W.D. Conference – Case Law Update

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UNITED STATES SUPREME COURT – Cases to watch

1. Truck Insurance Exchange v. Kaiser Gypsum Co., Inc. (22-1079) October 2023 Term (argued March 19, 2024)

Should an insurer of a Chapter 11 debtor have standing to object to confirmation of the plan?

2. Office of the United States Trustee v. John Q. Hammons Fall 2006, LLC (22-1238) October 2023 Term (argued January 9, 2024)

What is the appropriate remedy for the uniformity violation of the imposition of fees applied only in the 88 federal judicial districts that have US Trustees but not the 6 who have Bankruptcy Administrators? This issue was left unresolved in *Siegel v. Fitzgerald* (596 U.S. 464 (2022)). At issue is whether the United States government should refund fees overpaid in the 88 judicial districts, or whether to accept the remedy proposed by Congress, or to allow the United States government to retroactively collect additional fees in the Bankruptcy Administrator districts.

3. Harrington v. Purdue Pharma, L.P. (23-124) October 2023 Term (argued December 4, 2023)

U.S. Trustee Harrington objected to the provisions in the Chapter 11 plan shielding the Sackler family from civil liability in exchange for their contribution of up to $6 Billion to the plan. There are two main questions before the Supreme Court. The first is whether Harrington has a right to challenge the confirmation of the plan at all. Perdue and the committee of unsecured creditors assert the U.S. Trustee is merely an "interloper" who lacks the right "to destroy a plan that the actual victims crafted and overwhelmingly support." The second question before the court centers on the legality of the plan itself. The US Trustee alleges that the Sacklers are able to "shield billions of dollars of their fortune" and obtain a release from civil liability for opioid-related claims without having to personally declare bankruptcy, reaping the personal benefits as a third party. Amy Howe, *Opioid maker Purdue's bankruptcy case comes before Supreme Court*, SCOTUSblog (Dec. 2, 2023, 1:40 PM), https://www.scotusblog.com/2023/12/opioid-maker-purdues-bankruptcy-case-comes-before-supreme-court/

FOURTH CIRCUIT

1. *Yagi v. Hilgartner (In re Hilgartner*), 22-1762, 22-1778 (4th Cir. Jan 18, 2024).

Underlying settlement agreement to compensate a victim for an assault provided that Debtor pay the victim $415,000 (the "principal") in installments and 15% interest on late payments and reasonable attorney's fees. Debtor paid a considerable sum, then defaulted on payments. On the eve of the scheduled hearing for a default judgement, the Debtor filed Chapter 13 bankruptcy. The victim later filed an action to determine dischargeability – specifically arguing the full amount under the settlement agreement *including* the interest on late payments and attorney's fees from enforcement is not dischargeable.

The Bankruptcy court concluded that the debts "arising from" the malicious injury were non-dischargeable pursuant to § 523(a)(6); however, the other debts which the court categorized as "collection debts" did not fall under the cope of § 523(a)(6) and made them dischargeable.

The Debtor appealed, arguing the court erred in finding all of the debt non-dischargeable. The Debtor contended that because the debt arose from a settlement agreement and not reduced to judgement, the debtor should be categorized as breach of contract claim rather than for willful and malicious injury under § 523(a)(6). The District Court disagreed on both counts, affirming and reversing in part the bankruptcy court's decision. The Court rejected the Debtor's contention that the settlement agreement converted a non dischargeable tort claim into a dischargeable contact claim. Citing *Archer v. Warner*, 538 U.S. 314 (2003), the court held that money promised in a settlement contract arising out of a tort retain the character of the underlying tor for dischargeability purposes.

The Debtor appealed to the Fourth Circuit pressing the same arguments as in the lower court. The Court promptly dispensed of the issue of whether the $229,045.00 outstanding amount of principal is dischargeable by citing *Archer v. Warner*. The Court noted that analyzing dischargeability in cases with no underlying lawsuits may present a challenges, however in this case, the settlement agreement itself was clear: the debt was "for the pain, damage, and suffering" caused by the debtor.

Relying on the Supreme Court's *Cohen* decision, the Court further found that attorney fees and late charges nondischargeable as Cohen holds that § 523(a) exceptions may reach punitive and other related ancillary debts.

2. *Kiviti v. Bhatt*, 80 F. 4th 520 (4th Cir. 2023)
Congress's limits on judicial review; claims must rise and fall together and "manufactured" finality

The Kivits hired a contractor to renovate their D.C home. The District requires contractors to be licensed. The contractor represented to the Kivits he was licensed, but he was not.

The work was delayed and defective and the Kivitis sued the contractor in D.C. Superior Court. The contractor filed Chapter 7. The Kivitis then brought a two count AP moving the Court to rule that (1) $58,770 was owed to them under D.C. law and (2) a finding that the debt was non dischargeable. The Bankruptcy Court rejected Count II, finding any existing debt dischargeable, but permitted Count I to proceed to determine whether the Kivits were owed any money. The Movants preferred a favorable ruling on Count 2 over Count 1 because they did not want to expend resources if they knew the debt was dischargeable. Resultantly, the parties reached a deal whereby the Kivitis voluntarily dismissed Count I to facilitate an appeal of the Count II decision.

The District Court affirmed the decision of the bankruptcy Court and a 4th Circuit appeal ensued. Vacating the District Court's order, the 4th Circuit ruled the district court did not have jurisdiction over the appeal as the Order was not a final order. The Court explained that bankruptcy courts are not Article III courts and resultantly, Article III constraints do not apply to them. The Court added that parties cannot collude to create finality after the fact through a voluntary dismissal with prejudice.

3. *Guthrie v. PHH Mortg. Corp*., 79 4th 328 (4th Cir. 2023) (analysis of preemption)

Plaintiff appealed the district court's grant of summary judgement to PHH Mortgage Corporation on numerous federal and state law claims. The two issues on appeal were whether the Bankruptcy Code preempts state law causes of action for a creditor's improper collection efforts related to debt that has been discharged in bankruptcy and whether there were genuine issues of material fact with respect to Guthrie's federal and state claims. The Fourth Circuit affirmed in part, vacated in part, and remanded. The court held that the Bankruptcy Code does not preempt Plaintiff's state law claims.

4. *Bestwall LLC v. Comm. Of Asbestos Claimants (In re Bestwall LLC),* 71 F.4th 168 (4th Cir. 2023).

The district court affirmed a bankruptcy court order entering a preliminary injunction preventing thousands of third-party asbestos claims from proceeding against debtor Bestwall LLC's affiliates, including affiliate and non-debtor Georgia-Pacific LLC ("New GP"). The Official Committee of Asbestos Claimants ("Committee") and Sander L. Esserman in his capacity as Future Claimants Representative appealed. The parties argued that the bankruptcy court lacked jurisdiction to enjoin non-bankruptcy proceedings against new GP and, alternatively, that the bankruptcy court erred in entering the preliminary injunction because it applied an improper standard. The Fourth Circuit affirmed. The Court agreed with the district court that the bankruptcy court had "related to" jurisdiction to issue the preliminary injunction and applied the correct standard. The court explained that the Claimant Representatives asserted that under the first prong of the preliminary injunction test, the district could should have determined whether Bestwell would be able to obtain permanent injunctive relief. The Court wrote that requiring a party

to show entitlement to a permanent channeling injunction this early in the bankruptcy proceeding puts the cart before the horse; Section 524(g) does not require such proof until the plan confirmation stage. Contrary to the express intent of Congress as shown through the Bankruptcy Code, the position of the Claimant Representatives would effectively eliminate reorganization under Chapter 11 as 27, an option for many debtors. Therefore, the court rejected the Claimant Representative's argument that the bankruptcy court needed to find that it would enter a permanent injunction to order to grant a preliminary injunction.

5. *Bledsoe v. Cook*, 70 F.4th 746 (4th Cir. 2023)

Appellees filed a voluntary petition under Chapter 13 of the Bankruptcy Code. Appellees calculated their disposable income using Official Form 122C-2. As the form instructs, Appellees entered the relevant "National and Local Standards" for their monthly costs for food, clothing, utilities, out-of-pocket healthcare, and vehicles. The bankruptcy trustee objected to Appellees' proposed Chapter 13 plan. The trustee acknowledged the Cooks followed the instructions on Official Form 122C-2. The trustee maintained, however, that the form was wrong because the Bankruptcy Code only allowed Appellees to claim the relevant Local Standards amount for their "Mortgage/Rent" deduction ($1,098) rather than their actual monthly payment ($2,233.34). The trustee asked the bankruptcy court to certify an appeal directly to the Fourth Circuit under 28 U.S.C. Section 158(d)(2)(A). The Fourth Circuit affirmed. The court explained disposable income, in turn, means "current monthly income received by the debtor" minus "amounts reasonably necessary to be expended." Clause Three says the Appellees' "average monthly payments on account of " that mortgage "shall be calculated" based on the amounts "contractually due to secured creditors," that is, what Appellees owe under their mortgage agreement. Performing that calculation, the Appellees reached an average monthly payment of $2,233.34. Then, Clause One tells Appellees to "reduce" their "current monthly income" "by the amount determined under" Clause Three. Thus, Appellees subtracted $2,233.34 (and other uncontested amounts) from their current monthly income to reach a disposable income of $253.27. Accordingly, the court concluded Appellees were entitled to use their average monthly mortgage payments when calculating their disposable income.

Western District of Virginia

1. *Hegedus v. U.S. Bank*; 5:23-cv-017 (W.D. Va. Mar 5, 2024)

U.S. Bank moved for an injunction against *pro se* Debtors who from 2015 to 2023 attempted to delay foreclosure of Delaware property. For over a decade, the Debtors engaged in frivolous delay tactics. U.S. Bank moved the Court to restrict access to the Court pursuant to the All Writs Act, which permits a federal court to restrict access to the courts where a litigant abuses access through repeated, meritless and vexatious filings.

"28 U.S.C. § 1651(a); Cromer v. Kraft Foods N. Am., Inc., 390 F.3d 812, 817 (4th Cir. 2004..." Hegedus v. U.S. Bank, 5:23-cv-017 (W.D. Va. Mar 05, 2024).

Applying a four-part test, the court found that despite the voluminous history of vexatious litigation, the motion was moot as the Debtors had been silent for nearly 8 months. The Court did note that if the Debtors revived their practices, the court would revisit the issue.

United States Bankruptcy Court Western District of Virginia

1. ***In re Poullath*, 23-61057 (Bankr. W.D. Va. Mar 07, 2024)**

Can a Debtor use Virginia Code § 34-13 to claim an exemption in personal property?

The Debtor filed Chapter 13 and amended Schedule C to exempt $1.00 in real property used as her residence and $6,263.67 in personal property not used as her residence under §34-4. In addition, she claimed as exempt $24,999.00 in certain property interests under § 34-13.

The Debtor's position was that Va. Code § 34-13 permits a Debtor to extend any portion of the unused $25,000 for residential property exemption to personal property.

Virginia Code §34-13 states:

§ 34-13. Householder may set apart exemption in personal estate.

> If the householder does not set apart any real estate as before provided, or if what he does or has so set apart is not of the total value which he is entitled to hold exempt, he may, in addition to the property or estate which he is entitled to hold exempt under §§ 34-26, 34-27, 34-29, and 64.2-311, in the first case select and set apart by the writing required by § 34-14 to be held by him as exempt under §§ 34-4 and 34-4.1, so much of his personal estate as shall not exceed the total value which he is entitled to hold exempt and, in the latter case, personal estate, the value of which, when added to the value of the real estate set apart, does not exceed such total value.

The Court analyzed the text of the statute and found by its clear terms, when the householder is entitled to an exemption under § § 34-4 or 34.1, but has not exhausted it, then they may use §34-13 to exempt any personal property up to the exemption value allowed under §§ 34-4 or 34-4.1.

2. ***In re Smith*, 23-70619 (Bankr. W.D. Va. Jan 18, 2024)**

The city of Roanoke moved to modify the automatic stay. Debtor filed Chapter 13 to stop the public auction of her home due to past due delinquent taxes and fees. The scheduled sale took place on September 13, 2023; however, unbeknownst the Special

Commissioner, the Purchaser and the City, the Debtor filed Chapter 13 on that same day. Based upon the testimony, the Court found the Debtor filed her petition 4 minutes prior to the 12:00 P.M. sale.

The City moved for modification of the stay asking for a finding that the property was never property of the estate under § 541.

Citing *Whitlow* (*City of Roanoke v. Whitlow*, 410 B.R. 220 (Bankr. W.D. Va. 2009), the City argued that because the right of redemption pursuant to Va. Code § 58.1-3794 was lost the property was never property of the estate under § 541,

The Court however distinguished her equitable right of redemption from ownership and ruled that because the Debtor filed her petition before the sale occurred, the property still belong to the debtor legally and equitably at the time her bankruptcy case began, therefore, the automatic stay was violated.

3. ***Advancial Fed. Credit Union v. Cruz (In re Cruz),* 23-70483, 23-07020 (Bankr. W.D. Va. Dec. 26, 2023)**

The Court denied the Chapter 13 Trustee's motion to intervene in an adversary proceeding filed by a creditor seeking determination of nondischargeability of credit card debt arising from an alleged internet scam. The Trustee asserted he has an interest in the outcome of the adversary proceeding due to his trustee duties under Section 1302(b); that he has an interest in the success of each debtor's case and that allowing him to intervene would not prejudice or unduly delay the plaintiff's rights. The Court held that the Trustee did not have a right to intervene under Rule 24(a)(2) as he did not demonstrate a significantly protectable interest in the adversary proceeding. The Court further held that the Trustee did not demonstrate a basis for permissive intervention under Rule 24(b)(1)(B). Finally, the Court held that Federal Rule of Bankruptcy Procedure 6009 did not support intervention.

Eastern District of Virginia

1. ***Hao v. Vetter*, 1:23-cv-708 (E.D. Va. Mar 3, 2024)**

The Court affirmed the Bankruptcy Court's order granting summary judgment to the United States Trustee in regards to the third count of its adversary complaint, denying debtor a Chapter 7 discharge. Notably, one of the issues on appeal was whether the Bankruptcy Court had erred when it took judicial notice of debtor's invocation of his Fifth Amendment privilege in a separate adversary proceeding brought by a creditor. Debtor argued he was entitled to notice of the trial court's taking of judicial notice. The Court found there was no abuse of discretion by the trial court when it did not provide debtor advance notice that it took judicial notice of his invocation of the Fifth Amendment because such notice is not required under Rule 201.

2. ***Ruano v. Meiburger*, 1:22-cv-1439 (E.D. Va. Nov 2, 2023)**

The appeal stemmed from the Bankruptcy Court's denial of debtor's claimed exemption under Va. Code Ann. § 34-29 of funds she accumulated in a savings account from transfers to that account of $100 every time her paycheck was deposited into her checking account. The issue brought by debtor on appeal was whether the trial court erred in deciding the objection in the Chapter 7 Trustee's favor where the Trustee did not present live testimony or documentary evidence. The Court found that the parties agreed as to the salient facts and the trial court was left to determine which party's position was supported by the case law and the relevant case law was clear that the subsequent transfer of funds made the funds in the savings account not covered by the wage exemption.

3. ***Labgold v. Regenhardt*, 1:22-cv-751 (E.D. Va. Nov 1, 2023)**

Debtor sued his bankruptcy attorney for malpractice after he was denied a discharge under Chapter 7 due to his 4 months' pre-petition transfer of real estate to himself and his wife as tenants by the entirety, a transfer that was not disclosed on his Statement of Financial Affairs. There were three adversary proceedings tied to the debtor's bankruptcy case, one was filed by the U.S. Trustee seeking denial of discharge, the second by the Chapter 7 Trustee to avoid the transfer of real estate, and the third was brought by creditors to have debt declared non-dischargeable. Debtor settled the Chapter 7 Trustee's adversary and agreed to purchase the real estate from the estate. The U.S. Trustee prevailed on its adversary and Debtor appealed up to the Fourth Circuit, which affirmed the denial of discharge. In the malpractice action, debtor argued that he would not have lost the dischargeability adversary but for the conduct of his counsel. The District Court granted debtor's attorney's motion for summary judgment and dismissed debtor's complaint for malpractice because it found that debtor's pre-petition conduct (transferring the real estate to tenants by the entirety ownership 4 months before filing) was the cause for the U.S. Trustee's adversary complaint and not the attorney's post-petition conduct.

4. ***Parker v. Martin*, 653 B.R. 765 (E.D. Va. Sep 11, 2023)**

The debtor, Parker, appealed the Bankruptcy Court finding that Martin's $150,000 state court unjust enrichment judgment against her was a non-dischargeable "debt … for … embezzlement [pursuant to] 11 U.S.C. § 523(a)(4)." Debtor's father and Martin's mother were in a long-term relationship. The parents, Peggy and Morton, while never married, entered into a contract entitled "Post Marital Agreement" to execute mutual and reciprocal wills, which they did. The agreement limited the amount they could gift their children to $1,500 per year. Those mutual wills left their joint estate to the survivor, and the survivor's will left 2/3 to Martin and 1/3 split between Morton's 3 children. Peggy died first. In violation of the agreement, Morton transferred $240,000 to one of his children, the debtor, consisting of: 2 annuities, life insurance policy, and bank accounts. Debtor's unrefuted testimony was that she contacted the bank, insurance company, and annuity funds and was told they passed outside the Will and were lawfully hers. So, she kept them all. Martin

sued for his 2/3 interest pursuant to the agreement and the Will. He obtained a state court judgement for $150,000 for unjust enrichment after five (5) years of litigation. When the debtor filed a bankruptcy case, Martin filed an adversary to have the debt declared non-dischargeable. He prevailed in the Bankruptcy Court which "by equating knowledge of the will's terms with intent to defraud, the bankruptcy court concluded that the Funds had been embezzled and entered judgment against Parker." To support a finding of embezzlement, Martin was required to prove each of four elements: (i) fraudulent (ii) conversion of (iii) the property of another (iv) by one with lawful possession thereof. The District Court reversed, holding that Martin did not prove two of the elements necessary to establish embezzlement. The unrefuted testimony of debtor did not show she acted with fraudulent intent but that she was operating under a good faith belief that she was entitled to the funds. Even if mistaken, that belief precluded a finding of fraudulent intent. Martin also failed to prove the funds were "the property of another." An appeal to the Fourth Circuit is pending (23-2084)

5. ***King v. Johnson*, 1:22-cv-01037 (E.D. Va. Aug 9, 2023)**

The debtors had a 76% interest in an LLC whose sole asset was a piece of real estate. The LLC executed a consent to transfer real estate to a creditor (Johnson) in October 2016 but undertook no further action to complete the transfer. Debtors filed under Chapter 7 in July of 2019. In March of 2021, Trustee proposed a plan to dissolve the LLC and sell the real estate, and use the proceeds to pay debtors' debt and initiated an adversary to recover the real estate. Within days, debtor attempted to transfer the real estate from the LLC to Johnson through a deed of gift. The bankruptcy court approved the Trustee's plan for liquidation and sale, found that the Trustee had authority to step into debtors' shoes ad wind up the LLC, and found that the attempted transfers were not valid. The Court affirmed, finding that all of the debtors' membership interests became property of the bankruptcy estate and Trustee was free to exercise those rights, that the 2016 consent memorialized the members' intention to undertake certain actions that were ultimately not done until after debtors filed bankruptcy when the debtors lacked the authority to effectuate that transfer.

United States Bankruptcy Court Eastern District of Virginia

1. ***Ferguson Enters. V. Blubaugh*, 23-01045-BFK (*In re Blubaugh*, 23-10752) (Bankr. E.D. Va. Mar 5, 2024)**

In this adversary proceeding, Ferguson Enterprises sought to have the debt owed it by the debtor determined non-dischargeable based upon fraud. Debtor signed loan documents on his behalf and on behalf of his company in February of 2019. Another guarantor, debtor's father, denied that he signed the loan documents. In March of 2023, Ferguson Enterprises sued debtor, his company, and debtor's father for breach of contract and breach of guaranty. On May 5, 2023, debtor filed a Chapter 7 bankruptcy. Debtor moved for summary judgment based in part on an argument that the statute of limitations to

allege fraud had run. The Court denied summary judgment and found "Plaintiff is not required to file fraud-based claims in the State court before the Defendant files for bankruptcy to preserve its Section 523(a) claims."

2. ***Gold v. Rhanime*, 23-01043-KHK (*In re El Rafaei,* 20-12583) (Bankr. E.D. Va. Feb 21, 2024)**

Second adversary case brought by Chapter 7 Trustee against the same creditor, this time asserting the proof of claim and underlying note were fraudulent. The first adversary (an avoidance action) resulted in judgment for the creditor because, while the trustee proved preferential transfers occurred on account of an antecedent debt, the trustee did not prove the Debtor was insolvent at the time of the transfers. The Court granted the creditor's motion for summary judgment based upon issue preclusion because the Court had found in the previous action that the note was an antecedent debt as proven by the trustee.

3. ***In re Reyna*, 23-71546-SCS (Bankr. E.D. Va. Feb 14, 2024)**

Relief from stay was granted to allow state court litigation to proceed by creditors against the debtor with the bankruptcy court retaining jurisdiction over enforcement of any judgment against the debtor or property of the estate and any determination of the dischargeability of debt. The Court considered the *Robbins* factors when determining whether to grant relief from the stay. *In re Robbins*, 964 F.2d 342 (4th Cir. 1992). Those factors include: (1) whether the issues in the pending litigation involve only state law, so the expertise of the bankruptcy court is unnecessary; (2) whether modifying the stay will promote judicial economy and whether there would be greater interference with the bankruptcy case if the stay were not lifted because matters would have to be litigated in bankruptcy court; and (3) whether the estate can be protected properly by a requirement that creditors seek enforcement of any judgment through the bankruptcy court. The personal injury tort claims of a creditor may not be determined by the bankruptcy court as there is no jurisdiction over those causes of action. Defamation is one such personal injury tort claim and the Court was required to grant relief regarding the defamation matter. The other litigation by the creditors involved claims that fell under only state law, were entangled with the defamation case, and could be litigated in state court in such a way as to protect the Chapter 7 bankruptcy estate.

4. ***Deaver v. Johnson*, 23-03022-KLP (*In re Johnson*, 23-30757) (Bankr. E.D. Va. Feb 13, 2024)**

Chapter 13 debtors' motion to dismiss adversary complaint was granted. Adversary complaint filed by creditor sought non-dischargeability determination based upon 523(a)(6) for malicious prosecution and defamation by the debtors and some co-conspirators. The complaint alleged facts that included an extramarital relationship between the creditor and one of the debtors and the post-relationship conduct of the debtors and some co-conspirators that resulted in the creditor's loss of employment,

several criminal charges against him that were each dismissed, damage to his personal and professional reputation, loss of income, and significant legal costs. Debtors raised the inapplicability of 523(a)(6) to chapter 13 cases and while the creditor argued 1328(a)(4) at the hearing, the Court concluded that the motion to dismiss must be granted as 523(a)(6) was inapplicable and the creditor was denied leave to amend the complaint because he alleged no physical injury so as to be able to pursue non-dischargeability under 1328(a)(4).

5. ***In re Parquet*, 23-11323-BFK – *Parquet II* (Bankr. E.D. Va. Feb 2, 2024)**
. . . Know your judge?

Chapter 13 debtors undertook voluntary actions to reduce income and increase allowable expenses post-petition and claimed those changes as reductions to their income on Form 122C to reduce their overall disposable monthly income. The income decrease was the result of debtor directing his parents to no longer contribute $210 monthly to the direct payment of his student loans. The expense that the debtor voluntarily increased was to his retirement contribution (an increase of 3.75 times the historical contribution). The trustee objected to confirmation under Section 1325(b)(1)(B) (disposable income) and Section 1325(a)(3) (good faith). While the Court overruled the disposable income objection because the objected to changes on Form 122C met the *Lanning* "known or virtually certain to occur" test and "unusual" requirement, the Court sustained the trustee's objection to confirmation on the good faith ground. It held that it was good faith for the debtor to have his parents cease payments towards his student loans but that the increase in the retirement contribution in this case exceeded good faith. **Interestingly, the Court specifically detailed that "absent highly unusual circumstances that may justify a greater increase in voluntary contributions, the Court will allow deductions in cases assigned to the undersigned Judge for increased voluntary contributions made during the six months preceding the filing of the bankruptcy case, or after the filing of the case and before confirmation, of the greater of: (a) 100% of the debtor's previous contributions (i.e., if the Debtor was contributing $300.00 per month, she will be entitled to an increased contribution of up to $600.00 per month); or (b) the amount of an employer's matching contributions (thus, if the Debtors in this case were not making any contributions, they would be entitled to contribute up to $158.31 per month)."

6. ***Meiburger v. DPG Holdings, LLC*, 22-01044-KHK (*In re Parker*, 21-12073) (Bankr. E.D. Va. Jan 29, 2024)**

Chapter 7 Trustee sought the dissolution of DPG Holdings, LLC (an entity created by debtor and her husband to hold and manage a duplex rental property). The Court held that under Va. Code §§ 13.1-1046, -1047 the entity must be dissolved because there was a deadlock between the co-owner of the entity and the Trustee such that the business could not continue to operate.

7. ***Wingenbach v. Gray*, 22-03120-KLP *(In re Gray*, 22-31731-KLP), 2024 Bankr. LEXIS 69, 73 Bankr. Ct. Dec. 57, 2024 WL 150674 (Bankr. E.D. Va. Jan. 12, 2024)**

Creditors initiated an adversary proceeding against a Chapter 13 debtor seeking to have their state court judgment deemed nondischargeable pursuant to 11 U.S.C. Sec. 523(a)(2). The state court had entered judgment for creditors based upon the debtor's misrepresentations as to his qualifications to perform construction work, misrepresentations that included whether he had a valid contractor's license, insurance, and was able to perform the work. The Bankruptcy Court held that the state court judgment was non-dischargeable. Collateral estoppel bound the Bankruptcy Court as the underlying claim had been fully litigated and the state court had determined that the debtor made representations regarding his status as a licensed contractor, knew or should have known they were false at the time they were made, and such representations were made with an intent to deceive the creditors, and they reasonably relied on the misrepresentations, and suffered damages as a result of the misrepresentations

8. ***In re Machado*, 22-11030-KHK (Bankr. E.D. Va. Jun 28, 2023)**

Debtors filed an amended plan (their fourth plan after three prior plans were denied confirmation), proposing an estimated total of payments of $136,200, that was to result in the cure of mortgage arrears, payment of a priority claim, payment of attorney's fees, and a 73% distribution to non-priority unsecured creditors. Trustee objected to confirmation, arguing a lack of good faith on the part of the debtors, lack of feasibility of the plan, and a failure to satisfy the liquidation test. Some of the facts noted by the Court include: the debtors had traded in a 2017 Chevy Tahoe that they owned free and clear prepetition towards the purchase of a 2022 Chevy Tahoe which resulted in a monthly payment of approximately $528; that they incurred a personal loan of $17,000 17 days before filing; and they paid a portion of their legal fees and the court costs with a credit card and proposed to compromise that claim as part of their chapter 13 plan. The Court sustained the Trustee's objection, denying confirmation and dismissing the case. The Court held that the debtors had not properly calculated or committed their projected disposable monthly income according to the means test, that the plan failed the liquidation test, and that the plan was not feasible. The Court also found that the plan had not been filed in good faith and showed an abuse of the provisions, purpose, and spirit of chapter 13. The Court denied confirmation without leave to amend, given that a new plan could not cure the bad faith on the part of the debtors.

9. ***In re Stevenson*, 23-32811-KRH (Bankr. E.D. Va. Nov 8, 2023)**

Debtor proposed a Chapter 13 plan to cure mortgage arrears and resume direct mortgage payments for a mortgage secured by real estate debtor inherited. Debtor had no personal liability on the note underlying the secured debt. Secured creditor objected to confirmation of the plan on the grounds that debtor was not in privity of contract with the

secured creditor and that the plan assumes the mortgage loan by debtor without secured creditor's consent. The Bankruptcy Court asked "whether [secured creditor]'s in rem rights against the Property constitute a 'claim' as defined by section 101(5) of the Bankruptcy Code, which claim can properly be included in the Plan." There is no Fourth Circuit opinion and a split among bankruptcy courts on this issue. The Bankruptcy Court was persuaded by *Johnson v. Home State Bank*, 501 U.S. 78 (1991) and its broad definition of "claim" to allow a cure where there are only in rem rights and no contractual privity because the personal liability discharged in a prior bankruptcy case. The Bankruptcy Court determined that the secured creditor has a secured claim that can be properly modified by the debtor's plan pursuant to the 11 U.S.C. Section 1322(b)(2) even in the absence of in personam liability against the debtor.

10. *Williams v. Selene Fin.*, 23-01001-BFK (*In re Williams*, 18-12940-BFK) (Bankr. E.D. Va. Oct 20, 2023)

Chapter 13 debtor filed an adversary proceeding against Selene and U.S. Bank because they refused to send the monthly mortgage statements directly to her from April 2022 through February 2023 even where her confirmed plan required the debtor to pay the ongoing monthly mortgage payments directly. The Dodd-Frank Act from 2010 requires lenders to provide periodic statements for residential mortgages. 15 U.S.C.A § 1638(f). Regulation Z, 12 C.F.R. § 1026.41, further requires that a servicer "shall provide the consumer" the periodic statements. 12 C.F.R. § 1026.41(a)(2). There is a bankruptcy exception at 12 C.F.R. § 1026.41(e)(5) which does not apply to this case. Selene sent the periodic statements to the debtor's attorney, and not to the debtor, arguing that they may not communicate directly with a represented party under the FDCPA. Notably, debtor did make her monthly payments and remained current. Selene prevailed on its argument that debtor lacked standing because she suffered no harm. Debtor's complaint was dismissed.

COURT OF APPEALS OF VIRGINIA

Shaw-McDonald v. Eye Consultants of N. VA, P.C., et.al. No. 0067-23-4 (Jan. 30, 2024)
In August of 2019, debtor filed a medical malpractice suit against Eye Consultants of Northern Virginia, P.C. and Northern Virginia Eye Surgery Center, LLC (collectively "Eye") claiming negligence in her cataract surgery performed in 2017. Almost two years later, in March of 2022, debtor filed a Chapter 7 bankruptcy. While the pending tort action was not disclosed on the original schedules, debtor amended her schedules to disclose the cause of action and the Chapter 7 Trustee abandoned the cause of action. The trial court dismissed the civil cause of action against Eye with prejudice finding that debtor lacked standing due to the bankruptcy filing and pursuant to Kocher v. Campbell, 282 Va. 113 (2011). The Court of Appeals found that the debtor had standing when she filed the case, lost standing for the period of time that the bankruptcy case was pending, and had

standing restored to her upon the abandonment of the asset back to her "'as if' no bankruptcy petition had been filed." Reversed and remanded.