W.D. CONFERENCE - RECENT DEVELOPMENTS IN CONSUMER BANKRUPTCY LAW
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U.S. SUPREME COURT

1. **Boechler, P.C. v. Comm'r of Internal Revenue**, 142 S. Ct. 1493 (4/21/22)(Barrett)
Deadline to petition Tax Court for review under 26 USC §6330(d)(1) is not jurisdictional.

"The Internal Revenue Service can seize taxpayer property to collect tax debts. Before it does so, however, the taxpayer is typically entitled to a 'collection due process hearing'-a proceeding at which the taxpayer can challenge the levy or offer collection alternatives like payment by installment. . . . [T]he taxpayer has 30 days to petition the Tax Court for review.

Boechler, P.C., the petitioner in this case, missed the deadline by one day. According to the Commissioner of the IRS, this tardiness extinguished Boechler's opportunity to seek review of the agency's determination. The Commissioner insists that the deadline is jurisdictional, which means that the Tax Court has no authority to consider late-filed petitions. And even if it is not jurisdictional, the Commissioner argues, the Tax Court lacks the power to accept a tardy filing by applying the doctrine of equitable tolling. We disagree with the Commissioner on both scores." "[A] procedural requirement [is] jurisdictional only if Congress 'clearly states' that it is."

… "Section 6330(d)(1) provides: 'The person may, within 30 days of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to *such matter*).'"

Reviewing the phrase "such matter" and its limitation on the Tax Court authority, the Supreme Court held that "the text does not clearly mandate the jurisdictional reading."

2. **Siegel v. Fitzgerald**, 142 S. Ct. 1770 (6/6/22)(Sotomayor)
The Bankruptcy Judgeship Act violates the uniformity requirement of the Constitution's bankruptcy clause by increasing quarterly fees solely in districts under the U.S. Trustee program, not in those under the Bankruptcy Administrator program.

"The Bankruptcy Clause empowers Congress to establish 'uniform Laws on the subject of Bankruptcies throughout the United States.' U.S. Const., Art. I, §8, cl. 4. … The question in this case is whether Congress' enactment of a significant fee increase that exempted debtors in two States violated the uniformity requirement. Here, it did."

The Trustee Program is funded by user fees and the Administrator Program is funded by the Judiciary's general budget. Following a 9th Circuit challenge, Congress required all chapter 11 debtors to pay a uniform fee. 2000 Act §105, 114 Stat. 2412 (enacting 28 U.S.C. § 1930(a)(7)).

In 2017, Congress enacted a temporary increase in the fee rates applicable to all new and old large Chapter 11 cases to address a shortfall. *See* Pub. L. 115-72, Div. B, 131 Stat. 1229 (2017 Act). The maximum fee was increased from $30,000 a quarter to $250,000 a quarter from the first quarter of 2018 through 2022. § 1004(a), *id.*, at 1232. The Administrator Program districts did not adopt the increase until October 2018 and applied it only to newly filed cases. In 2021, Congress amended the statute to make the fee increase mandatory for everyone. *See* Pub. L. 116-325, 134 Stat. 5088.

When Circuit City's quarterly fees increased from a maximum of $56,400 to $632,542 they objected. The Bankruptcy Court for the E.D. Virginia found the fee "non uniform" and "directed that for the fees due from January 1, 2018, onward, the trustee pay the rate in effect prior to the 2017 Act." The Fourth Circuit reversed, finding the new fees were lawful because the uniformity clause forbid "'only 'arbitrary' geographic differences."

The Supreme Court found that the uniformity requirement applies to the 2017 Act and to substantive and administrative aspects of bankruptcy law. The Court noted that, "[i]n sum, our precedent provides that the Bankruptcy Clause offers Congress flexibility, but does not permit the arbitrary, disparate treatment of similarly situated debtors based on geography."

The Supreme Court found further that "[u]nder the specific circumstances present here, the nonuniform fee increase violated the uniformity requirement." The Court noted that Congress created this problem because of its decision to "create a dual bankruptcy system funded through different mechanisms in which only districts in two States could opt into the more favorable fee system for debtors." Although the Bankruptcy Clause provides some flexibility, it "does not permit Congress to treat identical debtors differently based on an artificial funding distinction that Congress itself created."

The Court noted that it did "not today address the constitutionality of the dual scheme of the bankruptcy system itself, only Congress' decision to impose different fee arrangements in those two systems … The Court holds only that the uniformity requirement of the Bankruptcy Clause prohibits Congress from arbitrarily burdening only one set of debtors with a more onerous funding mechanism than that which applies to debtors in other States."

The Supreme Court remanded back to the Fourth Circuit Court of Appeals to determine the remedy for this problem.

See notes below, Siegel v. United States Tr. Program (In re Circuit City Stores, Inc.), case 08-35653 (Adv. 19-3091) (Bankr. E.D. Va. 12/15/22)(Huennekens)(holding "that the Trustee may recover the amount of the Unconstitutional Overpayment")

3. **Tyler v. Hennepin Cty**, No. 22-166 (filed Aug. 19, 2022).
The Takings Clause is violated when state law permits the government to take and sell a debtor's home to satisfy a tax debt and keep the surplus value as a windfall.

Appellant Geraldine Tyler accumulated approximately $15,000 in overdue real estate taxes (including penalties and interest) on her condominium in Hennepin County, MN. The County seized the property and sold it for $40,000. The County kept the $25,000 surplus. Tyler filed suit alleging that the County had "unconstitutionally retained the excess value of her home above her tax debt in violation of the Takings

Clause of the Fifth Amendment and the Excessive Fines Clause of the Eight Amendment". The Minnesota District Court dismissed the case and the Eighth Circuit Court of Appeals affirmed that decision. The Supreme Court unanimously reversed, holding that the County's retention of the excess funds without justly compensating Tyler violated the Takings Clause under the Fifth Amendment. The Court declined to address Tyler's Eighth Amendment Claim as the Fifth Amendment claim provided complete relief for her injuries.

The Court found that Ms. Tyler had standing and that the Fifth Amendment's Takings Clause protects private property interests beyond those defined by state law. Referring to the historical practices dating back to the Magna Carta, the "Court's precedents have long recognized the principle that a tax- payer is entitled to the surplus in excess of the debt owed. See United States v. Taylor, 104 U. S. 216; United States v. Lawton, 110 U. S. 146. Nelson v. City of New York, 352 U. S. 103, did not change that." While many of Minnesota's law recognize that the tax payer is due the surplus in cases of bank foreclosure or collection for personal property taxes, the Minnesota law under which this property was seized did not provide her the opportunity to recover any excess value from the state.
The state also tried to argue that Ms. Tyler held no property interest in the condominium because she "constructively abandoned her home by failing to pay her taxes." However, abandonment requires one to "surrender or relinquishment or disclaimer of" all rights in their property. Rowe v. Minneapolis, 51 NW 907, 908. Minnesota's forfeiture law is not concerned about abandonment or use of the property but rather only the failure to pay taxes.

The Court therefore held that Ms. Tyler held a protected property right in the excess value of her condominium which the county had seized and that the county's retention of the excess value without justly compensating her sufficiently created a claim under the Fifth Amendment's Takings Clause.

4. **Bartenwerfer v. Buckley,** 598 U.S. ___, 143 S.Ct. 665 (Feb. 22, 2023).
Section 523(a)(2)(A) precludes debtor from discharging in bankruptcy a debt obtained by fraud, regardless of her own lack of culpability.

A married couple in San Francisco specialized in flipping houses and sold a house in 2008 for $2 million without disclosing to the buyer, Buckley, water leaks and other problems. A jury awarded the buyer more than $200,000 in damages, which a state judge reduced by almost half. They later filed for personal bankruptcy, and the wife sought to discharge the buyer's judgment against her, saying her husband was responsible for the renovation and that she was not aware of the problems. Despite finding that "David had knowingly concealed the house's defects from Buckley … the [lower] court imputed David's fraudulent intent to Kate because the two had formed a legal partnership to execute the renovation and resale project." The Ninth Circuit ruled against the wife, holding that her debt was not eligible for a bankruptcy discharge pursuant to Section 523(a)(2)(A), regardless of her knowledge of the fraud. The Supreme Court affirmed in a unanimous opinion.

The Supreme Court noted that Section 523(a)(2)(A) bars from discharge "any debt for money 'obtained by . . . fraud." Observing that "sometimes a debtor is liable for fraud that she did not personally commit-for example, deceit practiced by a partner or an agent" the Court found that "the passive voice [used in] §523(a)(2)(A) turns on how the money was obtained, not who committed fraud to obtain it." The Court observed that, "Passive voice pulls the actor off the stage." Further, the Court noted that:

"In the late 19th century, the discharge exception for fraud read as follows: '[N]o debt created by the fraud or embezzlement *of the bankrupt* . . . shall be discharged under this act.' Act of Mar. 2, 1867, §33, 14 Stat. 533 (emphasis added)."

This limitation to the debtor who committed the fraud was removed when the Code was amended in 1898 which supports the Court's holding that the debt will not discharge as to either debtor. The Court goes on to list various ways in which "victims have a variety of antecedent defenses at their disposal that, if successful, protect them from acquiring any debt to discharge in a later bankruptcy proceeding." And therefore, "Congress has 'evidently concluded that the creditors' interest in recovering full payment of debts' obtained by fraud 'outweigh[s] the debtors' interest in a complete fresh start,' … and it is not our role to second-guess that judgment."

5. **MOAC Mall Holdings LLC v. Transform,** 528 U.S. ____ (2023)(Jackson)(April 19, 2023).
Section 363(m) of the Bankruptcy Code — which restricts the effects of certain successful appeals of judicially authorized sales or leases of bankruptcy-estate property — is not a jurisdictional provision.

In 2019, the US Bankruptcy Court for the Southern District of New York allowed Sears to sell its assets to Transform Holdco LLC. One asset was a lease for space in the Mall of America in Minneapolis. MOAC Mall Holdings, LLC owned the mall and petitioned the U.S. District Court to appeal the bankruptcy court's order assigning the lease to Transform, arguing that Sears had not shown "adequate assurances of future performance by the assignee." The District court dismissed the appeal because MOAC Mall Holdings LLC did not receive a stay for the lease assignment. MOAC then appealed to the U.S. Court of Appeals for the 2nd Circuit which affirmed the district court's decision with reference to 11 U.S.C. §363(m):

The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

The question before the Supreme Court was therefore, whether Bankruptcy Code §363(m) limits a federal appellate court's jurisdiction to conduct judicial review, even when there is an opportunity for a judicial remedy that would not affect the validity of the sale in a bankruptcy proceeding?

In a 9-0 decision the Court held that §363(m) is not a jurisdictional provision because Congress did not clearly state that statute is such.

6. **Anderson v. Morgan Keegan & Co. (In re Infinity Bus. Grp.)** 31 F.4th 294 (4th Cir. 4/19/22)(Heytens)
(Chapter 7) Trustee may not proceed with lawsuit against investment advisor because he stands in the shoes of the Debtor with unclean hands.

"Infinity Business Group used a dodgy accounting practice that artificially inflated its accounts receivable and therefore its revenues. The company's CEO cooked up the practice, and the board of directors and outside auditors blessed it. Many of these wrongdoers have already been held responsible for their conduct through civil lawsuits, criminal charges, or both.

Yet Infinity's bankruptcy trustee remains unsatisfied. He insists the true mastermind was a financial services company Infinity contracted with to (unsuccessfully) solicit investments. But even assuming-contrary to the bankruptcy court's scrupulous factfinding-that the financial services company played some role in creating or perpetuating the flawed accounting technique, the trustee still cannot succeed in holding the financial services company liable. As both the bankruptcy and district courts correctly held, the trustee's claims run headlong into the longstanding principle that one wrongdoer cannot recover from another for joint wrongdoing. We thus affirm. …

This Court has recognized that a trustee generally acts as 'the representative of the estate,' 11 U.S.C. § 323(a), and therefore 'can . . . assert those causes of action possessed by the debtor' as part of the power to secure the 'estate' under 11 U.S.C. § 541(a). *Grayson Consulting*, 716 F.3d at 367 (quotation marks omitted). When exercising such powers, however, a trustee 'stands in the shoes of the debtor' and is 'subject to the same defenses as could have been asserted against the debtor.' *Id.* (quotation marks and emphasis omitted). We have specifically held that this includes *in pari delicto*, stating: '[T]o the extent that *in pari delicto* would have barred a debtor from bringing suit directly, it similarly bars a bankruptcy trustee-standing in the debtor's shoes-from bringing suit.' *Id.* For that reason, the trustee is plainly subject to *in pari delicto* to the extent he brings this action under Section 541.

As the trustee correctly notes, however, the Bankruptcy Code grants trustees certain powers beyond those of the debtor, including the ability 'to, in essence, step into [a] creditor's shoes to do the same thing [that] creditor could do.' *Cook v. United States*, 27 F.4th 960, 965 (4th Cir. 2022) (quotation marks omitted) (emphasis added). As relevant here, 11 U.S.C. § 544(a)(1) grants a trustee the powers of a hypothetical judgment lien creditor-that is, if a creditor holding a judgment lien against the debtor could pursue a particular action on the debtor's behalf, the trustee may do so too even if no actual creditor holds such a lien. See *Angeles Real Estate Co. v. Kerxton*, 737 F.2d 416, 418 (4th Cir. 1984). The trustee's argument that he may evade in pari delicto by proceeding instead under Section 544(a)(1) therefore raises two questions: (1) would a judgment lien creditor be able to bring the debtor's causes of action under 'applicable state law,' *Angeles Real Estate*, 737 F.2d at 418; and (2) if so, would that (again, hypothetical) creditor be subject to *in pari delicto*? …

After an 18-day bench trial, the bankruptcy court entered judgment in favor of Morgan Keegan and Meyers. The court found the trustee failed to prove the essential elements of any of his claims. It also concluded all of the trustee's claims were barred by an affirmative defense known as *in pari delicto*, which bars recovery by a plaintiff who 'bears equal or greater fault in the alleged tortious conduct' than the defendant. JA 292. Rejecting the trustee's efforts 'to frame [Infinity] as a neophyte to the world of securities and raising capital that relied heavily on Meyers and Morgan Keegan for advice,' the court found Infinity, 'through its

management, bears the greater fault in this matter for the implementation and consequences of the use of the' faulty accounting technique. JA 328.

The trustee appealed to the district court, which agreed with the bankruptcy court's conclusions on both the elements of the claims and in pari delicto and therefore affirmed."

Held: "We hold only that when a trustee pursues a right of action that ultimately derives from the debtor-even if the trustee is nominally exercising a creditor's powers when doing so-the trustee remains subject to the same defenses as the debtor. …

As the bankruptcy court found, Infinity's officers and auditors were the authors of the company's demise-not Morgan Keegan or Meyers. At worst, the latter simply failed to stop a ship that was already sinking, and the law does not hold them responsible for that failure. The judgment in favor of Morgan Keegan and Meyers is therefore *AFFIRMED*."

7. **Cantwell-Cleary Co. v. Cleary Packaging, LLC (In re Cleary Packaging, LLC),** 36 F.4th 509 (4th Cir. 6/7/22)(Niemeyer).
Bankruptcy Code § 1192(2) which incorporates § 523(a) limits the discharge equally as to individual and corporate debtors.

Cleary Packaging, LLC filed a petition under Subchapter V of Chapter 11 seeking to discharge $4.7 million judgment against it for "intentional interference with contracts and tortious interference with business relations" by Cantwell-Cleary. The judgment arose because a former president and CEO of Cantwell-Cleary left the company and formed Cleary Packaging, Inc., taking employees, customers, and sensitive information with him. Cantwell-Cleary opposed the discharge of its $4.7 million judgment, arguing that small business debtors under § 1192(2) cannot discharge debts per § 523(a). The Debtor defended, noting that 523(a) only refers to "individuals" and not corporations. The Bankruptcy Court found that "the exceptions to dischargeability that were incorporated into § 1192(2) from § 523(a) applied only to 'individual' debtors.'" On direct appeal, the Fourth Circuit reversed. The appeals court found that "person" includes "both individuals and corporations" pursuant to § 101(41) and "corporations" includes limited liability companies pursuant to § 101(9)(A). Noting that § 523(a) limits the discharge of "individuals" the court pointed out that § 1192(2) excepts from discharge "debt" without regard for who the debtor might be.

> In short, while § 523(a) does provide that discharges under various sections, including § 1192 discharges, do not "discharge an individual debtor from any debt" of the kind listed, § 1192(2)'s cross-reference to § 523(a) does not refer to any kind of debtor addressed by § 523(a) but rather to a kind of debt listed in § 523(a). By referring to the kind of debt listed in § 523(a), Congress used a shorthand to avoid listing all 21 types of debts, which would indeed have expanded the one-page section to add several additional pages to the U.S. Code. Thus, we conclude that the debtors covered by the discharge language of § 1192(2) — i.e., both individual and corporate debtors — remain subject to the 21 kinds of debt listed in § 523(a).

And this reading is consistent with various opinions interpreting the reach of a chapter 12 discharge with similar language as applying to farming individuals and corporations. As to fairness, the court observed that, "[g]iven the elimination of the absolute priority rule, Congress understandably applied limitations on the discharge of debts to provide an additional layer of fairness and equity to creditors to balance against the altered order of priority that favors the debtor."

At bottom, while we recognize that the relationship between § 523(a) and § 1192 might be a bit discordant — or perhaps more accurately, clumsy — we find more harmony from following a close textual analysis and contextual review of § 1192(2) and thus conclude that it provides discharges to small business debtors, whether they are individuals or corporations, except with respect to the 21 kinds of debts listed in § 523(a)...

8. **Houck v. Lifestore Bank**, 41 F.4th 266 (4th Cir. 7/19/22)(Niemeyer)
Appeal must be noted within 30 days of entry of final judgment, and discussion of the doctrine of cumulative finality.

"Diana Houck sued three defendants under 11 U.S.C. § 362 for violating a bankruptcy stay by their participation in the foreclosure and sale of her home while her bankruptcy petition was pending. The district court dismissed the claims against the first defendant but not the other two, and Houck appealed the dismissal order, even though it was interlocutory. While her appeal was pending before us, however, the district court dismissed the claims against the other two defendants and entered a final judgment in the case. That final judgment saved her appeal from dismissal in our court under the doctrine of 'cumulative finality,' as the district court had at that point adjudicated all claims as to all parties in the case.

We reviewed the order dismissing the first defendant and remanded the case for further proceedings against that defendant. Because Houck never appealed the dismissal of the other two defendants, however, we never had those defendants before us.

After a successful trial against the first defendant - *resulting in a judgment of over $260,000* - Houck appealed the final judgment that she obtained against that defendant in order to challenge the earlier dismissals of the other two defendants.

We conclude that we lack jurisdiction over Houck's appeal of the final judgment in favor of the other two defendants, as it was untimely [and] dismiss Houck's appeal.

… [W]e lack jurisdiction because Houck failed to appeal the February 2014 judgment within 30 days of its entry. Section 2107(a) of Title 28 provides that a party seeking appellate review of a judgment must file its notice of appeal within 30 days of the judgment's entry, subject to certain exceptions not relevant here. See also Fed. R. App. P. 4(a)(1)(A) (same). And the Supreme Court has held that this time requirement is 'jurisdictional in nature.'"

9. **Bruton v. First Citizens Bank & Tr. Co. (In re Butler)**, 22-1079 (4th Cir. 9/2/2022)(unpublished)
Court denied and dismissed Chapter 7 Trustee adversary to avoid lien.

"Daniel C. Bruton, the Chapter 7 trustee for debtor Cynthia A. Butler, appeals the district court's order affirming the bankruptcy court's order granting First Citizen Bank & Trust Co.'s and Mortgage Electronic Registration Systems, Inc.'s Fed.R.Civ.P. 12 (b)(6) motions to dismiss his adversary complaint. Finding no reversible error, we affirm. . . .

The Trustee has the power to 'avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by… a bona fide purchaser of real property.' 11 U.S.C. § 544(a)(3). The Trustee's 'right to avoid is determined by whether, under state law, a bona fide purchaser of the property would have taken the property subject to the lien. If a bona fide purchaser would not have taken it subject to the lien, then neither would the [t]rustee.' *In re McCormick*, 669 F.3d 177, 180 (4th Cir. 2012). We conclude that the bankruptcy court correctly applied North Carolina law to determine that the notarial certificate at issue substantially complied with the law, Bruton failed to overcome the presumption of regularity, and thus

Bruton could not avoid the lien. *See, e.g., Freeman v. Morrison,* 199 S.E. 12, 13-15 (N.C. 1938); *Mfrs.' Fin. Co. v. Amazon Cotton Mills Co.*, 109 S.E. 67, 68-69 (N.C. 1921); N.C. Gen. Stat. § 10B-99(a) (2021).

10. **Logan v. Butler (In re Croniser)**, 22-1227 (4th Cir. 10/14/22)(per curiam)
Appeal dismissed as moot.

Facts: This is a case in which the 4th Circuit Court of Appeals dismissed an appeal as moot after the bankruptcy court ordered the escrowed funds released to the debtor. The debtor had appealed the portion of the district court's order affirming the bankruptcy court's order which authorized his sale of property but ordered the proceeds of the sale to be held in trust. However, before the 4th Circuit could hear the appeal, the bankruptcy court ordered the escrowed funds to be released to the debtor. The 4th Circuit found the case was moot because the debtor no longer had a legally cognizable interest in the outcome of the appeal.

"Because Croniser only challenged the escrowing of the sale proceeds in this court, we vacate the portions of the district court's order affirming the bankruptcy court's order authorizing the sale. We remand with instructions for the district court to dismiss that portion of Croniser's appeal and to instruct the bankruptcy court to vacate the portion of its order directing the proceeds of the sale to be held in escrow. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process."

11. **CACI, Inc.-Federal v. Ngo (In re Ngo),** 22-1535 (4th Cir. 12/22/22)(unpublished)
Affirmed lower court finding that arbitrator's award of attorney's fees, costs and expenses is a nondischargeable debt in the debtor's bankruptcy case.

Facts: The Bankruptcy Court for the Eastern District of Virginia held that attorney's fees, costs, and expense awarded to CACI, Inc-Federal in arbitration were nondischargeable in Ngo's bankruptcy case. The case arose out of a dispute between Ngo and CACI, Inc, a government contracting firm. Ngo was employed by CACI as a director, and she had access to CACI's trade secrets. In October 2014, Ngo resigned from CACI and began working as a competitor. CACI filed a lawsuit against Ngo, alleging that she has misappropriated CACI's trade secrets. The case was resolved through arbitration and the arbitrator awarded CACI $1 million in damages and $250,000 in attorney fees, costs and expenses. Ngo filed for bankruptcy shortly after the arbitration award was issued. CACI filed a claim in the bankruptcy case, seeking to have the arbitration award declared nondischargeable. The Bankruptcy Court agreed with CACI, and the district court affirmed.

"Bao-Tran Xuan Ngo appeals the district court's order affirming the bankruptcy court's determination that attorney's fees, costs, and expenses awarded to CACI, Inc. - Federal in arbitration were nondischargeable in Ngo's bankruptcy. She contends that the bankruptcy court erred by giving collateral estoppel effect to the arbitrator's findings that she acted in a "fiduciary capacity" and that she inflicted a "willful and malicious injury."

The District Court held that the arbitration award was nondischargeable because Ngo had acted in fiduciary capacity when she misappropriated CACI's trade secrets. The Court also held that Ngo's misappropriation of CACI's trade secrets was willful and malicious injury.

The Fourth Circuit affirmed the District Court, which had affirmed the Bankruptcy Court opinion.

12. **U.S. Trustee v. Delafield**, 21-1632 (4th Cir. 1/11/2023)(Quattlebaum)
Court sanctions against Debtor's attorney upheld.

"A bankruptcy court imposed sanctions against Darren Thomas Delafield. After the district court affirmed those sanctions, Delafield appealed, asserting the sanctions order violated his due process rights. To be sure, a lawyer facing suspension or disbarment is entitled to notice of the charges for which such discipline is sought and an opportunity to be heard on those issues. *Nell v. United States*, 450 F.2d 1090, 1093 (4th Cir. 1971). But our review of the record reveals that Delafield was afforded sufficient process. Thus, we affirm. . . .

Under *Nell,* Delafield was entitled to "notice and an opportunity to prepare a defense." *Id.* But unlike the lawyer there, Delafield received both notice and the opportunity to prepare. The United States Trustee's complaint provided detailed and specific allegations of misconduct against Delafield, his law firm and his fellow partners related to the [New Car Custody Program]. The complaint also specified the provisions of the Bankruptcy Code that the Trustee alleged Delafield violated. And it accused Delafield of illegal and unethical conduct regarding the NCCP. Finally, the complaint identified the exact sanctions that were ultimately imposed against Delafield: a $5,000 fine and disbarment. True, as Delafield notes, the complaint did not cite to the Virginia Rules of Professional Conduct that Delafield was ultimately found to have violated. Identifying such rules is certainly preferred in an action seeking suspension or disbarment. But this omission did not violate Delafield's due process rights. The complaint adequately notified Delafield of the conduct for which he was being accused and the sanctions that were being sought.

Additionally, Delafield received an opportunity to prepare and present a defense. He was afforded the opportunity to conduct discovery before trial. Then, at trial, Delafield presented evidence, cross-examined witnesses called by the United States Trustee and made arguments before the bankruptcy court.

We are also unconvinced by Delafield's claim that the bankruptcy court should have ignored his post-complaint conduct in seeking conflict of interest waivers from the Williamses. The bankruptcy court found the evidence related to the NCCP. The court explained that it admitted and considered evidence of Delafield's post-complaint misconduct to rebut his arguments that he had taken corrective action after his initial misconduct concerning the NCCP. J.A. 492-93. It found that obtaining waivers allowed Delafield to assert the attorney client privilege to conceal information about the NCCP. *Id.* Thus, the post-complaint conduct showed that, instead of correcting matters, Delafield continued his misconduct related to the NCCP. Finally, Delafield was given the opportunity to respond to the post-complaint conduct issues through his direct testimony and post-complaint briefing.

For the foregoing reasons, we conclude that Delafield was afforded adequate due process and we affirm the district court's order.

13. **United States v. Alicea**, 21-2220 (4th Circ. 1/19/2023)(Traxler)
The SRP imposed for failure to obtain health insurance under the ACA is a tax entitled to priority under 507(a)(8).

"[T[he Affordable Care Act ('ACA') included a mandate (now repealed) requiring most individuals to maintain health insurance meeting certain minimum requirements. Individuals covered by the ACA who did not maintain the minimum level of insurance were required to pay a 'shared responsibility payment' ('SRP') to the Internal Revenue Service through their annual income tax returns. *See* 26 U.S.C. § 5000A. The ACA identifies the SRP as a penalty rather than a tax. *See* 26 U.S.C. § 5000A(b)(1) …."

The bankruptcy court concluded that "for purposes of the Bankruptcy Code, the SRP is a penalty, not a tax, and therefore is not entitled to priority under § 507(a)(8). The government appealed to the district court, which affirmed the bankruptcy court's decision. The district court held that even if the SRP was generally a tax, it did not qualify as a tax measured by income or an excise tax and thus was not entitled to priority."

"In *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 132 S.Ct. 2566, 183 L.Ed.2d 450 (2012) (*NFIB*), the Supreme Court upheld the constitutionality of the individual mandate. Although the Court determined that the SRP was a penalty, not a tax, for purposes of the Anti-Injunction Act, *see id.* at 546, 13 S.Ct. 2566, it concluded that, as a constitutional matter, the SRP could fairly be read as a tax on the uninsured, which the Court found was within Congress's power to impose, *see id.* at 574, 132 S.Ct. 2566. The question in this case is whether the SRP qualifies as a tax measured by income or as an excise tax entitled to priority in bankruptcy proceedings. See 11 U.S.C. §§ 507(a)(8)(A), 507(a)(8)(E). As we will explain, we conclude that the SRP qualifies as a tax measured by income, and we therefore reverse the judgment of the district court and remand for further proceedings."

"Supreme Court precedent requires us to apply a functional analysis that ignores the label given to the exaction and instead considers whether the exaction operates as a tax or a penalty [and to determine if] SRP is a tax within the meaning of the Bankruptcy Code, under a statute that we must construe narrowly."

"'For the purpose of determining claim priority in the context of bankruptcy,' an exaction is a tax if it is

> (a) An involuntary pecuniary burden, regardless of name, laid upon individuals or property; (b) Imposed by, or under authority of the legislature; (c) for public purposes, including the purpose of defraying expenses of government of undertakings authorized by it; and (d) Under the police or taxing power of the state.

Holding: "… a functional analysis of the SRP shows that it operates as a tax [measured by income], not a penalty." And so, it is entitled to priority under 11 U.S.C. § 507(a)(8).

14. **Truck Ins. Exch. v. Kaiser Gypsum Co. (In re Kaiser Gypsum Co.),** 21-1858 (4th Cir. 2/14/23)(Agee)
Primary insurer's attempts to block its' insured's chapter 11 plan is denied.

Facts: Kaiser Gypsum Company, Inc. filed for Chapter 11 bankruptcy in 2016. The company's principal business consisted of manufacturing and marketing gypsum plaster, gypsum lath and gypsum wallboard. Kaiser's plan of reorganization was confirmed by the bankruptcy court in 2019. This case illustrates the

importance of asbestos claims in bankruptcy cases. The rule applied in confirmation of the plan was for it to be fair and equitable and meet the best interests of the creditors.

Held: The Court found that the plan of reorganization was fair and equitable because it provided for the distribution of $2.4 billion to asbestos claimants. The Court also found that the plan of organization met the best interests of the creditors because it allowed the company to continue operating and to generate revenue. The Court also considered the number of asbestos claims and the amounts of their claims, the company's ability to pay, the economic impact of the plan on the company and its employees, the fairness and equitableness of the plan and the best interests of the creditors.

"This bankruptcy appeal involves a primary insurer's attempts to block its insureds' Chapter 11 reorganization plan (the "Plan"), which establishes a trust under 11 U.S.C. § 524(g) for current and future asbestos personal-injury liabilities. In adopting the bankruptcy court's recommendation to confirm the Plan, the district court concluded in relevant part that the primary insurer was not a "party in interest" under 11 U.S.C. § 1109(b) and thus lacked standing to object to the Plan. Having carefully considered the parties' briefs and the record, we affirm, but we do so on both § 1109(b) grounds and Article III grounds."

"In sum, as an insurer, Truck fails to show that the Plan impairs its contractual rights or otherwise expands its potential liability under the subject insurance policies, so it is not a party in interest under § 1109(b) with standing to challenge the Plan in that capacity. Similarly, as a creditor, Truck objects to parts of the Plan that implicate only the rights of third parties, which fails to allege an injury in fact sufficient to confer Article III standing. Accordingly, none of Truck's objections to the Plan can survive."

DISTRICT COURTS

15. Martinez v. Gorman, #1:21-cv-1077 (E.D Va. 6/16/22)(Ellis)
$300/mo. reduction in mortgage payment not enough by itself to support a 1329 motion to increase plan payments by that amount.

Debtor's initial plan was confirmed on 7/27/20: $1,710/mo. x 60 mos, total of $102,000, plus a Direct by Debtor ("DBD") mortgage payment of $3,710/mo. that was classified as an alimony payment. On 6/3/21, Debtor filed a motion to refinance the mortgage and reduce the mortgage payment by $300/mo.; the motion was granted even though the Debtor had surrendered his interest in the property. The Trustee promptly filed a 1329 motion to increase the plan payment by $300/mo., and the Bankruptcy Court granted his motion. The Debtor has appealed that ruling. Held: (1) A confirmed plan is reviewed on appeal for abuse of discretion. (2) Court cites *Murphy* for the binding nature of plan res judicata, "preventing parties from seeking to modify plans when minor and anticipated changes in the debtor's financial condition take place." (3) These changes (the refinancing, and the Debtor retaining his interest in the real estate) were unanticipated. (4) Bank. Ct. did not explain why $300/mo. was a substantial enough change to warrant plan modification, other than to say it would be $3,600 over the next four years; considered in isolation, that's not a substantial change, when there's no evidence of whether the Court considered any other changes. (5) *Murphy* said that a lower mortgage interest rate alone did not improve the debtors' financial condition. (6) A monthly savings of $300/mo. is only 3% of the Debtor's $12,809/mo. gross income; a "modest increase, not a substantial change." (6) Res judicata bars this modification of the confirmed plan. (7) Case is remanded to determine if the Debtor's change to retaining this property substantially changed is financial condition in other ways; Court should consider the "aggregate effect of these financial changes."

On remand, **In re Martinez, Jr.**, 20-10250-BFK (Bankr. E.D. Va. 11/1/22)("The Trustee concedes that the Debtor's financial circumstances have changed and that it would not be fair nor feasible to require the Debtor to pay an additional $300.00 per month into his Plan going forward.")

16. **Harlow v. Wells Fargo & Co**., 7:22-cv-00267 (W.D. Va. 6/21/22)(Urbanski)
Filing false forbearance notices in chapter 13 cases in April and May 2020 does not support a RICO claim because there is no threat of repetition.

Wells Fargo allegedly filed 904 false forbearance notices in chapter 13 cases in April and May of 2020. Various Debtors filed a Complaint alleging, in part, RICO violations for this behavior. The District Court observed that RICO's remedies are not for "the ordinary run of commercial transactions" but only for "ongoing unlawful activities whose scope and persistence pose a special threat to social well-being [and] of continued criminal activity." The Court found the conduct occurred over a "brief period" and posed no "threat of continued racketeering activity." The District Court dismissed the RICO count in the Complaint and remanded back to the Bankruptcy Court to decide the remaining counts, including violation of Bankruptcy Code Sections 105, 362, 364, 1322(b)(5), 1327, 1329 and Rules 3002.1 and 4001(c).

See notes below: On remand: pre-trial hearing set for June 13, 2023, A.P. No. 20-07028.

17. **Halcom v. Genworth Life Ins. Co**., 3:21-cv-19 (E.D. Va. 6/28/22)(Payne)
Court approved the settlement of a class action, and approved class counsel's motion for attorney fees, and attorney fees for objectors, and incentive pay.

In this class action litigation, the "Plaintiffs make clear that they do not challenge Genworth's prerogative to raise premiums [for long-term care], subject to certain regulatory conditions, they allege that the manner in which Genworth raised premiums, in combination with disclosures made by Genworth in connection with premium increases, fraudulently deprived them of material information that was necessary to their being able to make informed decisions about their long-term care policies." The parties reached a settlement, after some negotiation of the specific release terms, which grants several options to policy holders to settle their claims. The court approved the settlement, including:

1. $1 million to class counsel and $26,701.96 in costs
2. $1.2 million to objectors' counsel
3. $7,500 "incentive pay" to each of the represented objectors.

18. **Hilgartner v. Yagi**, 1:21-cv-01179 and 1:21-cv-01123, (E.D. Va. 6/30/22)(Alston)
The entire amount owed, including attorney fees and interest, arising from a Settlement Agreement which settled a tort claim for malicious and willful assault is non-dischargeable pursuant to § 523(a)(6).

Dispute as to the allowance and discharge of creditor Yasuko Yagi's proof of claim for $463,637 which arose during their "long-distance extra-marital romantic relationship" following a violent incident. The Debtor first signed a confession and agreed to pay Yagi $80,000. Sometime thereafter, they both executed a "Settlement Agreement" by which the Debtor agreed to pay Yagi $415,000, with interest and late fees. The District Court agreed with Yagi that "while the debt for which [she] sought collection was not for money obtained by the underlying tort but rather for the money promised in a settlement contract arising out of tort, that debt retained the character of the underlying tort." The District Court agreed that the Debtor's conduct was "malicious and willful" and therefore the debt to Yagi will not discharge pursuant to 11 USC § 523(a)(6). The District Court adopted the Bankruptcy Court's allowance of Yagi's attorney fees as properly calculated and reasonable using the lodestar analysis. The District Court also adopted the Bankruptcy Court decision to disallow $92,000 in late fees because they "amount to a penalty and are therefore void as a matter of D.C. common law." The District Court remanded to the Bankruptcy Court "solely on the matter of calculating the allowable interest amount after removing the inclusion of all late charges."

Reversing the Bankruptcy Court, the District Court also found that the attorney fees and interest are "non-dischargeable pursuant to § 523(a)(6)" as the "ancillary costs meant to enforce and collect on that contract."

Appealed to the Fourth Circuit, consolidated case #22-1762 (L) and 22-1778, briefs filed, no hearing date set.

19. **Indus. Dev. v. Poe (In re Poe**), 1:21-cv-867, (E.D. Va. 7/18/22)(Ellis)
State court order on demurrer is not a final order and therefore not entitled to collateral estoppel. The 3-year statute of limitations for oral contracts in Virginia does not apply to this unjust enrichment action and therefore, the Bankruptcy Court order dismissing the case as beyond the statute of limitations is reversed.

The Warren County IDA filed a state court action against the Debtor alleging fraud, unjust enrichment, conversion, and conspiracy, related to funds she received, indirectly, from the IDA. The Debtor filed a demurrer that the state court action was filed beyond the 3-year statute of limitations which the state court

overruled. After the Debtor filed this chapter 7 bankruptcy case, the IDA filed a Complaint to have the debt declared non-dischargeable pursuant to 11 U.S.C. §§ 523(a)(4) and (a)(6). The Bankruptcy Court gave no preclusive effect to the state court denial of demurrer, and dismissed the complaint as beyond the 3-year statute of limitations. The District Court agreed that the state court order on demurrer is not a final order and therefore has no preclusive effect. The District Court, however, found the 3-year statute of limitations for oral contracts in Virginia does not apply to this case for unjust enrichment because no part of the dispute involves an oral contract between the parties. The District Court held that a 5-year statute of limitations applies to claims for conversion in Virginia, and the claim was brought within such 5 years. The District Court reversed and remanded to the Bankruptcy Court.

20. **Askri v. Gorman**, 1:21-cv-00799, (E.D. Va. 7/29/22)(Alston), *affirmed* #22-1876 (4th Cir. 1/19/23)
Affirmed the Bankruptcy Court dismissal of the Debtor's 7th bankruptcy case.

The Debtor and his wife filed 7 bankruptcy cases, two of which went up to the Fourth Circuit. In the 2021 case the "Trustee objected to the plan both at the time of Askri's filing in the Bankruptcy Court and upon Askri's appeal to this Court on the grounds that Askri engaged in bad-faith practices by filing frivolous lawsuits and could not meet the financial commitments made in the plan."

"On June 24, 2021, the Bankruptcy Court held a hearing on Trustee's Motion to Dismiss with Prejudice and on June 25, 2021, the court granted the motion [finding that] Askri's 'income, arrearages, and additional liabilities that have not been accounted nor provided for in his Plan' make reorganization 'objectively futile' [and imposing] a one-year moratorium on Askri's right to file another bankruptcy petition and awarded interest earned and attributable to payments made under the Plan to Trustee." The debtor appealed, raising 14 issues. The court found most of the issues had been previously adjudicated, specifically noting that:

> In the 2017 case, Askri, "under penalty of perjury," claimed he previously tendered full payment to his three creditors for all outstanding debts, but these statements were false. … Askri failed to provide the court evidence of his claimed payments and continues to file petitions to prevent foreclosure by the same creditors he reported to pay. … After ten years of attempts to outfox the Bankruptcy Code, Askri continues to fall well short of the good-faith expected of him in seeking to pay his outstanding debts. Again, the Bankruptcy Court's decision dismissing Askri's latest Plan is legally sound and will be upheld.

21. **Sopkin v. Mendelson**, 1:16-CV-01146 (E.D. Va. 9/1/22)(Hilton)
Court awards sanctions against plaintiff Sopkin, after a very long dispute over the distribution and management of partnership assets, after her complaint was dismissed under Rule 12(b)(6) for failure to state any claim.

Various defendants sought sanctions against the plaintiff, Sopkin, after her complaint was dismissed under Rule 12(b)(6). The attorney fees for the various defendants totaled $62,854 and for such the defendants sought sanctions against the plaintiff under Rule 11.

Applying an "objective standard of reasonableness," the Court "finds that Plaintiff's own conduct sufficiently violated 11(b)(1) and (3) to warrant sanctions." In support, the Court notes that the "Plaintiff's amended complaint, which she verified and signed, is baseless on all counts in terms of evidentiary support." The Court found "no factual basis" for the plaintiff's allegations. Going further, the Court also found "that

Plaintiff's conduct indicates she filed this action with an improper purpose in violation of 11(b)(1). The Court infers the existence of an improper purpose partly because of the baselessness of all her claims."

In determining the amount of sanctions the court noted:

> Once a court determines that sanctions are warranted, it must then determine the type of sanction, keeping in mind the goals of Rule 11: compensating the victims, streamlining court dockets, and, most importantly, deterring future abuse of the litigation process. … A court will award fees and costs directly to the party seeking sanctions if it determines that the Rule 11 violations made "the complaint to the court a substantial failure under Rule 11(b)." … The court must consider the following factors in calculating sanctions: (1) the reasonableness of the opposing party's attorney's fees; (2) the minimum amount to deter; (3) the sanctioned party's ability to pay; and (4) the severity of the Rule 11 violation.

Weighing these factors, the Court awarded the entire $62,854 in sanctions.

22. **Yates v. Nationstar Mortgage**, 1:21-cv-00118 (E.D. Va. 9/13/22)(Giles)
Affirmed the Bankruptcy Court ruling that the Debtor's fraud and forgery claims are barred by res judicata.

The Debtor filed a bankruptcy case in 2017 and received a discharge. During that case Nationstar Mortgage obtained relief from the automatic stay to foreclose upon her real estate. Thereafter the Debtor filed a Complaint against Nationstar Mortgage in the E.D. Virginia alleging fraud and forgery which was dismissed. The Fourth Circuit affirmed the dismissal. In 2019 the Debtor filed a chapter 11 petition which was dismissed finding the fraud and forgery claims were barred by res judicata. In 2020 she moved to reopen her original 2017 case alleging Nationstar Mortgage violated the discharge injunction. She also filed various actions including a Motion to Recuse Judge Kenney alleging he had "personal bias or prejudice" against her. The District Court found the fraud and forgery claims against Nationstar Mortgage were all barred by res judicata and affirmed the various rulings of the Bankruptcy Court.

23. **Patterson v. Mahwah Bergen Retail Group**, 3:21-cv-167 (E.D. Va. 9/16/22)(Novak)
Court approves the three (3) attorney fee applications in this complex mega case.

On January 13, 2022, the District Court vacated the Bankruptcy Court's confirmation of Chapter 11 Plan and remanded the case, finding it erred by approving an overly broad Exculpation Provision that exceeds the bounds of similar provisions approved in other cases and the Third-Party Releases that must be voided and severed from the reorganization plan. A modified plan was confirmed on March 3, 2022.

On January 13, 2022, the Court also "entered the Fee Order, requiring that, for any further petitions for approval of attorneys' fees in the Bankruptcy Action, the Bankruptcy Court submit proposed findings of fact and conclusions of law to this Court, pursuant to 28 U.S.C. § 157(c)(1) [and] any attorneys' fees approved in this case shall not be for rates that exceed the prevailing market rates in the Richmond Division of the Eastern District of Virginia."

"Following the remand of the Bankruptcy Case, on February 15, 2022, the Bankruptcy Court promulgated amendments to its Local Rules concerning the assignment of mega and complex chapter 11 cases. Under the new amended rules, a mega bankruptcy case is now assigned randomly to a Bankruptcy Judge in the District, but not necessarily in the Division in which the case was filed. Accordingly, the Court ordered the Bankruptcy Court to consider the impact of the amended rules in determining the appropriate rate of

compensation in this case." And further, "[d]ue to the unique procedural history of this case and the impact of the amendment of the rules regarding assignment of mega bankruptcy cases, the Court agrees with the Bankruptcy Court's analysis that this case warrants rates exceeding the prevailing market rates in the Eastern District of Virginia."

The District Court adopted the Bankruptcy Court's "Report and Recommendation" and approved the attorney fees requested by three (3) firms. The District Court also directed that in "future mega cases, the 'yardstick' for the rate calculation must begin with the prevailing rates in this District [making] specific findings of fact that address the factors enumerated in 11 U.S.C. § 330(a)(3) and the Johnson factors, as adopted by the Fourth Circuit in *Barber v. Kimbrell's, Inc.*, … particularly with respect to the complexity of the case."

24. **In re Yeh**, 5:22-mc-0009 (W.D. Va. 11/28/22)(Urbanski)
Pro se withdrawal of reference from the bankruptcy court denied.

This pro se debtor filed a chapter 7 bankruptcy case on August 22, 2022. On November 16, 2022, he filed an action in the District Court asking that "the reference to the bankruptcy court be withdrawn and his bankruptcy case be transferred to the district court" because he "cannot get a fair hearing in the Bankruptcy Court. The bankruptcy Court has exhibited bias towards the bank, assuming and deciding that they are a creditor or interested party and denying debtor's motions to continue and extend time, prejudicing his case." He also alleged:

> Debtor's case and the contested matter with US Bank is legally and factually complex, highly disputed, raises an important question of first impression and another unresolved question of law, involves interpretations of the bankruptcy code and substantial and material consideration of non-bankruptcy law affecting interstate commerce. This case involves interpretations of non-bankruptcy state and federal laws affecting bankruptcy, contract law, assignments of mortgages, chains of title, etc. surrounding interstate banking (including mortgage banking), which is interstate commerce.

The District Court found no grounds for mandatory withdrawal under 28 U.S.C. § 157(d) noting that, the debtor's "conclusory allegations identify no non-Title 11 federal law at issue in this case requiring consideration, much less substantial and material consideration, and the case is hardly complex."

"The Fourth Circuit has not enumerated factors to consider for permissive withdrawals, but its district courts have routinely applied the following factors developed by other circuits: '(i) whether the proceeding is core or non-core; (ii) the uniform administration of bankruptcy proceedings; (iii) expediting the bankruptcy process and promoting judicial economy; (iv) the efficient use of [the parties'] resources; (v) the reduction of forum shopping; and (vi) the preservation of the right to a jury trial." Applying these factors the Court also found no grounds for permissive withdrawal.

The motion to withdraw the reference was denied.

25. **Adams v. Tavenner**, 3:22-cv-237 (E.D. Va. 1/4/23)(Novak)

Court allows the Trustee to continue to rely on the Debtors *current* equity security holders list for tax purposes.

This case arises out of the Chapter 11 bankruptcy case voluntarily commenced on September 3, 2019, by LeClairRyan, PLLC. LeClair filed its list of Equity Security Holders ("ESH List") pursuant to Rule 1007(a)(3). The case was converted to a Chapter 7. The U.S. Trustee appointed Lynn Tavenner as Chapter 7 Trustee. Tavenner began using the ESH List to file taxation documents for the Estate. Appellants, Adams amongst others, sought amendment of the ESH List. The Bankruptcy Court entered two orders: 1) Denying LeClair's motion to amend the ESH list and 2) granting Trustee's motion approving reliance on the ESH List and for procedures for filing tax returns.

Appellants challenge the court's denial of request to amend the ESH List filed by the Liquidating Trustee. Appellants challenge the ESH List due to tax consequences flowing from their placement on the List. "But those tax consequences have no influence here, as the sole issues before the Court are (1) whether the Bankruptcy Court erred in authorizing the Trustee's continued use of the ESH List and (2) whether the Bankruptcy Court erred by interpreting the Firm's Operating Agreement to find that Appellants were correctly included on the List."

"Here, as the bankruptcy case was converted from a Chapter 11 to a Chapter 7 proceeding on October 4, 2019, the ESH List properly made its way into this proceeding. Thus, the Trustee could use this list in the current proceeding."

"Despite the proper usage of the ESH List in the bankruptcy proceeding, the Court finds that the Bankruptcy Court issued too broad of an Order authorizing its use, as an aspect of the Order became advisory in nature."

"Here, although properly addressing the issue, the Bankruptcy Court went too far in its ruling, venturing into advisory opinion territory by issuing a broad authorization of the Trustee's continued reliance on the ESH List. . . . The language of the Order allowed the Bankruptcy Court to rule on a universe of issues, both those presented to the Bankruptcy Court and ones not before it. . . . The Bankruptcy Court acted properly in regard to the current ESH List. "However, the Bankruptcy Court did not address the accuracy of a future or revised list, nor could it, as no such list existed at the time. Additionally, the Bankruptcy Court did not determine if it had the power to issue an authorization of continued reliance on any revised ESH list for seemingly any and all purposes, forever and always. Thus, through this breadth, the Bankruptcy Court issued a partially unconstitutional opinion and that aspect of the Order must be stricken on remand."

"As such, the Court AFFIRMS IN PART the Bankruptcy Court's Order on the Motion to Authorize to the extent that it allows the Trustee to continue to rely on the Debtor's *current* ESH List. The Court REVERSES IN PART the Bankruptcy Court's Order to the extent that it authorizes the Trustee to rely on any revised or future ESH List."

"[N]ow that the Court has determined that the Trustee can continue to rely on the current ESH List in the Chapter 7 proceeding, the Court turns to Appellants' Motion to Amend. The Bankruptcy Court found that 'the issue presently before the Court is a discrete one: should the Trustee be ordered to amend the list of equity security holders for a now-defunct law firm devoid of lawyers in order to remove Mr. LeClair and the former attorneys as equity security holders?' The Bankruptcy Court answered in the negative and this Court agrees."

"Under Bankruptcy Rule 1009(a), the standard for amending schedules or lists, like the ESH list, is liberally granted. . . . Thus, the Bankruptcy Court possesses the discretion under Rule 1009(a) to grant or deny amendment of a list. Here, the Bankruptcy Court found no legal reason to order amendment. In determining whether the Bankruptcy Court correctly declined to amend the ESH list, the Court now turns to the accuracy of the current list."

"In deciding whether the Bankruptcy Court erred in denying amendment of the ESH List, the Court must first determine whether adoption of the Dissolution Resolution validly occurred and, if so, whether Appellants remained members of LeClairRyan following adoption of the Dissolution Resolution. Once the Court determines the Firm's membership on July 29, 2019, the Court must turn to whether the Trustee correctly dated the ESH List. The Court finds that the Firm correctly adopted the Dissolution Resolution pursuant to the Operating Agreement and that Appellants remained Members of the firm following the July 29, 2019 dissolution. The Court additionally finds that the ESH List should be dated as of the Petition date of the Chapter 11 bankruptcy filing-not the dissolution of date of the Firm-but, regardless, the List's Membership does not change between the two dates. Therefore, Appellants correctly remain on the List and the Court affirms the Bankruptcy Court's denial of Appellants' efforts to amend this List."

"The Court holds that the current ESH List's membership remains accurate. However, on remand, the Bankruptcy Court shall also correct the date of the ESH List to be September 3, 2019. Again, the Court makes no findings regarding the potential tax implications of ESH List membership, as that question is not before the Court."

26. **Hayes v. Fay Servicing, LLC**, 6:22-cv-00063 (W.D. Va. 3/16/23)(Moon)
Affirmed Bankruptcy Court dismissal of pro se case because Debtor failed to obtain prepetition credit counseling before filing.

Pro se Debtor failed to obtain credit counseling until the day after the case was filed, in violation of Bankruptcy Section 109(h).

"Hayes appealed the bankruptcy court's order dismissing his case without prejudice for failure to complete the required credit counseling during the 180-day period before filing his petition. . . . He challenges the bankruptcy court's finding that he did not suffer from the kind of disability that permits it to waive the credit counseling requirement under Section 109(h)(4). . . . Specifically, he argues that the court was unable to determine during a videoconference his mental or physical health." The District Court affirmed, noting that the Debtor appeared before the Court in a videoconference hearing and was able to obtain the credit counseling, just one day too late.

See also Hayes v. Fay Servicing, LLC, 6:22-CV-00040 (W.D. Va. 4/3/23)(Moon)(dismissing Complaint alleging various claims against Fay Servicing).

27. **In re Evans v. Evans,** 5:22-cv-00026 (W.D. Va. 3/20/23) (Dillon)

Does filing a state court petition for rule to show cause alleging "collection of a domestic support obligation from property that is not property of the estate," qualify for an exception to a violation of automatic stay under section 362(b)(2)(B)?

Facts: Mr. Evans filed Chapter 13 on February 20, 2021. He listed his former spouse as a non-priority unsecured creditor in his schedules in the amount of $113,500 and the plan listed did not require separate treatment. Mrs. Evans filed a proof of claim in the amount of $114,500 as a priority claim attaching a Property Settlement Agreement ("PSA") and objected to confirmation of the plan as well. The objection was resolved by the parties and on June 1, 2021, Mr. Evans's Chapter 13 plan was confirmed. The terms of the plan required Mr. Evans to pay $1,000 per month directly during the term of the plan and that any balance of the $114,500 debt still owing at the end of the plan would survive the chapter 13 discharge. On June 10, 2021, nine days after confirmation of the debtor's plan, Mrs. Evans filed a petition in state court asking the debtor to appear show cause why he should not be held in contempt for noncompliance with the PSA. Specifically, she asked the state court to enforce a provision of the PSA requiring to the debtor to indemnify and hold her harmless for a joint unsecured mortgage deficiency. On August 16, 2021, the state court held a hearing. On August 27, 2021, the state court found the debtor in contempt for failure to perform certain provisions of the PSA. On October 29, 2021, the debtor filed a motion to hold Mrs. Evans in contempt of the bankruptcy court for violating the automatic stay and confirmation order. On January 26, 2022, the Bankruptcy Court held a hearing and issued an order on February 4, 2022. The Bankruptcy Court concluded Mrs. Evans violated the automatic stay by filing the petition in state court and the filing did not fall within the narrow exceptions to the automatic stay enumerated in 11 U.S.C § 362(b). The Bankruptcy Court further held Mrs. Evans willfully violated the automatic stay and awarded actual damages but denied punitive damages. Mrs. Evans asked the Bankruptcy Court to reconsider the order and the Bankruptcy Court denied her motion. Her appeal followed shortly thereafter.

Held: "This Court is persuaded by the bankruptcy court's reasoning and its interpretation of section 362(b)(2)(B)….In this statute, Yvonne characterizes the filing of the civil contempt suit to enforce the PSA as mere 'collection.' In reality, Yvonne's state-court contempt action could be more accurately described as the "commencement…of a civil action or other proceeding"—namely, contempt—for the 'enforcement' of the PSA and other 'domestic support obligations.' *See* §§ 362(b)(2)(A)(ii), (b)(2)(G). And reading the entire statute makes clear that congress knew how to create automatic-stay exceptions for the 'commencement' of certain 'civil action[s] or proceeding[s],' *see* § 362(b)(2)(A)(ii)—and for the 'enforcement' of certain legal obligations, *see* § 362(b)(2)(G), but chose not to use any of those terms in the exception Yvonne relies upon here. This Court is obligated to accept that Congress was purposeful in its word choice and thus that there is no exception to the automatic stay for the commencement of civil contempt enforcement litigation with respect to a domestic support obligation…. Further, Yvonne's contempt suit was not a collection *'from property* that is not property of the estate.' *See* § 362(b)(2)(B) (emphasis added). Nor was it against property *at all.* As the Bankruptcy Court found below, the contempt proceeding was not an action against an asset or other isolated item of property outside the estate but, rather, was an action against James himself—seeking an order that he be compelled to take certain action in compliance or face jail time. … Consistent with the court's obligation to construe the exceptions 'narrowly to secure [a] broad grant of relief to the debtor,' *In re Stringer,* 847 F2d at 552, the court finds that Yvonne's petition for rule to show cause and related state-court contempt filings violated the automatic stay and do not fit within the § 362(b)(2)(B) exception. . . . For the foregoing reasons, the order of the bankruptcy court is affirmed."

28. **Willner v. Fitzgerald**, 2023 U.S. Dist. LEXIS 40967 (E.D. Va 2/7/23)
If the filing is driven by a desire to delay a creditor's ability to collect and there is no intent or ability to reorganize, then there is a lack of good faith in the filing

This is a case where a debtor and his wife filed 3 bankruptcies and two federal district court lawsuits to stop a foreclosure with U.S. Bank. At the time they filed the first case they had not been making payments and their schedules showed no ability to pay. In that Chapter 11 case, U.S. Bank was granted relief from the automatic stay but relief was stayed if the debtor could get a contract for the sale of the property. The debtor did not get a contract, relief was granted, the debtor got a discharge and the case was closed. However, while the case was still open the debtor and his wife filed a civil action against U.S. Bank. The case was eventually dismissed for failure to state a claim. The debtor and his wife appealed but before that could even be reviewed they filed another claim, which was also dismissed.

Next he files a chapter 13 case which gets dismissed for several reasons including exceeding the debt limit, res judicata barred any objection to the claim of U.S. Bank and bad faith. Then comes the third filing, another chapter 11 case. This case gets dismissed for filing in bad faith; this is really a two party dispute and that the debtor had no insurance on the property. The debtor filed two motions to reconsider, one in which he showed that property was insured under forced-place insurance held by the servicer, both motions were denied.

On appeal, the District Court considered whether: (1) the Bankruptcy Court erred in dismissing a chapter 11 case based on failing to provide proof that certain property was adequately insured; (2) the Bankruptcy Court erred in dismissing the chapter 11 case based on an abuse of the system and filing in bad faith to delay execution of a creditor's right against certain property; and (3) the Bankruptcy Court erred in denying the appellant's motions for reconsideration.

The court found that the lack of insurance was a cause for dismissal and that in cases of serial filers it is their responsibility to show it is not a case of futility. "In determining this, courts are to consider whether the filing of the bankruptcy petition was driven by an honest intent to reorganize or an improper basis/ purpose. If the filing is driven by a desire to delay a creditor's ability to collect and there is no intent or ability to reorganize, then there is a lack of good faith in the filing."

BANKRUPTCY COURTS

29. **In re Knott,** 21-50423 (Bankr. W.D. Va. 6/24/22)(Connelly)
Sec. 109(e) [debt limit for Chap. 13 debtor]: amount based on schedules/petition date, not claims actually filed?

"The question in this case is whether individuals who do not meet the eligibility debt limits of Bankruptcy Code section 109(e) may nevertheless proceed under chapter 13 if not all creditors file proofs of claim for such debt and they successfully obtain disallowance of enough filed claims to render the total amount of filed allowed claims within the debt limits. In other words, are the debt limits in section 109(e) based on the amounts claimed on proofs of claim filed with the Court after accounting for potential disallowance of some of those claims? This Court answers no. The eligibility limits of section 109(e) are based on the amount of debt as of the petition date …

Because these debtors had converted their case from chapter 7 to chapter 13 although they were ineligible for chapter 13, the Court determined it was appropriate to reconvert their case back to chapter 7…

Mr. and Mrs. Knott admit owing, at the time of the petition, unsecured debts in the amount of $759,061.40 (Column C of Schedule D + priority debts and scheduled unsecured debts on Schedule E/F)...

Based on the filed proofs of claim, $175,383.53 reflects secured claims and $436,610.69 reflects unsecured claims, an amount more than the unsecured debt limit applicable to this case under section 109(e) …

The Court found the debtors to be ineligible for chapter 13 and concluded the case should be reconverted to chapter 7."

30. **In re Raza,** 21-12075 (Bankr. E.D. Va. 6/29/22)(Kenney)
SBA loan counts as income and may be exempt under Virginia Code 34-29(d)(1)

"In December 2021, the Debtor applied in the name of 4 Star for an Economic Injury Disaster Loan (an "EIDL Loan") with the Small Business Administration ("SBA") [and] was granted a loan in the amount of $75,400.00. … The funds were deposited into 4 Star's Bank account at Northwest Federal Credit Union … on December 23, 2021. … The Debtor caused 4 Star to transfer the funds to his personal bank account, . . . on the same day. … The Debtor testified in this proceeding that he transferred the funds to his personal account because he had not been paid in some time (it was not clear for just how long he had not been paid)."

Despite the Debtor's failure to show the money as income on his tax return, and despite the lack of records showing he was owed back salary, the Court allowed the exemption of the funds using Va. Code Ann. § 34-29.

> The Trustee maintains that the Debtor's informal recordkeeping "should be to [his] detriment." In the end, however, the resolution of the Trustee's Objection depends largely on the burden of proof under Bankruptcy Rule 4003(c). The Debtor testified that he transferred the funds to his personal bank account because he had not been paid. There was no evidence that 4 Star was profitable in 2021, or that the transfer was a distribution of profits, much less a distribution of profits after payment of a reasonable salary to the Debtor. The fact that the Debtor had not been paid in so long indicates that the business probably was not generating a profit at the time. Small business owners are entitled to pay themselves reasonable compensation as earnings for their efforts, which in turn may be exempted from the bankruptcy estate.

31. **In re Ilyev**, 17-12987-KJHK (Bank. E. D. Va. 7/26/22)(Kenney).
Debtors have a duty to disclose to the Trustee post-petition "substantial and unanticipated changes" in their financial condition.

Confirmed plan for below median debtor paid 4%; Debtor retained his residence, paying $1,625/mo. in mortgage payments. During the pandemic, the Debtor accepted a forbearance and didn't pay the mortgage for 18 mos, 9/20-2/22. In 4/22 the Debtor filed a motion to approve the forbearance; Trustee objected to the motion and moved to modify the confirmed plan. The Trustee asked what happened to the unpaid mortgage payments. Debtor accounted for $11K of the $17K, and claimed he spent $10K on medical bills but provided no documents to support that. There was no evidence that the Debtor suffered any decrease in income from COVID, and he withdrew his motion to approve the COVID payment deferral.

Held: (1) Debtors have a duty of cooperation with the Trustee per sec. 521(a)(3) and Bank. Rule 4002(a)(4). (2) Debtor's duty to disclose post-petition assets has been a "subject of some controversy." Cite to Judge Waites' *Boyd* case, 618 B.R. 133, holding there is no duty to disclose a post-petition cause of action. (3) But in *Boyd*, case was already closed and debtor had received his discharge, case involved an exempt asset, and creditor had no standing to complain. (4) Other Courts have found that debtors do have such an obligation: *Cortez*, 457 F. 3d 448 (5th Cir. 2006); *Zvoch*, 618 B.R. 739 (Bankr. W.D. Pa. 2020); *Padula*, 542 B.R. 753 (Bankr. E.D. Va. 2015); *Pautin*, 521 B.R. 754 (Bankr. W.D. Tex. 2014). (5) Opinions like *Boyd* "place insufficient weight on the duty of cooperation under Section 521(a)(3) and Rule 4002(a)(4)." (6) Here there was a deferral of $29,250, and the debtor spent $17K on wife's education, child care, and acting lessons for daughter. (7) As to where to draw the line on what changes must be disclosed: see *Murphy*: "substantial and unanticipated" standard; in other words, only major fluctuations must be disclosed. (8) This duty of cooperation "includes a duty of disclosure for substantial and unanticipated changes in the Debtor's financial condition." (9) The COVID mortgage deferral constitutes such a change, so the Debtor had a duty to disclose this deferral to the Trustee. (10) These deferred payments were a savings of 30% of the Debtor's gross monthly income and 32% of his total monthly expenses. (11) "The question then becomes the remedy…." It is difficult for the Court to accept the debtor's claim that plan modification is infeasible this late in the case (3-4 months left) when he failed to disclose the forbearance for 18 months. (12) Debtor is ordered to file a modified plan. The $11K is still available for distribution, and some of the $17K can be repaid during the remainder of the plan. The modified plan does not have to recapture the entire $29,250 "but it must be a good faith effort to repay the lion's share of the funds to the Trustee." (13) Trustee's motion to modify the plan is granted.

32. **In re Litvinas**, 21-31912 (Bankr. E.D. Va. 8/15/22)
Lien voluntarily released by the IRS is extinguished and its claim is no longer secured.

Between 2014 and 2016, the Debtor accumulated various income tax obligations. The IRS assessed interest and penalties on the unpaid taxes. In 2015, the Debtor and his mother acquired real property. In March 2019, the IRS recorded a Notice of Federal Tax Lien. On June 14, 2021, Debtor filed Chapter 7. On October 7, 2021 Chapter 7 Trustee declares the case an asset case and issues appropriate notice. Trustee files a Motion to sell debtors real estate for $450,000. Prior to closing the Trustee through his Court-approved realtor contacts the IRS requesting a payoff of their lien. The IRS replied "the lien was released by the IRS on 10/25/2021." Trustee finalizes sale and issues report resulting in net proceeds to the Debtor's bankruptcy estate in the amount of $154,215.30.

The IRS files its claim late and then amends it in the aggregate amount of $94,796.82, of which the IRS claimed $77,925.26 was secured by a federal tax lien. The Trustee objected requesting the secured portion be reclassified as unsecured in the amount of $81,827.90 "because the lien purportedly securing tis claim was released."

"When the IRS voluntarily filed its release of the Notice of Federal Tax Liens on October 25, 2021, with the Clerk's Office for the Circuit Court of Spotsylvania County, the release became conclusive proof that the Tax Lien had been extinguished. 26 C.F.R. § 6325-1(f)(l)(A). The IRS voluntarily changed its status from secured creditor to unsecured creditor. …

The Trustee does not contest that the IRS is entitled to a priority unsecured claim in the amount of $12,968.92, nor does the Trustee contest aggregate amount of the Proof of Claim. In light of the foregoing, the Court finds that the IRS is entitled to a priority unsecured claim in the amount of $12,968.92 and a general unsecured claim of $81,827.90. Because the IRS filed its Proof of Claim after the Claims Bar Date,

the Trustee shall make pro rata distributions, if any, on account of the IRS's general unsecured claim in accordance with section 726(a)(3) of the Bankruptcy Code."

33. **Commonwealth of Va. ex rel. Va. State Bar v. Francis (In re Francis)**, 21-11929 (Bankr. E.D. Va. 12/2/22)(Kenney)
Costs related to revocation of law license will discharge, except for the administrative fee.

"This Opinion addresses whether costs assessed by the Virginia State Bar ('the State Bar') in a disciplinary proceeding against the Debtor, a former attorney, are excepted from the Debtor's discharge under Bankruptcy Code Section 523(a)(7). The Court finds that, with the exception of the State Bar's Administrative Fee, the costs are dischargeable. Accordingly, the Court will grant the Debtor partial summary judgment on Count I of the State Bar's Complaint, and will grant the State Bar partial summary judgment on Count I as to its Administrative Fee."

"Section 523(a)(7) provides an exception to the debtor's discharge for debts 'to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss[.]' 11 U.S.C. § 523 (a)(7). The State Bar is an administrative agency of the Virginia Supreme Court. Va. Code § 54.1-2910. The Debtor does not contest that the State Bar is a governmental unit. The Court, therefore, will address the other two elements of: (a) whether the debt is a 'fine, penalty or forfeiture;' and (b) whether the debt is 'compensation for actual pecuniary loss.' 11 U.S.C. § 523 (a)(7)."

"On balance, the Court finds, consistent with *Kelly, CCMV,* and the majority of cases addressing the issue, that the State Bar's costs constitute a 'penalty' within the meaning of § 523(a)(7)."

"The Court finds that the costs assessed by the State Bar are dischargeable, with the exception of $667.20 of the Administrative Fee, which is determined to be non-dischargeable under § 523(a)(7). The Court will grant partial summary judgment, *sua sponte*, to the Debtor on the dischargeable costs and will grant partial summary judgment to the State Bar on $667.20 of the Administrative Fee."

34. **Harlow v. Wells Fargo & Co. (In re Harlow)**, 17-71487, A.P. No. 20-07028 (Bankr. W.D. Va. 12/12/22)(Black)
Grants, in part, and denies, in part, Wells Fargo's motion to dismiss the Second Amended Class Action Complaint.

"This adversary proceeding stems from alleged acts by Wells Fargo after the onset of the COVID-19 pandemic. The Plaintiffs' key allegations of fact are that the Plaintiffs, who are debtors in open Chapter 13 bankruptcy cases in various courts around the country, had their mortgage loans placed in forbearance status by Wells Fargo without the Plaintiffs' permission, knowledge or request. Additionally, the Plaintiffs allege that Wells Fargo filed a notice of forbearance on the claims register through a Rule 3002.1 notice or a notice of forbearance on the main case docket in each case, all of which contained false statements that the Plaintiffs had requested forbearance from Wells Fargo."

Wells Fargo moved to dismiss all claims under 12(b)(6). The court denied the motion, finding that:

> The Court believes that Rule 3002.1 must have teeth to achieve its purposes, and that, different from a private right of action for compensatory damages, punitive, non-compensatory sanctions can be warranted to achieve its purposes. Otherwise, Rule 3002.1(i), the sanctions provision of the Rule (which is exactly what it is), would have little deterrent ability as to future violations. In that respect, a claim for punitive, non-compensatory sanctions for violation of Rule 3002.1 can and should be able to be maintained.
>
> The Court believes the facts as alleged, taken in the light most favorable to the Plaintiffs, state a plausible claim against Wells Fargo for violation of Rule 3002.1 as to Harlow and the Rodriguezes.
>
> … Notwithstanding the filing of the forbearance notices on the main case docket, the Court believes a plausible claim for violation of Rule 3002.1 is stated at this early stage of the proceedings [as to Estes and Fewell].

In addition,

> By the thinnest of margins, the Court will deny the motion to dismiss as to Section 362(a)(3) [finding] that the Plaintiffs allege sufficient facts to support a plausible claim the Defendants acted to exercise control over bankruptcy estate property in violation of 11 U.S.C. § 362(a)(3). …
>
> Wells Fargo's unilateral action in changing the debtor's post-petition obligations constitute an exercise of control over property of the Plaintiffs' bankruptcy estate by an alteration of the "status quo."...

Filing of the forbearance "is plausibly an exercise of control over property of the estate in contravention of Section 362(a)(3)...." Following a thorough analysis of the Court's power to sanction, the Court found that "Plaintiffs have made a plausible claim that Wells Fargo engaged in a maneuver or scheme sufficient to undermine the integrity of the bankruptcy system." The court found grounds to award sanctions for violation of section 362(a)(3) and pursuant to section 105(a) for potential violation of the confirmation order.

The court granted the motion to dismiss as to:

(i) alleged violation of 362(a)(6), finding that the forbearance was not "an attempt to collect a debt";
(ii) allegations of perpetrating a fraud upon the court, finding the conduct did not rise to the level of actual fraud; and
(iii) allegations against the parent company, Wells Fargo & Co., finding there were insufficient facts to pass the "veil-piercing test."

35. **Siegel v. U.S. Trustee Program (In re Circuit City Stores, Inc.)**, 08-35653, Adv. 19-3091 (Bankr. E.D. Va. 12/15/22)(Huennekens)

Directing the U.S. government to refund overpayment of trustee fees.

The Trustee of the Circuit City Stores, Inc. Liquidating Trust filed a turnover compliant seeking recovery of the quarterly trustee fees paid by the Trustee to the government which "exceeded those the Trustee would have had to pay in a [non-trustee] District." The Bankruptcy Court details the dual system for bankruptcy administration in the country. The Bankruptcy Court, considering *Siegel* on remand from the

Fourth Circuit, joined the Second and Tenth Circuits in ordering refund of overpayments paid for U.S. trustee fees.

The Court "holds the first option provided by the McKesson Court - a refund - is the appropriate remedy here. There is ample precedent for ordering a refund for unconstitutional overpayments to a governmental entity [and] the refund period shall include the first three quarters of 2018."

Further, "the Trustee can avoid the transfer of the Unconstitutional Overpayment pursuant to section 549 of the Bankruptcy Code. Once the transfers are avoided, the Trustee is entitled to recover the amount of the Unconstitutional Overpayment from the Defendants as the Defendants are collectively either the 'initial transferee' and/or 'the entity for whose benefit such transfer was made. 11 U.S.C. § 550(a)(1)."

36. **Skaggs v. Gooch (In re Skaggs),** 17-50941 (Bankr. W.D. Va. 1/19/23)(Connelly)
Court imposed $25,000 remedial sanction for violation of the discharge order.

On August 9, 2022, the Court granted summary judgment against attorney, Stephen W. Gooch, and his firm, finding them in contempt for violation of the discharge order. Skaggs v. Gooch (In re Skaggs), 644 B.R. 149 (Bankr. W.D. Va. 8/9/22). The Court set another hearing to determine the appropriate remedial sanctions, and the January 2023 order followed. The quoted language below (shown as a block) is from the August 9, 2022 summary judgment opinion:

> "The parties in this matter contest whether post-discharge collection action subjects the offending creditor to sanctions for contempt of the bankruptcy discharge order. The answer depends on the application of *Taggart v. Lorenzen*, 139 S. Ct. 1795 (2019), to the facts of this case. "
>
> "The discharge injunction in section 524(a) lacks the statutory enforcement mechanism found in section 362(k), and so a bankruptcy court may rely on the broader doctrine of civil contempt through its equitable power under section 105(a) to give effect to a debtor's discharge."
>
> "Mr. Skaggs asks this Court to decide if the defendants violated the discharge injunction and if so whether the violation was sanctionable contempt of this Court's discharge order. Determining the extent of the discharge injunction and enforcing its terms touches the purpose of bankruptcy; it is axiomatic that a bankruptcy judge has authority to hear and decide this fundamental bankruptcy function. Indeed, the Bankruptcy Code contemplates such authority through sections 105(a) and 524(a)(2). *See Taggart,* 139 S.Ct. at 1801. ("In our view, these provisions authorize a court to impose civil contempt sanctions when there is no objectively reasonable basis for concluding the creditor's conduct might be lawful under the discharge order.")."
>
> "The key facts are not contested. Mr. Skaggs owed a debt to Virginia Cellular One, Inc. The debt was reduced to a judgment. The judgment was recorded. Mr. Skaggs owned no real estate and so the judgment debt was unsecured. Mr. Skaggs filed bankruptcy. Mr. Skaggs obtained a discharge in bankruptcy. At the time he obtained a discharge in bankruptcy, he still owned no real estate. The unsecured debt was discharged and the judgment voided. Months after his bankruptcy discharge, he inherited real estate. When he was in the process of selling the inherited real estate, he was advised by the title agency that the judgment would have to

be paid prior to closing. He reached out to the defendants. The defendants provided Mr. Skaggs with a payoff statement for the Cellular One judgment debt and communicated an offer to release the judgment for a discount from the stated payoff. The debtors' bankruptcy lawyer intervened by instructing the title agency that the judgment had been voided and the debt discharged in bankruptcy. The closing went forward."

"As a matter of law, the discharge order voided the judgment. No judgment lien existed at the time of the discharge and so the creditor had no *in rem* rights. When the defendants issued the payoff letter and offered a discounted payment for the judgment debt, they violated the discharge injunction. Because the defendants had no objectively reasonable basis on which to believe the judgment survived the bankruptcy discharge order or that their collection activity was otherwise lawful, the defendants may be held in contempt of the discharge order, as a matter of law."

"The question for the Court is to what extent the defendants should pay damages. For the reasons stated in its memorandum opinion granting summary judgment, and to avoid any doubt, the Court now holds the defendants in contempt of the discharge order for violating Mr. Skaggs's discharge injunction. The Court imposes a remedial sanction upon the defendants in the amount of $25,000.00, representing the plaintiffs' attorney's fees in this matter." (This quote is from the Jan. 2023 opinion).

37. **In re Hancock**, 22-31936 (Bankr. E.D. Va. 2/7/23)(Huennekens)
Cause of action under the Camp Lejeune Justice Act of 2022 arose postpetition and is not property of the estate.

The Debtors filed their chapter 7 case on July 19, 2022, and received their discharge on October 19, 2022.

"On August 10, 2022, while the Debtors' Case was still pending, the Camp Lejeune Justice Act of 2022 was enacted into law." This created a cause of action for exposure to contaminated water on base for which the Debtor has a claim. The Debtors moved to reopen the case to list and exempt the cause of action.

"[T]he Court must determine whether the Debtor's Claim for the prepetition injury he allegedly suffered at Camp Lejeune is property of the Debtors' bankruptcy estate. If the Claim is not property of the bankruptcy estate, then there is no need for the Debtors to amend their schedules and statements to include the Claim, and the Motion should be denied."

"The date upon which the Debtor suffered the alleged injury is irrelevant. The Debtor did not have a claim within the meaning of the Bankruptcy Code until August 10, 2022 - which occurred after the Petition Date. Because the Debtor's right to assert payment of the Claim arose postpetition, the Claim belongs to the Debtor and is not property of the bankruptcy estate. … The Claim is not an asset that could be administered by a Chapter 7 trustee for the benefit of the creditors of the bankruptcy estate. As reopening this Case would be futile, the Court should deny the Motion."

38. **Hegedus v. U.S. Bank (In re Hegedus)**, 19-50855; A.P. No. 22-05007 (Bankr. W.D. Va. 02/15/2023)(Connelly). ***Complaint dismissed for insufficient pleading.***

The pro se plaintiffs filed a complaint that the defendant violated the discharge injunction arising from a foreclosure action. In granting the defendant's motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), the Court found that the plaintiffs had failed to plead a cause of action that was plausible on its face.

39. **Cavalier Pharmacy, Inc. v. Health Mart Atlas, LLC (In re Cavalier Pharmacy, Inc.)**, 23-70004; A.P. No. 23-07002 (Bankr. W.D. Va. 3/8/23)(Black)

Plaintiff, an independent retail community pharmacy, filed a motion for a temporary restraining order and preliminary injunction seeking to require the Defendant, a Pharmacy Services Administrative Organization, to turn over funds the debtor contended belong to it. In denying the Plaintiff's motion, the Court found that the Plaintiff failed to meet its burden to prove that it is likely to succeed on the merits of the underlying claims in the adversary proceeding litigation. Here, the test is whether the debtor will be successful in this litigation where it seeks turnover of its receivables, an injunction and a finding that the automatic stay is violated. The Court found that the doctrine of recoupment applies to such receivables under the terms of the contract signed by the parties, thus the automatic stay provided for in the Bankruptcy Code does not apply.

40. In re Robinson, 18-31989 (Bankr. E.D. Va. 3/17/23) (Phillips)
Debtor fails to follow the requirements of the Chapter 13 plan and consequently the UST can dismiss the case with prejudice.

Facts: Debtor filed Chapter 13 on April 13, 2018. The Debtor's primary asset was a 100% ownership interest in a parcel of rental real estate. The Debtor valued this property at $41,900 with $10,000 exemption and mortgage lien of $14,704.10 leaving hypothetical equity of $17,195.90. Debtor's plan was confirmed on September 15, 2018. Debtor made successful payments for several years. However, on October 20, 2021 the Chapter 13 Trustee moved to dismiss the Debtor's case for default under the plan payments. The Debtor moved to convert her case to Chapter 7 on December 21, 2021 and the Court entered an order of conversion the next day.

On May 15, 2020, more than 2 years into the Chapter 13 case and over a year and a half before the Debtor converted her case to Chapter 7, there was a fire which damaged the real estate. As a result, the debtor made an insurance claim and obtained an actual cash value settlement totaling $91,174.53. From that amount, the debtor received a direct payment in the amount of $82,554.03. The Debtor did not amend schedules A/B or C to disclose the Insurance Claim or exempt any of its proceeds. The debtor did seek approval of the funds from the Bankruptcy Court. Seven months after receiving these proceeds the debtor amended her schedules to report the fire but did not disclose the insurance claim or its proceeds. Through bank statements it was determined the debtor spent the funds for her own benefit. The United States Trustee moved this Court to dismiss the Chapter 7 case of the debtor with prejudice to refile another bankruptcy case for two years. The UST contends the Debtor committed bad faith by failing to disclose the existence of the Insurance Claim and her receipt of the proceeds and by failing to provide accurate and incomplete information on her bankruptcy schedules. The UST argues the debtor's failure to do so, coupled

with her dissipation of the proceeds without court authority and her subsequent conversion to Chapter 7 after the funds had largely been expended, requires the dismissal of her case for bad faith.

Held: "If the Chapter 13 Trustee, a creditor, or the Debtor had moved to modify the chapter 13 plan pursuant to § 1329 in light of the Debtor's substantial and unanticipated receipt of the Proceeds, such a modification likely would have occurred….This failure forms the basis of the UST's assertion….Recently, in *In re Ilyev,* this Court held that while the Bankruptcy Code and Federal Rules of Bankruptcy Procedure may not explicitly require the amendment of a debtor's schedules when an asset becomes property of a chapter 13 estate pursuant to § 1306(a), '[d]ebtors also have a duty of cooperation with the Trustee. Section 521(a)(3) requires debtors to cooperate with trustees as necessary to enable the trustee to perform the trustee's duties under Title 11.' . . . The Court concluded that '[t]he duty of cooperation under Section 521(a)(3) and Rule 4002(a)(4) includes a duty of disclosure for substantial and unanticipated changes in the debtor's financial condition. The Chapter 13 Trustee cannot perform his duties, and the Court is not in a position to decide whether a particular change in financial circumstances may be substantial and unanticipated, without disclosure.'"

"Having found that both the Insurance Claim and the Proceeds constituted property of the estate and that receipt of the Proceeds stemming from the destruction of the Petersburg property represented a substantial and unanticipated change in the debtor's financial circumstances, the Court must now review the Debtor's actions and determine whether dismissal with prejudice is the appropriate remedy under the circumstances of this case. The primary consideration here is whether the Debtor has acted in good faith."

"Considering the totality of the circumstances, the Court finds that the Debtor failed to act in good faith. Consequently, cause exists to dismiss the Debtor's case pursuant to 11 U.S.C. § 707(a)….There is no doubt that the proceeds received by the Debtor during the pendency of her chapter 13 case represented a substantial and unanticipated change in circumstances necessitating that her receipt of same be disclosed in her bankruptcy case. It was for the Court, not the debtor, to determine the appropriate disposition of the Proceeds regardless of the perceived needs of the Debtor and her dependents. The Debtor's failure to report her receipt of the Proceeds deprived her creditors of the opportunity to seek a modification of her Plan and, more importantly, preempted the role of the Court to determine their appropriate disposition. For the foregoing reasons, the Debtor's bankruptcy case will be dismissed. The Debtor will be prohibited from filing a bankruptcy case in this or any other court for a period of one year."

41. **In re Arnolds**, 2023 Bankr. LEXIS 51, 2023 WL 138858 (Bankr. E.D. Va. 1/9/23)

In November 2005 debtor purchased a home and financed it with BankUnited FSB. The debtor also got a HELOC with IndyMac Bank, FSB. The liens were both secured, in order, on the property. In August of 2006 the debtor secured a third lien against the property with Navy Federal Credit Union. In June 2009 BankUnited FSB mistakenly recorded a certificate of satisfaction in the land records, which resulted in the release of its lien.

In November 2015 the debtor filed a chapter 7 bankruptcy. In her schedules she listed the property and listed all three liens. The case was uneventful, and the trustee filed a report of no distribution, the debtor received her discharge, and the case was closed.

In August 2019, Ms. Arnold entered into a Lien Modification Agreement and confirmed the validity of the note and deed of trust. In December 2021 she sold the property. The lienholder DLJ (which had bought the BankUnited loan) did not receive any proceeds. Ms. Arnold went on to pay cash for a new residence. In April 2022 BankUnited recorded a Document of Rescission in Fairfax County. DLJ then filed a lawsuit in Fairfax County against Ms. Arnold and the new buyer of her house with many counts including fraud. Ms. Arnold filed to have the case moved to the bankruptcy court. The lender filed a motion to remand due to lack of subject matter jurisdiction.

The Motion to remand was granted but the request for attorney's fees denied. It was determined that the debtor was not seeking any relief from the Bankruptcy Court for any alleged violation of the discharge order but that she wanted to adjudicate her affirmative defense of discharge so remand was appropriate.

42. **In re Health Diagnostic Lab'y, Inc.,** 2023 Bankr. LEXIS 8, 72 B.C.D. 48, 2023 WL 105586, Bankr. E.D. Va. 1/4/23)

Chapter 11 plan in this case consolidated all bankruptcy estates and established a Liquidating Trust. After the Liquidating Trustee made his first distribution, the U.S. Trustee claimed his office was entitled to payment of their quarterly fees. The Liquidating Trustee objected to those fees. The court disagreed with the Liquidating Trustee (citing 1930(a) of Title 28 subsection (a)(6)) stating that "in addition to the filing fee paid to the clerk, a quarterly fee shall be paid the US Trustee".

43. **In re Dobson**, 23-60148 (Bankr. W.D. Va. 5/17/23)(Connelly)
Debtors' eligibility for a certain chapter of bankruptcy is determined on the petition date.

Debtors filed a joint chapter 11 bankruptcy and elected to proceed under subchapter V of the section. The day after they filed, Dobson Homes, Inc. (owned by Mr. Dobson as the sole shareholder) filed a chapter 7 bankruptcy petition. The debtors attended their 341 hearing on March 2, 2023 and on March 26, 2023 the U.S. Trustee filed an objection to their subsection V election claiming that they exceeded the debt limit allowed as the debts from the filing of Dobson Homes, Inc. chapter 7 must be added to their current case (which then caused them to exceed the $7,500,000 limit).

Both parties agreed that the debtors met the requirements under §1182(1)(A) on the date of the filing. The U.S. Trustee argued that when Dobson Homes, Inc. filed their bankruptcy, thereby adding to the debts of the Mr. Dobson under §1182(1)(B)(i), they were no longer eligible for relief under subchapter V. The Trustee argued that when the code failed to state "as of the petition date" in subsection A congress left open the ability to include debts post-petition in the debt limit.

The court disagreed and held that §1182(1)(A) determines who is eligible to be a debtor on the day the case is filed, and if the debtor is eligible at that moment they cannot be disqualified due to changes that occur after the date of filing. The code did not provide any wording to imply the determination of "debtor" to be ongoing. Here the debtors met all of the requirements of subsection (A) and none of the exceptions of (B) as Mr. Dobson was not yet a member of a group of affiliated debtors under this title when he filed his petition, and therefore were eligible for subchapter V status.