holding was dispositive of the appeal, the Court of Appeals did not need to address whether the payments could be avoided under § 547.

Case: *Susquehanna Bank v. United States (In re Restivo Auto Body, Inc.)*, 772 F.3d 168 (4th Cir. 2014).

Date Decided: October 31, 2014

Code Section: 26 U.S.C. §§ 6321, 6323

Background: On January 4, 2005, Restivo Auto Body, Inc. borrowed \$1 million from Susquehanna Bank and secured repayment by executing and delivering a deed of trust. Six days later, on January 10, 2005, the IRS filed notice of a federal tax lien against Restivo for unpaid employment taxes. On February 11, 2005, Susquehanna Bank recorded the deed of trust. Susquehanna Bank commenced an adversary proceeding in Restivo’s chapter 11 case seeking a judgment declaring that its security interest had priority over the IRS’s tax lien.

Procedural History: The bankruptcy court granted Susquehanna Bank priority, holding that the recordation related back to the effective date of the deed of trust under the Maryland Code. The district court affirmed, ruling that (i) the Maryland Code related back Susquehanna Bank’s subsequent recordation of its deed of trust to the date the deed of trust was executed and delivered, thus giving the bank a security interest effective before the IRS recorded its tax lien, and alternatively that (ii) Maryland common law, under the doctrine of equitable conversion, gave the bank a protected security interest in the property, regardless of recordation, when the deed of trust was executed. The IRS appealed.

Issue: Whether Maryland law gave Susquehanna Bank a security interest, as defined by 26 U.S.C. § 6323(h)(1), when the bank received a deed of trust to secure repayment of its loan on January 4, even though it did not record the deed of trust until February 11.

Holding: The Court of Appeals affirmed the judgment of the district court on the ground that under Maryland common law, Susquehanna Bank acquired an equitable security interest in the two parcels of real property on January 4, regardless of recordation, because its interest became “protected . . . against a subsequent lien arising out of an unsecured obligation” on that date. The Court of Appeals rejected the holding that the Maryland Code gave the bank retroactive priority concluding that 26 U.S.C. § 6323(h)(1)(A)’s use of the present perfect tense precludes giving effect to the Maryland Code’s relation-back provision.

Case: *Wolff v. United States (In re FirstPay, Inc.)*, 773 F.3d 583 (4th Cir. 2014).

Date Decided: December 12, 2014

Code Section: 11 U.S.C. §§ 547, 550

Background: FirstPay, Inc. provided payroll processing services. Prior to each payroll date, FirstPay would withdraw funds from the client’s checking account sufficient to cover (i) taxes for which client was liable, (ii) payment of the client’s employees’ wages, and (ii) fees owed to FirstPay. FirstPay deposited those funds into a “tax account” and held the funds there until taxes were due, at which time FirstPay would remit the payments to the taxing authorities. FirstPay, however, also transferred portions of the clients’ funds to FirstPay’s own operating account to pay business expenses and for lavish personal expenditures by FirstPay’s principals. As a result of the misappropriation, a substantial portion of its clients’ tax obligation went unpaid and now remain due and owing. Creditors filed an involuntary chapter 7 petition against FirstPay. The trustee filed a complaint seeking, among other relief, (i) declaratory judgment that the government had no claim for taxes or penalties against FirstPay clients whose taxes were paid to FirstPay but not ultimately remitted, (ii) avoidance of FirstPay’s payments to the IRS as preferences and fraudulent conveyances, and (iii) turnover of avoided transfers.

Procedural History: The bankruptcy court granted the government’s motion for summary judgment as to declaratory judgment and the preference claims and entered a judgment in favor of the government on the fraudulent conveyance claims. The district court reversed as to the claim to avoid as preferences under 11 U.S.C. § 547(b)(4)(A). On remand, the bankruptcy court granted the trustee’s motion on the preference and turnover claims. The district court affirmed. The Court of Appeals remanded with instruction to the bankruptcy court (i) to reconsider the preference claim without regard to a concession that FirstPay’s transfer of tax funds to the IRS on behalf of its clients was a transfer of FirstPay’s own interest in property and (ii) to determine the merits of the government’s “ordinary course of business” defense. The bankruptcy court determined the funds were not FirstPay’s property and thus not preferences, but even if they were preferences, they were protected by the “ordinary course of business” exception. The trustee appealed, and the district court affirmed.

Issue: Whether the bankruptcy trustee may reclaim as property of the debtor the approximately \$28 million transferred by the debtor to the IRS during the 90 days preceding the filing of the bankruptcy petition.

Holding: Under Maryland law, FirstPay held the tax funds in an express trust and lacked the equitable interest in the property necessary for its transfers to be avoided under § 547(b).

Case: *Covert v. LVNV Funding, LLC*, 779 F.3d 242 (4th Cir. 2015).

Date Decided: March 3, 2015

Code Section: 11 U.S.C. §§ 502, 1327

Background: The plaintiffs each separately filed individual bankruptcy under chapter 13 in Maryland. LVNV Funding, LLC and its affiliated companies held unsecured claims against each plaintiff and filed proofs of claim in each case. Each plaintiff had their chapter 13 plan confirmed and made payments which went to the payment of unsecured claims. The plaintiffs filed a putative class action lawsuit in the District of Maryland, alleging that the defendants had violated the federal Fair Debt Collection Practices Act and various Maryland laws by filing these proofs of claim without a Maryland debt collection license. In addition, plaintiff Covert alleged unjust enrichment.

Procedural History: The defendants moved to dismiss and the district court granted the motion, finding that the unjust enrichment claim was barred by res judicata and that the federal and state statutory claims failed to state a claim because filing a proof of claim does not constitute a “collection activity” within the meaning of the statutes. The plaintiffs appealed.

Holding: The Court of Appeals concluded (i) that the confirmation orders of each plan were a final judgment, (ii) that the plaintiffs and defendants were parties to the earlier confirmation proceedings, and (iii) that, because all of the plaintiffs’ claims implicitly ask the district court to reconsider the provision of the confirmed plans, they are based on the same cause of action as the plan confirmation orders. The Court of Appeals thus held that the claims were barred by res judicata.

Case: *Moses v. CashCall, Inc.*, No. 14-1195, 2015 WL 1137242, 2015 U.S. App. LEXIS 4098 (4th Cir. Mar. 16, 2015).

Date Decided: March 16, 2015

Code Section: 9 U.S.C. § 1–16 (Federal Arbitration Act); 28 U.S.C. §§ 157–58, 1291–92

Background: The debtor borrowed \$1,000 from Western Sky Financial, LLC, promising to repay \$1,500 at 149% interest (effectively 233.10% per annum on the money received). The debtor subsequently filed for bankruptcy. The agreement specified that Indian tribal law would apply and that any dispute arising under the agreement would be resolved by arbitration. CashCall, Inc., the loan servicer, filed a proof of claim. The debtor filed an adversary proceeding requesting (i) declaratory judgment that the loan was illegal and void and (ii) damages for CashCall’s allegedly illegal debt collection activities. CashCall simultaneously sought to dismiss the adversary action or to stay the proceeding and compel arbitration.

Procedural History: The bankruptcy court retained jurisdiction over the first claim and denied the motion of CashCall to compel arbitration. With respect to the second claim, the bankruptcy court made recommended findings of fact and conclusions of law to retain jurisdiction over the claim and deny the motion to compel arbitration. On appeal from the bankruptcy court, the district court affirmed the bankruptcy court’s denial of the motion to compel arbitration as to the first claim and, itself, denied the motion to compel arbitration with respect to the second claim.

Issue: Whether two claims, one for declaratory relief and one for money damages, asserted by the debtor in an adversary proceeding, are subject to arbitration.

Holding: The Fourth Circuit held that the district court did not err in affirming the bankruptcy court’s exercise of discretion to retain jurisdiction over the declaratory judgment claim, because its resolution could directly impact the claims against the debtor’s estate and sending it to arbitration would substantially interfere with her efforts to reorganize. The Fourth Circuit, however, further held that the district court erred in retaining jurisdiction over the non-core claim and denying CashCall’s motion to compel arbitration of that claim.

Case: *Jenkins v. Ward (In re Jenkins)*, No. 14-1195, __ WL __, __ U.S. App. LEXIS __ (4th Cir. Apr. 27, 2015).

Date Decided: April 27, 2015

Code Section and Rule: 11 U.S.C. § 727(c)(1); Fed. R. Bankr. P. 2003(e), 4004

Background: The debtor filed for relief under chapter 7 and disclosed on his Statement of Financial Affairs receipt of \$235,000 in lawsuit proceeds in the two years prior to filing his petition. The debtor did not provide information on the status of those funds. At the meeting of creditors, the debtor testified that the proceeds were deposited into his wife's bank account of which he claimed to not be an owner. The trustee requested an extension of time to file a complaint objecting to discharge, which the bankruptcy granted and extended to sixty days after the conclusion of the 341 meeting. A continued 341 meeting was held on July 19, 2012, but the debtor still failed to provide the trustee with some information. Counsel for the trustee noted that the trustee would decide if "we can adjourn the meeting" but that "officially the meeting is continued." No notice of a continued meeting was ever filed, nor did the meeting reconvene. On September 26, 2012, sixty-nine days following the July 19 341 meeting, the trustee filed a complaint objecting to discharge. The debtor responded that the trustee was "barred by the applicable statute of limitations."

Procedural History: The trustee moved for summary judgement, and the bankruptcy court granted it finding that the complaint was timely. The debtor appealed, and the district court affirmed. The debtor appealed.

Holding: The Court of Appeals held that the trustee's complaint was untimely, reversed the district court judgment, and remanded. The Court of Appeals found that, since the presiding official in this case neither announced an adjourned date and time nor filed a statement specifying as much as required by Bankruptcy Rule 2003(e), the meeting was never adjourned and thus concluded on the July 19 date. The Court of Appeals refused, however, to adopt a "bright-line approach" that the failure to adjourn a creditors' meeting pursuant to Rule 2003(e) is *per se* the conclusion of the creditors' meeting.

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- a. We have desktops that connect to PACER in our Roanoke, Lynchburg, and Charlottesville courthouses.
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 1. <http://www.7tutorials.com/how-connect-hidden-wireless-networks>
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 1. <http://www.7tutorials.com/how-connect-hidden-wireless-networks-windows-8>
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 - iv. Go to settings on your Apple device and access airplay. Once you access airplay you will see “USBC CR2” or another similar name depending on the location and in which courtroom you are located. Click that and connect!
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