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IMPORTANT CHAPTER 12 and 13 BANKRUPTCY DECISIONS: WD VA, 4th Cir., and Sup. Ct.:

[Notes: Cases are numbered in chronological order within each Court group: those with a "B" are Bankruptcy Court or District Court decisions[~202 cases]; "F" are Fourth Circuit decisions [~63 cases]; and "S" are U.S. Supreme Court decisions [~56 cases].]

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IMPORTANT CASES: BANKRUPTCY AND DISTRICT COURTS

B1A. **In re Josephine Thornton**, 21 B.R. 462 (Bankr. W.D. Va. 4/14/82), Opinion by Pearson. **Post-petition medical expenses are allowable under 1305 and covered by a hardship discharge.** After Chapter 13 debtor's plan was confirmed, she applied to the Court for permission to add certain post-petition medical services creditors; permission was granted. The debtor later applied for a hardship discharge. Held: (1) In a 1328 hardship discharge, post-petition debts under 1305 that are allowed are discharged to the same extent as an allowed pre-petition claim. (2) Medical debts are the kind enumerated in the legislative history as being necessary services for which prior approval is not practicable. (3) The hardship discharge in this case will include discharge of the post-petition medical services.

B2. **In re Joan Pritchett**, 55 B.R. 557, 560, Bankr. W.D. Va., 11/27/85 Opinion by Anderson (Bankr. W.D. Va. 1985). **1305 claims filed after plan payments completed are disallowed and not subject to discharge.** Although Section 1305 allows for filing claims for post-petition taxes, where the claim is filed after "debtor had completed all payments under her chapter 13 plan" the Court disallowed the late claim. Only the holder of a sec. 1305 claim may file proof of the claim; a debtor may not file on behalf of the holder. If a holder of a 1305 claim does not file a claim, the claim (i) is not an allowed claim, (ii) cannot be provided for in the plan, and (iii) is not subject to discharge. Here the post-petition claims were not "provided for" [1328(a)] because they were not added to the debtor's schedules until after she had completed her plan payments. To be discharged, a claim must be both an allowed claim and provided for.

B2A. **In re C & J Oil Co., Inc.**, 81 B.R. 398 (W.D. Va. Bankr. 1987) [Krumm opinion]. **Allowance of attorney fees: standard; burden of proof; clerical or administrative work; travel time; preparation of fee application**. Chapter 11 case involving fee application by debtors' counsel for fees under Code sec. 330 and Rule 2016. Court stated that: (1) Review of fee applications is guided by the 12 factors in *Barber v. Kimbrell's, Inc.* , 577 F.2d 216 (4th Cir. 1978). (2) Burden of proof to justify a fee allowance is on the movant. (3) Clerical or routine services ("largely legal secretarial work or administrative work not directly related to the delivery of legal services which can be compensated under Code sec. 330") are not compensable as necessary legal services under Code sec. 330. *In re Wabash*, 69 B.R. at 478 (Bankr. S.D. Ind. 1987). (4) Travel time should not be allowed at the full hourly rate unless there is a "substantial reason justifying the full charge";

court finds that 75% of the allowed hourly fee for necessary travel should be permitted. (5) 75% of the allowed hourly rate for the individual preparing the fee application is allowable. (6) Mileage is reimbursable at the existing rate for government employees; parking is reimbursable. (7) Court disallows paralegal time that constituted "either legal secretarial work or messenger service."

B3. **Nunley v. Jessee**, 92 B.R. 153 (W.D. Va. 1988). **Attorney fees on appeal for defending fees awarded initially.** District Court held that "litigants [in bankruptcy] who prevail on a fee award initially are routinely entitled to additional fees required to defend those fees on appeal."

B4. **In re Mitchell**, 116 B.R. 63, Bankr. W.D. Va. (Anderson, 3/29/90). **Debtors must increase plan payments by the amount incorrectly refunded to them by the IRS.** IRS erroneously refunded to the debtors an overpayment by the Trustee on its priority claim; the money should have been returned to the Trustee. *Held*: The IRS' amendment of its POC will be allowed, because there will be no prejudice to any party. When a creditor receives plan payments in excess of its claim, "the excess funds should again be used to fund the plan." So the debtors must increase their plan payments to pay to the Trustee the amount incorrectly refunded to them by the IRS.

B5. **In re Gary and Barbara Tarpley**, 123 B.R. 741, Bankr. W.D. Va. (Anderson, 1991). **Must file a timely Homestead Deed to do a 522(f) lien avoidance in Chap . 13.** (i) a Homestead Deed need not be filed in order for debtors to obtain the benefit of Va. Code section 34-4 exemptions claimed by them on Schedule C for the purpose of passing the "Chapter 7 test" of Code section 1325(a)(4), but (ii) in order to avoid a lien under Code sec. 522(f), "a Virginia Chapter 13 debtor must perfect claimed exemptions in accordance with the applicable provisions of the Virginia Code." [Note: This case appears to have been overruled by In re Botkin, Dist. Ct. WD VA, 5/17/10.]

B6. **In re Saunders**, 130 B.R. 208 (Bankr. W.D. Va. 1991) [Anderson]. **506(b) allows contractually authorized attorney's fees for fully secured claims only.** The Court noted a split in authority, but chose to side with the Sakowitz case (Texas) and not the United Merchants (2nd Cir.) case. The $8,736 fees in question were 25% of principal fees sought by the creditors for post-petition work, though only $748 of actual time was expended by the creditors. Court found there was no difference in analyzing 506 between an unsecured claim and an under-secured claim.

B7. **In re Endicott**, 157 B.R. 255 (Bankr. W.D. Va. 1993) (Krumm). **Maximum length of plan.** The period of the plan under 1322(d) begins upon confirmation of the plan, not when the case is filed or the first payment made.

B7A. **In re Richard Roberts Lexington Associates, Ltd.**, 171 B.R. 546 (Bankr. W.D. Va. 1994). **Allowance of an 18 month late deficiency claim on real estate in a Ch. 7 case.** Court allowed an unsecured deficiency claim filed for real estate in a Chapter 7 matter almost 18 months after the foreclosure sale, which had been conducted prior to the claims bar date, because the deficiency related back to the original claim filed and there had not yet been a distribution.

B8. **In re Leftwich**, 174 B.R. 54 (Bankr. W.D. Va. 1994) [Krumm]. **Debtor's signature on related document sufficient to create security agreement.** Debtor failed to sign a security agreement but had signed other documents related to the transaction. Issue was whether that deprived the creditor of a security agreement. Court held that the UCC's "authentication requirement" served an evidentiary function, and that because the parties had intended to create a security interest, his signature on the related document satisfied the signature requirement of the UCC.

B9. **In re Duncan**, 182 B.R. 156 (Bankr. W.D. Va. 1995). [Krumm]. **109(g)(2) requires causal connection.** In order to apply the statute and dismiss the subsequent case, the Court required a causal connection between the creditor's motion for relief and the debtor's voluntary dismissal of the case: the request for relief must "trigger the dismissal." Here the debtor also incurred post-petition debt that could be grounds for a voluntary dismissal and refiling. Court did not dismiss the second case.

B10. **Elkwood Homes, LTD v. County of Culpeper, VA**, 202 B.R. 232 (Bankr. W.D.Va. 1996). **In the 4th Circuit, tax assessments can be used as proper valuation of the property.** [There is a presumptive correctness afforded to a county's tax assessment. In order to rebut the presumption that the assessment is valid, the debtor must demonstrate manifest error or total disregard for controlling evidence. City of Richmond v. Gordon, 224 Va. 103 (1982); County of Mecklenburg v. Carter, 248 Va. 522 (1994). It is not enough to show that an assessment is excessive as compared to an assessment of a similar property. It must be plainly apparent that it is out of line with the method of valuation adopted in the tax payer's district as a whole. City of Roanoke v. Gibson, 161 Va. 342 (Va. 1993). However, in times of rapid market change, real estate tax assessments are the least reliable for a number of reasons and while they may be evidence, they are not necessarily determinative of the value of the real estate. In re Gray, 2010 WL 276179 (Bankr. E.D.Va. 2010). Real estate brokers and agents who do not have training in conducting appraisals are not qualified to testify as to the fair market value of a property. In re Donoway, 139 B.R. 156 (Bankr. D.Md. 1992).]

B10A. **In re Root**, 203 B.R. 55 (Bankr. W.D. Va. 1996). **Co-debtor stay of 1301 applies to medical debt.** Issue: whether the co-debtor stay of sec. 1301 applied to medical debt. After reviewing the Code section and the Virginia doctrine of necessities, the Court concluded that the co-debtor stay did apply to medical debt.

B12. **In re Waters**, 227 B.R. 784 (W.D. Va. 1998). **Factors to consider in good faith analysis.** Court discussed two cases which added four additional good faith factors beyond Deans v. O'Donnell : proximity in time of Chapter 13 and Chapter 7 filings; whether Debtor has incurred any change in circumstances suggesting that a second filing was appropriate and that the debtor would be able to comply with terms of the Chapter 13 plan; whether the two filings accomplished result that was not permitted in either chapter standing alone; and whether the filings treated creditors in fundamentally fair and whether they were an attempt to manipulate the system.

B13. **In re Branch**, 228 B.R. 831, 835 (Bankr. W.D. Va. 1998); Judge Krumm. **Creditor must file a claim to be paid.** Secured creditor never filed a POC; Debtors filed POC for it under Rule 3004, but filed it 23 days late. Court disallowed the late filed claim, for which the plan made specific provision, noting that "a creditor who elects not to file a claim elects also not to be paid under the plan." No evidence of excusable neglect was offered or found. The Court upheld the Chap. 13 Trustee's position that she cannot pay on a claim unless there is an allowed claim, and rejected the creditor's position that it should be paid solely because the plan has provided for its claim.

B14. **In re Spradlin**, Bankr. W.D. Va., # 7-98-02835, 5/11/00 Opinion (Stone). **Surrender of damaged collateral post-confirmation when it was initially being retained by the debtor.** Court declined to confirm a modified plan which proposed to surrender a car with a blown engine where the confirmed plan had the debtor keeping the car and paying the creditor for it as a cram down. The secured creditor "should not bear the risk of loss of value in the collateral when the debtor originally chooses to keep the property … but then later… chooses to give it up." The debtor must be free to surrender assets after confirmation when such a change is necessary, but the secured creditor must be dealt with "fairly and equitably." One way would be to treat the difference between the current value and the secured value that was being pain in the confirmed plan as an administrative expense, which might require increasing payments so that the unsecured creditors maintain their prior treatment. If that's not possible, Court can still allow the debtor to surrender the collateral but only after allowing the affected creditors a chance to be heard in Court.

B16. **In re Janice Benner,** 253 B.R. 719 (W.D. Va. 2000) [Krumm]. **Allocation of joint tenancy property when non-debtor spouse dies after case is filed (Ch. 7).** The filing of a Chapter 7 petition does not constitute a conveyance of title to the Chapter 7 trustee and does not sever a joint tenancy. A joint tenant (or a tenant by the entireties) does not "inherit" his cotenant's interest in the property when the cotenant dies; rather, he continues full ownership of the property alone. At filing the debtor owned "all of the property under Virginia law and she shared it with her non-debtor spouse. This is the interest that became property of the estate under sec. 541 and this is what the Ch. 7 trustee had to liquidate. When the non-debtor spouse died post-petition (w/i 90 days of case filing), the trustee had no one else to share the property with and, therefore, he takes it all." To the extent the debtor claimed any of this property as exempt under applicable state law, she will be entitled to that portion of the sale proceeds.

B17. **In re Christopher and Angel Todd**, *Case #7-02*-04451, Bankr. W.D. Va. *(Stone*, 3/17/03 opinion). **Chapter 7 test: deductable costs of liquidation; "effective date of the plan."** In evaluating whether a plan meets this test, both reasonable costs of sale and the Chapter 7 Trustee's statutory commission must be deducted from the fair market value of the property in question, but "…evidence ought to be offered rather than adopting some rule-of-thumb for the average case." And the payments to be distributed under the Ch. 13 plan "… must be capitalized … by converting deferred payments… into an equivalent capital sum as of the effective date of the plan," so evidence must be provided as to the proper present value of those payments…. Judge Stone has ruled that the "effective date of the plan"—the final hearing on plan confirmation—is the appropriate time to value property for purposes of the Chapter 7 test. In In re Allen, 240 B.R. 231, 237-238 (Bankr. W.D. Va. 1999) [initial confirmation, not a mod plan]. [In re Charles H. Sauter, 08-72050, 2/11/09 Opinion (Stone): Court reluctant to decide in a Ch. 13 case how Ch. 7 trustees ought to be paid when they sell property subject to liens but do not personally pay such liens. Here the DR failed to show it passed the Ch. 7 test, b/c he didn't show that the Ch. 7 trustee might have received much less in commission by accepting a lump sum payment from the DR w/o selling the property. This was an initial confirmation hearing.]

B17A. **In re Anthony & Carol Conley and Charles & Belinda Matney**, Bankr. W.D. Va., #7 02 05116 & 7 02 04796, 7/30/03 opinion (Stone). [cited in In re Jason E. Gillenwater, Bankr. W.D. Va., #12 71022, 9/18/12 opinion (Stone)] **Cannot exempt property that has been transferred away.** Under sec. 522, debtor can only exempt property recovered by the Trustee under 550 if the transfer of the property by the debtor was not voluntary and the debtor did not conceal the property. Issue: can a debtor exempt property which he owned but which he used to pay a valid debt? Held: there is no right under Virginia law to claim an exemption in property no longer owned by the debtor. Property is not property of the estate as of case filing; under 551 these payments would be reserved for the benefit of the estate and the creditors. Even though the payments came from the debtor's 401-K plan within 90 days of filing, once he paid the creditor he received value and waived any right to continue to claim them as exempt. Fact that the debtor could have waited til after the case was filed and paid this creditor from his 401-K account without a problem does not change the Court's decision.

B18. **In re John and Melissa Agnew**, 03-03057 (W.D. Bankr. 10/24/03, Judge Anderson). **Damages against creditor for failure to return repossessed car once case filed.** Once a debtor has filed a Chapter 13 case, a creditor who has repossessed the debtor's car pre-petition must return the car to the debtor once adequate assurances are provided to the creditor, or a willful violation of the automatic stay has occurred. Here the creditor failed to return the car, and damages of $2,232 will be awarded against the creditor.

B19. **In re Grover and Cynthia Clark**, #5-00-00969, Bankr. W.D. Va., 4/1/04 Opinion (Krumm). **Plan modification; 1329.** DRs requested to modify their 60 mo. plan to 39 mos. b/c IRS claim came in much less than anticipated, and % payout to unsecureds was much greater than noticed. Court: failure of CRs to file in expected amounts not "unanticipated"; no substantial change in the DRs' circumstances since confirmation; w/o a substantial change, CRs entitled to rely upon the confirmed plan terms; confirmed plan is "consistent w/ the DRs' calculation of their surplus income and their good faith in proposing the original plan"; maintaining the confirmed plan "fulfills the intent of Congress that Ch. 13 DRs repay to their creditors the debt owed to the extent of their ability during the Ch. 13 plan payment period." Proposed plan modification denied.

B19A. **In re Thompson**, 344 B.R. 461 (Bankr. W.D. VA 2004) (Stone). **Vesting of undisclosed claim in debtor upon plan confirmation.** In Chapter 7, an undisclosed asset always remains property of the bankruptcy estate and never reverts to the debtor at the end of the case. In a Chapter 13 sec. 554 is subject to 1327(b) [confirmation vests all property of the estate in the debtor unless otherwise provided in the plan or confirmation order]. So in this case the confirmation order –which didn't provide otherwise--vested in the debtor the property of the estate, including the (undisclosed) qui tam litigation claim.

B20. **In re Ronald and Cynthia Cash**, Bankr. W.D. Va., #03-04003 (11/23/04; Anderson). **Proper standard by which to determine a reasonable attorney's fee for debtor's counsel.** (Judge Anderson's first opinion was appealed to the Dist. Ct.; this is his opinion on remand.) 11/29/04 decision by the Dist. Ct. in this case [#6:04CV00029] cited Code 330(a)(1)-(3) and required the trial court, in determining a reasonable attorney fee for debtor's counsel, to consider the time spent on such services; the rates charged; whether the services were necessary or beneficial to the administration of the case; whether the services were performed within a reasonable amount of time; and the customary compensation charged by comparably skilled practitioners. Calculating the lodestar is the first step: multiplying the number of reasonable hours expended by a reasonable hourly rate. Barber v. Kimbrell's, Inc., 577 F.2d 216 (4th Cir. 1978) [which cited the 12 factors of Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-719 (5th Cir. 1974)], and Anderson v. Morris, 658 F.2d 246, 249 (4th Cir. 1980). Judge Anderson reduced the attorney's fee request b/c some time entries were lumped together and therefore could not be properly evaluated, and b/c the attorney spent too much time counseling the debtor. Attorney asked for fees of $4,135 (19 hours); he will be awarded $1,918.

B21. **In re Hairston**, #7-04-00415, Bankr. W.D. Va. (Stone, 1/11/05 Opinion). **Property of the estate in Chapter 13 cases**. It has been defined as postpetition earnings of the debtor only to the extent that those earnings are paid to the Chapter 13 trustee or directly to creditors as provided for in the plan or confirming order.

B22. **In re Robert L. Metts**, 05-06053, Bankr. W.D. Va., 11/14/05 Opinion (Anderson). **Avoiding judg. liens; postponement of recording of order.** CR's claim shall be classified as wholly unsecured; lien shall be treated as void during the case. But judgment voiding the lien must wait til DR gets discharge, b/c 506(d) reinstates any lien if case dismissed prior to discharge.

B23. **In re Thelma Jenkins**, #05,74827 (W.D. Va., Judge Stone, 3/1/06). **Debtor's attorney sanctioned $100 for failure to advise Trustee in a timely manner regarding a requested document.** Debtor's attorney sanctioned $100, which will be distributed to creditors in the debtor's plan, for failure to comply with Court's continuance order requiring her to produce an accounting of foreclosure sale proceeds within 14 days. Her failure to determine in a timely fashion that no such document existed caused delay in confirmation, and she failed to advise the Trustee of the facts in a timely manner.

B24. **In re Kermit and Terri Ball**, #06-70154, Bankr. W.D. Va. (Krumm, 5/17/06 opinion): **Line 47, B22C: surrendering collateral.** Debtors cannot deduct the amount of pre-petition contractual payments if in their plan they are surrendering the collateral.

B25. **In re Kimberly Campbell**, 06-60678 (Anderson, 7/13/06 opinion). **1328: Eligibility for Discharge: time periods**; §1328(f) means that the 2 and 4 year disqualification periods are to be measured from the date the former case was filed to the date the current case was filed.

B26. **In re Walters, 339 B.R. 607,** Bankr. W.D. Va. 2006 (Krumm). **Definition of "personal injury" in VaC 34-28.** The definition of "personal injury," for purposes of the Virginia exemption statute (34-28), was broad enough to include Chapter 7 debtor's cause of action for libel, malice and negligence. Judge Krumm relied on Judge Ellis's reasoning in In re Webb , 214 B.R. 553 (ED VA 1997) [Title VII gender discrimination claim held exempt], to determine that "personal injury" under the Virginia exemption statute was broader than common law personal injury claims.

B27. **In re Wolfe**, 344 B.R. 762 (2006) (Bankr. W.D. Va. 3/20/06; Stone). **When is pre-petition foreclosure sale final.** Because the memorandum of sale was not prepared by the trustee under the deed of trust before the filing of the petition, the foreclosure sale was not completed before the petition, and the debtors therefore had an interest in the property as of the petition date

B28. **In re Miller**, 344 B.R. 769 (Bankr. W.D. Va. 2006) [Stone]. **Under-secured creditor cannot recover post-petition attorney's fees and costs.** GMAC had a security interest in the Ch. 13 debtor's car, and sought an unsecured claim for post-petition attorney's fees and costs when the debt was under-secured under 506(b). Held: Following In re

Saunders, 130 B.R. 208 (Bankr. W.D. Va. 1991), an unsecured or under-secured creditor cannot collect post-petition contractual attorney's fees from the bankruptcy estate. 506(b) authorizes such fees "for fully secured claims only."

B29. **In re Charles and Sherri McPherson**, 350 B.R. 38 (Bankr. W.D. Va., Anderson, 7/31/06). Case No. 06-60243. **Deduction of cram-down debt contract payments on Line 47, B22C.** Above median debtors. Trustee objected to confirmation of debtors' plan under 1325(b)(1) - (3) because they had included on Line 47 of B22C a deduction for the payments that *would have been made to the secured creditor* if the debtors had not crammed down the debt. Trustee argued that the debtors were only entitled to a deduction in the amount being paid through the plan to the creditor on the secured portion of its debt. Court said: Debtors must apply all of their "projected disposable income" to make payments to unsecured creditors. "Projected" modifies each of the component parts of "disposable income"; it modifies "CMI" *and* "amounts reasonably necessary to be expended for support." For "projected..amounts reasonably necessary to be expended for support," Court must give meaning to all parts of the phrase. That means that the deductions in question "concern amounts that will be paid in the future." Payments a debtor does not propose to make during a plan cannot be said to be reasonably necessary for the debtor's support; any deductions from income must be payments that will be made pursuant to a confirmed plan, not amounts provided for in pre-petition contracts. "Contractually due" in 707(b)(2)(A)(iii) has a different meaning in Chap. 13 than in Chap. 7, b/c Chap. 13 plan constitutes a new agreement between the debtor and her creditors, with new obligations being substituted for the old ones. Debtors argue that Court must focus only on wording of 707(b)(2). But to do that ignores the language of 1325(b)(1) - (3); Court must give import to terms "projected," "reasonably necessary," and "to be expended" in 1325. The language in 1325(b)(1) -(3) modifies the instructions in 707(b) concerning secured claims. Court distinguished Walker (its reasoning only applies in Chap. 7 cases) and Barr (Court there failed to consider the language in 1325(b)(1) & (2)), and cited Renicker and Jass in support of its conclusions.

B30. **In re Michelle Alderson**, #06-60186, Bankr. W.D. Va., 8/7/06 Opinion (Anderson). **Eligibility for discharge not relevant to plan confirmation.** DR convicted of identity theft, sentenced to 12 years, mostly suspended; ordered to make restitution; DR put restit. claim on SOFA, but not on schedules. CR argued that plan should not be confirmed b/c DR not eligible for discharge under 1328(f). But a debtor may "obtain relief even if not entitled to a discharge." Failure to list claim inadvertent, Court finds. Whether petition filed in bad faith must be determined "from the perspective of the DR"; must be a motive other than financial rehabilitation: must show "serious debtor misconduct or abuse."

B31. **In re Winters**, 2006 WL 3392890, Bankr. W.D. Va. (Krumm, 11/22/06 Opinion). **Standard of proof to extend automatic stay.** Good faith for purposes of section 362(c)(4) requires showing good faith factors defined in *Neufeld v. Freeman*, 794 F.2d 149) (4th Cir. 1986).

B32. **In re Timothy & Lori Luders**, 356 B.R. 671, Bankr. W.D. Va., 12/5/06 Opinion (Krumm). **521(a)(1)(B)(iv): sufficient paystubs.** Debtors claim that some stubs plus year to date stubs provide acceptable "other evidence of payment." The Court agrees. Court does not like the automatic dismissal aspect of 522 (i)(1).

B33. **In re Norina Harris** (#06-70538)**; In re Steven Jarrell** (#06-71129), Bankr. W.D. Va., 1/12/07 Opinion (Stone). **AP payments beyond confirmation; interest on secured claims; Court has independent duty to ensure compliance with Code even if no party is objecting.** AP payments under BAP & CPA are required pre-confirmation; language of 1325(a)(5)(B)(iii) does not preclude the continuation of AP payments in amounts less than the later amortized equal monthly payments post-confirmation until all administrative expenses have been paid in full [Court reserves the right to review this in the future if there's a party contesting it, which isn't the case here]; effective date of the plan is the date of confirmation and interest should begin to accrue on the balance of the secured loan on that date (cites the standard form plan, para. 3(A)); "applicable non-bankruptcy law controls how post-confirmation payments are to be applied to secured loan balances, not plan provisions." "Under the provisions of the Bankruptcy Code, this Court is required to confirm a Chapter 13 plan if it complies with the requirements of 11 U.S.C. § 1325. This Court also believes, however, that it has an independent duty not to confirm plans which it believes to be contrary to the pertinent provisions of the Bankruptcy Code irrespective of whether a creditor or other party in interest objects to confirmation. *See United States v. Easley,* 216 B.R. 543, 544 n.1 (W.D. Va. 1997)."

B34. **In re Suzanne Mullins**, 360 B.R. 493, #05-73530, 2/12/07 (W.D. Bankr., Opinion by Judge Krumm). **109(e): must include undersecured amounts on Sch. D in determining amount of unsecured debt.** In determining the amount of unsecured debt allowed under Code 109(e), "the Court must add the amount of unsecured debt to the amount by which secured creditors are undersecured. In re Balbus, 933 F.2d 247 (4th Cir. 1991)." The debtor has the burden of proof to establish eligibility for Chapter 13, not the objecting party.

B36. **In re Sandra Stockton**, #04-00792, Bankr. W.D. Va., 5/8/07 Opinion (Krumm) **Hardship discharge for deceased debtor; clear evidence needed to show permanence of disability.** The Court refused to allow it. Court also held that evidence of permanence of the disability was not sufficient, and no showing that modification of the plan was not practicable. [Note: RE discharge for deceased debtors, Judge Anderson *is* allowing it: In re Cooper, 03-00201; In re Jesse McDaniel, 09-60945, 08/16/10); neither case had any party objecting to the motion.]

B37. **In re Earl and Robin Hylton**, 374 B.R. 579, #07-70320, Bankr.W.D. Va. (Krumm, 8/22/07): **Disposable Income, above median cases; Good Faith; ACP**. For above median debtors, disp. inc. determined by using the means test of 707(b)(2) and 1325(b)(3). Debtors can claim IRS allowance for cars even if the cars will be paid off during the plan; no need for there to be actual expenses to claim the IRS allowances. To claim secured debt payments on Line 47, no need for the payments to be reasonably necessary, but the confirmation of the plan is still subject to the good faith test of Neufeld v.Freeman (4th Cir). DRs will have to show that the unsecured creditors are better off with this payment being made than they would be if this money was added to the plan payment. Applicable commitment period is a temporal requirement, not a multiplier.

B38. **In re Susan Maupin**, 384 B.R. 421, #07-61051, Bankr. W.D. Va. [11/1/07 Opinion; Anderson]; **In re Jones**, 07-50446, 12/14/07 Opinion (Krumm). **Adding substantive provisions in para. 11 of the plan.** Judges Anderson and Krumm both denied Marshall Slayton's attempts to add a variety of substantive provisions to paragraph 11.

B39. **In re William and Catherine Shifflett**, #05-50345, Bankr. W.D. Va., [12/14/07 opinion, Judge Krumm]. **Hardship discharge: evidence required.** Hardship discharge denied b/c even though debtor had a rare illness and was receiving Social Security disability payments, illness not catastrophic; no showing the debtor won't improve; and no showing that the debtor has tried to find alternative job, etc.

B40. **In re Andrea Clauden**, #07-61438, Bankr. W.D. Va., 2/5/08 Opinion (Anderson). **AP payments when plan goes from retain to surrender.** If Ch. 13 plan initially proposes T to pay claim in full and CR to get AP payments, and plan is [115 days] later modified to surrender the collateral, the CR is entitled to receive AP payments from the date of filing until the date the collateral is surrendered, and the T must forward such payments to the CR. CR's timely filed POC must be given effect *nunc pro tunc* from the petition date.

B41. **In re Beverly Horsley**, #07-61657, Bankr. W.D. Va., 4/19/08 Order (Anderson). **Creditor's attorney fees in lift stay cases.** In cases where the parties have agreed to a proposed settlement order resolving the matters in controversy without the need for a hearing, the fees which the Court will approve for the moving party will be $500.00 in attorney's fees plus reimbursement of the filing fee of $150.00, for a total of $650.00.

B42. **In re Jeri L. Styles**, 397 B.R. 771, #07-50408 (Bankr. W.D. Va. 2008). **Line 27, B22C—2 cars for 1 debtor**: Above median individual debtor may claim two IRS vehicle operating and ownership expenses; actual expenses are different from, and not a cap on, applicable IRS deductions. Nothing in B22C suggests that a debtor's family size determines the number of vehicles they can own. But good faith is still a requirement of confirmation even after the debtor is allowed to include nonessential assets in his plan (cites Hylton), and the issue of good faith will still have to be considered in this case before the proposed plan can be confirmed.

B43. **In re Daniel and Anita Minahan, #** 08-70118, Bkcty W.D. Va. , Judge Stone decision, 8/20/08 (T: Jo Widener)

Disposable Income in above median cases: misc. B22C expense issues $150/mo. for telecommun. exps. in SW VA is more than reasonable ($100 was eventually allowed b/c it was "reasonably necessary"). Food & clothing of $1,800/mo. is too much; can only exceed the IRS allowance in unusual circumstances, and then only by 5%. Monthly AP payments come *before* paying the debtor's attorney. Food, clothing, transp., and shelter expenses cannot exceed IRS allowances except in very unusual situations, and then only by 5%; actual amounts spent by the debtors on these line items not relevant to determining Chap. 13 plan payment. Court endorses *Jass, McPherson*, etc., to say that the figure on B22C is the starting point—not the starting and ending point—in determining the debtors' Chap. 13 plan payment. The proper date for determining both valuation of prop. to be distributed under the Plan, and disposable income under 1325(a)(5) and (b)(1) is the "effective date of the plan," will be the date of the final hearing on plan confirmation. Court believes that it *should* look at changes in the debtors' income since filing when considering confirmation of plan; it disagrees with Judge Meyer in the *Hoskings* case. Debtor's attorneys fees are "unsecured debts" as that phrase is used to determine plan payments and amount to be paid to unsecured creditors under B22C in above median cases.

B43A. **In re Gary Griffin,** Bankr. W.D. Va. 12/2/08, # 08 50237 (Krumm). **A judgment lien may attach to a debtor's equitable interest in real estate** under 8.01-458, in this instance an executory installment contract under which neither party has fully performed. Vendor that retains legal title retains an equitable lien securing the unpaid balance of the purchase price. A vendor's lien has priority over a judgment lien against the vendee.

B44. **In re Betty S. Moore**, 412 B.R. 830 (Bankr. W.D. Va., 12/5/08, Stone). **Court interprets Va. Code 34-18 re exempting appreciation in property after the filing of a Homestead Deed.** Chap. 7 case. Issue is whether Va. Code 34-18 allows the debtor to exempt all of the appreciation in real estate that occurs after the filing of an initial Homestead Deed; does the statute's "entire value" of property refer to the unencumbered value or just to its unencumbered equity? In prior joint Chap. 7 case, RE listed with value of $43,900 and lien of $35,000; debtors exempted $4,000 on Sch. C, and each filed a $5,000 homestead deed using 34-4 against the RE. In the current case, the widowed wife shows the same RE valued at $65,000 with a lien of $17,232; she has exempted under 34-18 the full value of the RE, claiming that all of the equity was exempted previously and so it is still exempt now. Held: (1) Court will accept the value of the property as listed by the debtors in her prior case, because T had the burden of proof to establish that the exemption wasn't properly claimed. (2) While the debtors exempted the entire *equity* in the property in the prior case, "it does not follow that the debtor is now entitled to exempt the entire value of the property in the current case." (3) "..an increase in the value of the debtor's equity in property resulting from a reduction in the amount of any lien against it is more akin to a "permanent improvement placed upon the real estate" funded by the use of non-exempt funds which are not entitled to receive the exemption under the plain language of 34-18." (4) The "increase in value" language modifies only the property which is "set apart," which is only that portion exempted under 34-4. The property set apart in a homestead deed "does not relate to the whole of the property which is exempted"; it only includes that which is exempted under 34-4; so the debtor is not entitled to exempt the entire value of her real property. (5) Since debtor's claimed exemption in the prior case was 11.4% of the property's value at that time, under 34-18 she can now claim an exemption of 11.4% "of the appreciation of the property's value since the recording of the homestead deed." (6) Wife debtor no longer entitled to rely upon her now-deceased husband's exemption claimed in the prior case; she can only assert against her own creditor her exemptions under Virginia law. (6) the debtor's motion to avoid a judgment lien is denied, because she is only allowed to assert an exemption of the $5,000 she originally claimed and (in accordance w/ the Trustee's concession) 11.4% of the appreciation in total value of the RE since then.

B45. **In re Kim Mack**, #08-72445, Bankr. W.D. Va., 1/14/09 Opinion (Stone). **Separate mortgage WDO not authorized by Code.** Such an order not authorized by 105(a) or 1325(c). Employer has not given its consent, and can't seek reimbursement.

B45A. **In re Mark G. Brown**, 399 B.R. 162 (Bankr. W.D. Va. 1/16/09) (Krumm). **Pro se debtor's second pending Ch. 13 case dismissed for bad faith under 1307(c) and LR 1017-2.** Chap. 13 Trustee [Connelly] filed motion to dismiss pursuant to Local Rule 1017-2 for maintaining two petitions contemporaneously. Pro se debtor has a Chapter 13 case pending that was confirmed, and another one that he has just filed; no discharge has been entered in either case. The mortgagee had

obtained a lifting of the automatic stay in the first case, and the pro se debtor thereafter filed this second case. Held: (1) No provision of the Code expressly disallows concurrent bankruptcy filings. (2) Debtor was prohibited from filing a subsequent Chapter 13 case with respect to any debt included but not discharged in the confirmed case. (3) No grounds to dismiss this second case under the "single estate rule" because no discharge was entered in the first case. (4) The totality of circumstances in this case dictate that the second case should be dismissed for bad faith in filing: lifting of the stay in first case, mortgagee the only creditor scheduled in the second case and the fact that the sole purpose of second case was to stop the foreclosure are evidence that the debtor is attempting to manipulate the bankruptcy system and frustrate the creditor's rights. (5) Case dismissed pursuant to Code sec. 1307(c) and Local Rule 1017-2.

B46. **In re Gibson**, #08-71770, Bankr. W.D. Va., 2/12/09 Opinion (Stone). **Reduction of attorney fees in second case.** DR filed second case w/I 3 months of prior case being dismissed. Trustee objected to $500 of the requested $2,600 fee. Court agreed, noting that schedules were virtually identical, and disallowed portion of fee based on Code 30(a)(4)(A)(i) re duplication of services.

B47. **In re Creger**, 403 B.R. 381, Bankr. W.D. Va., (4/17/09, Krumm). **Reformation of deed.** Court has jurisdiction to reform a deed of trust and deed on the debtors' real property. Because it would have an impact on the bankruptcy estate, Court had authority under sec. 105 to reform the deed.

B48. **In re Edward & Anita Smallwood**, #09-70529, Bankr. W.D. Va., 5/21/09 Opinion (Krumm). **Family size: B22C, Line 16.** DR pays child support for two children ages 4 and 12 not living in his household full time. DR does not have custody; just visitation rights. DR can't include kids in family size if he doesn't have physical custody.

B49. **In re Keith and Lucy Holmes**, #08-62195, Bankr. W.D. Va., 6/5/09 Order (Anderson). **Service of process on objections to claims under Rules 7004 & 9014.** If creditor is a corporation, serving an objection to claim on a general corporate mail box address is not sufficient process. But if the creditor has designated a party (e.g., attorney, law firm, or corporate employee) and an address at the top of the POC form, then service on that party at that address *does* satisfy the Rules.

B50. **In re Garland T. Harvey**, 407 B.R. 867, Bankr. W.D. Va. (Krumm, 7/20/09 Opinion). **Chapter 7: debtor can deduct house payments on Line 47 even if house is being surrendered.** Judge follows "majority of courts" in holding that a payment on a secured debt is still "contractually due" regardless of the debtor's intent to surrender the collateral; can't interpret 707(b)(2)(A)(iii) to require a forward looking analysis b/c inconsistent with backward-looking nature of CMI process. 707(b)(2)(A)(I) requires a snapshot of the debtor's expenses as of filing. FN #4 cites McPherson, which holds that debtor can't deduct payments when surrendering collateral in Chap. 13 via 1325(b), but that decision "does not provide any insight" into analyzing this issue under 707(b)(2)(A)(iii).

B51. **In re Tomer**, 2009 WL 2029798 (W.D. Va. 2009) (Anderson). **Good faith standard: petition vs. case.** Analysis of whether a petition was filed in good faith (a "broader and more subjective test") is separate from that required to determine whether the plan was filed in good faith (a totality of the circumstances test).

B52. **In re David and Amanda Falwell,** 434 B.R. 779, #08-60495 (WD VA, Judge Anderson), 11/5/09: **Objections to Proofs of Claim:** Burdens of production and proof are on the CR. CR meets burden of production by complying w/ Rule 3001. POC must contain info. required on Official Form 10 (CR identity; basis for claim; last 4 digits of act. #; date debt incurred; classif. of claim; and amount of claim). If no objection filed to a POC, it will be allowed in the amount set forth on the POC. DR may object to amt., classif. or existence of claim. Must assert basis for object, and come forth with evid. of equal or greater value than the CR has provided in POC. Any obj. must be based upon a reason set forth in Code 502. Not sufficient to claim "not supported by documentation." But if info provided on the POC is not sufficient to allow identification of the CR or the debt, that may be a basis. Obj. must be supported by evid. supporting the grounds alleged that is equal to or greater than the probative value contained in the OC and its supporting docs. If DR says claim undisputed, and later wants to object, DR can amend sched.

to "disputed," and then object. If DR objects based on an affirm. defense (Stat. of Lim, e.g.), burden of product. & proof are on the DR. DR must come forward w/ some evid. If POC supported by evid. that claim not barred by the S/L, then DR must provide evid. of greater probative value that the claim is barred. POC #10: Roundup's docs are sufficient to support a prima facie claim. No evid. by DRs in rebuttal. Claim will be allowed in amt. of $9,876.68. POC #7:No legal grounds provided by DR other than possibly S/L. No evid. produced to support that assertion, so they haven't met the burden of production. Objects. to POC #7 and 10 are overruled.

B52A. **In re Ronald and Johnnie Meade**, 420 B.R. 291, Bankr. WD VA, # 08 70942, 11/13/09 Stone opinion. [Ch. 7 case]. **B22C issues: amortizing a yearly bonus; amortizing a teacher's salary; adjusting Line 25 for actual taxes owed.** (1) An annual bonus received during the 6 mos. look-back period should be pro-rated over 12 mos. (Court not as certain of result if it had been received before that, but appears to lean the same way.) (2) Wife teacher's annual income will not be divided by 12, but the full amount received in the 6 mo. look-back period will be counted. (3) Husband who gets the use of a company car but pays $501/yr taxes on it will be allowed to claim the full $489/mo. vehicle expense on Line 28. (3) Line 25 for taxes ought to be deducted downward "to reflect what the income tax expense figure would be if their withholding were exactly aligned with their income tax liability."

B53. **In re Curtis and Carolyn Wright**, #09-62049, Bankr. W.D. Va., 11/20/09 Opinion (Anderson). **Creation of T by Es estate.** Deed failed to create a T by the Es ownership of the debtors' real estate b/c it transferred the property to them as "X and Y, husband and wife… herein after called the Grantee…with sole ownership" without mentioning anything about survivorship.

B54. **In re Fort**, 412 B.R. 840 (Bankr. W.D. Va. 2009) (Stone). **Automatic stay re ongoing DSO garnishment** State's post-petition filing actions in continuing to collect a debtor's pre-petition domestic support obligation through a wage garnishment did not violate the automatic stay, but collection of funds in excess of those provided for in the confirmed plan *did* violate Code re effect of confirmation. State was entitled to payment of post-petition interest on the amount provided by the confirmed plan.

B54B. **In re Meade**, 420 B.R. 291 (Bankr. W.D. Va. 2009). [Ch. 7 case] **B22C issues: amortizing work bonus; Line 30 taxes should be only those actually incurred; Line 37 telecommunication expense was excessive.** (1) Annual bonus received in 6 months before filing should have been included on Line 3, but could be "annualized" over 12 months. (2) On Line 30 Debtors should enter the total average monthly expense *actually incurred* for all federal, state and local taxes, other than real estate and sales taxes. Counsel should NOT just use the amounts withheld if those amounts had previously resulted in tax refunds. (3) Line 37 claim for $250/mo for telecommunication expenses was "excessive," not necessary for the "health" of the debtors and their dependents"; Court disallowed the deduction insofar as it exceeded 5% of income.

B55. **In re Taylor**, #09-72532, Bankr. W.D. Va., (1/13/10 opinion, Stone). **Grounds for dismissal with prejudice.** Court, finding bad faith b/c debtor filed case to retain encumbered property w/o the present financial means to propose a confirmable plan, dismisses case w/ prejudice on Trustee's motion. It was the 3rd case w/i 4 years; arrears were $20,000+,and debtor failed to make any payments to the Trustee since filing. Debtor was allowed to convert to Chap. 7.

B56. **In re Lynch**, #08-63151, Bankr. W.D. Va. (1/13/10 Anderson opinion): **Disposable Income, above median cases.** Chap. 7 motion to dismiss for abuse case. But on page19, Judge Anderson says, in using the second 707(b)(3) test to determine what a debtor would end up paying in a Chap. 13 case if it were converted:

(1) Projected mo. inc. is the income the DR will receive in the future;
(2) CMI is the starting point for determining that income; "…ultimately to be determined by considering any change in circumstances that a debtor may have experienced since the date on which" the petition was filed. Cites Jass, 340 B.R. 418.

Also, OK for one debtor to have two vehicle deductions as long as there is a good reason and no bad faith; and OK to claim all rent being paid, and not just the IRS housing allowance.

B57. **In re Clifton and Christine Clements**, 421 B.R. 755 (Krumm, 1/14/10 opinion). **Stripping undersecured lien on primary residence.** Judge reaffirms In re Witt, 113 F.3d 508, 513 (4th Cir. 1997), which holds that 1322(b)(2) prohibits a Ch. 13 debtor from modifying in any way the terms of an undersecured claim if that claim's only security is the debtor's principal residence.

B58. **In re Ricky D. Wharton (Wharton v. Beneficial)**, 4:10CV00001, District Court, W.D. VA (Kaiser), 3/9/10 Opinion, 2010 U.S. Dist. LEXIS 21473 [3/26/10 Opinion, Judge Anderson, 09-61741] **Lien avoidance.** Debtor sought to avoid liens using both T by Es exemption and 34-4. Creditor's failure to respond to lien avoidance at any stage is "a distinguishing factor," and creditor thereby "consented to Appellants' motion." Bank. Ct's failure to address the homestead exemption aspect of this case was "error as a matter of law." Bank. Ct's denial of debtor's motion is reversed, and CR's lien is avoided "to the extent it impairs the homestead exemption." Court's file was incomplete on this aspect, so case was remanded to re-examine the debtor's motion.

On remand (03/26/10), Anderson holds that the liens are avoided under sec. 522 using 34-4 if and once debtor obtains discharge; can't file the order til then. [There is no mention of the Homestead Deed/Tarpley issue b/c the issue was not raised to the Court by any party.]

B58A. **In re Gregory and Joyce Williams**, 424 B.R. 207 (Bankr. W.D. Va. 3/1/10), Krumm opinion. [Ch. 7 case] **B22A expenses: Line 32 (telecommunications) and Line 35 (assistance for adult family member).** On Line 32 for telecommunication expenses debtors can't claim "deductions that have already been claimed elsewhere" on the form, and they can only claim expenses "found to be reasonably necessary." Here, they failed to produce sufficient evidence of what those expenses were. A $200/mo. expense on Line 35 for a 40 year old step-child who is employed and getting a master's degree was not justified: insufficient evidence of her disability.

B59. **In re Arlen and Patricia Hampton**, #07-62119, Bankr. W.D. Va., (Judge Anderson). **Increase in value of T by Es property not grounds for increasing plan payments under 1329.**

A. 3/23/10 Opinion: Under sec. 1329 the Trustee asked the Court to modify the debtor's confirmed plan to require them to pay in full from the proceeds of the sale of their residence not just the balance of their plan payments, but all unsecured claims in full. Residence was owned as T by Es, and had increased in value by $27,000, which is 27% over 26 months (12%/yr). But net profit to them after closing expenses was only $12,200, which is only a 12% increase (5%/yr). These increases are well below those in Murphy (56%/yr) and Arnold (150%/yr). So this change is not "significant" as that phrase is used in Murphy. "…a plan filed by a Trustee in a motion to modify a debtor's plan is filed in bad faith if it seeks to require the debtor to pay more than the greatest amount calculated under the three tests [the priority claims test, the disposable income test, and the chapter 7 test] using the debtor's changed financial condition." Since the property is still held as T by Es, "nothing has changed in the DRs' financial situation that would … increase the amount of non-exempt property available to unsecured creditors if this were a chapter 7 case." There was no such exemption of the property whose value had increased in Murphy. T's motion to amend the debtors' plan is therefore denied.

B. 6/21/10 Opinion on Trustee's request for consideration (FRCP 59, Bank. Rule 9023): 4th Cir. established a "Threshold Test" in Arnold and Murphy: 1329 movant must show a "substantial and unanticipated change in post-confirmation financial condition" of the debtor. Once that threshold test is met, the Court must inquire whether the proposed modification falls within the kinds allowed by 1329(a). Then, if both of those tests are satisfied, the Court must determine if the proposed modification complies with 1329(b)(1). . Murphy expanded the Arnold test to include consideration of "sales of revested property of the debtor (and presumably sales of property of the estate)."

"Good faith and the three tests [pay all priority claims in full; Chapter 7 test; disposable income test]…. are the only sections that determine the minimum amount that must be paid to unsecured creditors through a Chapter 13 plan."

4th Cir. said in Murphy that revestiture was not an impediment to considering sale of property *under the threshold test*; but it wasn't providing an alternative method for determining how much the debtor would have to pay in a modified plan. Murphy does *not* say that a modified plan is filed in good faith if it is feasible.

Two entirely separate issues: applying Ch. 13 plan requirements through 1329(b) to determine the amount the debtor has to pay vs. applying the threshold test to see if the change in the debtor's financial condition is such as to allow any modification. In Murphy the 4th Cir. agreed with the Trustee that the debtor should pay more because the Chap. 7 test required it, despite the revesting of the property. The Chap. 7 test properly includes the non-exempt value of property of the estate even if it has revested in the debtor.

The Court disagrees with the Trustee: the cash proceeds received by the debtors from the sale of the real property should not be considered disposable income under 1325(b); "disposable income" does not include proceeds derived from the sale of assets held by the debtor as of the petition date. In re Solomon, 67 F.3d 1128 (4th Cir. 1995). The Trustee does not have authority to administer assets that are properly scheduled on Schedule A or B. This real estate would be available to Chap. 7 creditors if it were not exempt; as such, it does not constitute income in Chap. 13. The same is true for the proceeds from the sale of the real property. Both the real property and its proceeds can only be considered when applying the Chap. 7 test, not when calculating disposable income.

Once a plan has been confirmed, "…the rule in Murphy provides a shield to prevent a trustee or creditor from filing a motion to modify a … plan…when the debtor has experienced no more than an unsubstantial or anticipated change in his or her financial condition."

B59A. **In re Williams**, 424 B.R. 207, 213 (Bankr. W.D. Va. 2010). **B22C issues: satellite TV and internet services; support for adult child.** (1) Court found no evidence that "satellite tv services" were "necessary for the health and welfare of themselves and their dependents," and disallowed such amounts. (2) Court did find $51/mo for "internet services" was allowable because "for employment related matters." (3) Court disallowed deduction of $200 for a 40 year old daughter by a previous marriage who had no diagnosed physical or mental impairment.

B60. **In re Tinsley**, 428 B.R. 689, #09-51194, Bankr. W.D. Va., 4/8/10 opinion (Krumm). **Mileage reimbursement was income to be used in calculating "projected disposable income" for below-median debtors; employer per diem *is* evidence of such expenses**. Mileage reimbursement that below-median-income Chapter 13 debtors received from the debtor-husband's employer, based on the number of miles that the husband used his personal vehicle for business-related travel, constituted "income," such as the debtors should have included on the income side in calculating the "projected disposable income" available for the payment of unsecured claims. However, debtors were also entitled to use the mileage reimbursement that the debtor-husband received as evidence of his business- related travel expenses, and to deduct the full amount of these reimbursements as expenses in calculating their "projected disposable income." However, the Court went on to say: "travel expense reimbursement … may be claimed on Schedule J and be deter-mined to be a reasonable expense *upon proof of relationship between the amount of the mileage reimbursement claimed and documentation provided the Chapter 13 Trustee showing actual expenses incurred* and reasonable depreciation in value for the vehicle used" (emphasis added). Near the end of the opinion the Court says that it "agrees with the Trustee on the general proposition that debtors must document their expenses and that only expenses that can be confirmed by documentation can be allowed. The Court further agrees with the Trustee on the general proposition that the expenses must be reasonably necessary…"

B61. I**n re Herbert and Barbara Martin**, 427 B.R. 573, Bankr. W.D. Va. [04/13/10 Opinion, Krumm]. **Surrender in full satisfaction: controlling plan language, adequacy of notice.** Plan called for surrender of collateral in full satisfaction of debt before 4th Circuit ruled that wasn't proper. Secured creditor didn't object to the plan, but subsequent owner of the claim filed a deficiency claim anyway, and T (me) objected. Plan is a contract that binds both debtor and creditors; court must use Virginia law to interpret the contract; the specific language of para. 3.C. saying "surrender in full satisfaction" overrides the boiler plate language of the form plan that provides for a deficiency claim; party purchasing the claim post-confirmation was in privity with the original creditor, and is barred by preclusion doctrine; sec. 1327(a) precludes creditor from filing a claim; no denial of 5th Amend. due process. Espinosa has overruled Linkous, and controls adequacy of notice issue in this case; failure to require an A.P. in this instance was not a violation of the creditor's right to notice.

B62. **In re Kessinger**, 09-73238 (Bankr. W.D. Va. 5/12/10)(Krumm). **Above median debtors, Line 30, taxes.** Line 30 on B22C: debtor must offset taxes withheld with tax refunds to offset actual tax liability. [No formal opinion]

B63. **In re Kessee**, 10-70465 (Bankr. W.D. Va. 2010) (Krumm). **Above median debtor, deduction for grown children.** Above median debtor denied deduction for 18 year old child. [No formal opinion]

B64. **In re David and Mary Halterman**, # 07-50584, Bankr. WD VA, 6/8/10 Opinion (Krumm). **Distribution of proceeds upon case conversion.** Debtors with a confirmed plan became delinquent in their Chap. 13 plan payments, and obtained an order authorizing the sale of their real estate. The motion said that $26,857 of the sale proceeds would be used to pay the debtors' plan in full, so the Trustee did not object to the motion. On June 1 the proceeds were sent to the Trustee; on June 9 the debtors filed a motion to convert their case to Chap. 7. Held: (1) The amended plan was modified by the motion and order allowing the sale of real estate. Once that occurred, "the debtors no longer exercised control over said proceeds and therefore, the proceeds do not constitute property of the estate under 348(f)(1)(A)." Therefore the Ch. 13 Trustee is not required to turn the proceeds over to the Ch. 7 Trustee, and the Ch. 13 Trustee should distribute said funds to the creditors. The motion to sell constituted a modification of the plan because it reduced the time in which the creditors were to be repaid, and thus falls under 1329(a)(2); early payoff is a modification of the plan. Upon approval of the sale motion the Court "effectively confirmed a new modified plan that included" the sale proceeds. (2) Since the debtors were not in possession or control of the proceeds as of conversion, the sale proceeds were not "property of the estate" as required by Rule 1019(4) and Code 348(f)(1)(A). And the language of the Rule—"…unless otherwise ordered"—relates to the standard language in para. 3 of the confirmation order, which states that all funds received by the Trustee before an order of dismissal or conversion shall be disbursed to creditors. (3) Alternatively, judicial estoppel bars the debtors from prevailing; they can't contradict previous declarations if the change would "adversely affect the proceeding or constitute fraud on the court." The doctrine contains 3 elements: party is attempting to adopt a factual position inconsistent with a stance taken in a prior litigation; the prior inconsistent position was accepted by the court; and the party intentionally misled the court and gained an unfair advantage. (The advantage would be the debtors' ability to claim an exemption for some of the proceeds in Chap. 7.) All three elements are present here. (4) The debtors are not entitled to a homestead exemption in this real property, because they did not file a timely Homestead Deed. Tarpley, 123 B.R. at 743 [Query: is this changed by recent Dist. Ct. ruling in Botkin, above?]. Also, judicial estoppel applies to their request for a homestead exemption; this was not raised by the debtors at the motion to sell stage.

B67. **In re Marilyn Myers**, #10-60880, Bankr. WD VA, 6/21/10 Opinion (Anderson). **109(g)(2) issue: causal connection between motion to lift stay and motion to dismiss case.** Lift stay motion filed 6/8/09; consent order entered 6/9/09 allowing for payments. 1/20/10: mortgagee files notice of default; debtor fails to respond. 3/25/10: debtor voluntarily dismisses her case. 3/26/10: debtor files another case. Trustee filed a motion to dismiss case under 109(g)(2). Court adopts the position of Judge Krumm in the Duncan case: must be a causal connection between the dismissal and the request for relief. Court finds such a connection here; doesn't buy that she also dismissed to catch up her payments to the Trustee: she dismissed and refilled to avoid a possible foreclosure sale. 291 days between filing of lift stay motion and her dismissal motion not relevant; what's relevant is the time between the lifting of the stay and the motion to dismiss, which was only 30-45 days. No other factors present (post-petition debt, e.g.) as in Duncan. Case dismissed.

B67A. **In re Frye**, 440 B.R. 685, 687 (Bankr.W.D.Va. 2010) (Judge Krumm). **B22C issue: when is a child a dependent?** The Court … adopts the position that in order to determine whether a child qualifies as a dependent ... a court should look at the IRS dependency test as stated in IRS Publication 501."

B68. **In re Arley Joe McCreery**, #09-60858, Bankr. WD VA, 8/30/10 Consent Order (Anderson). **Distribution of plan funds by Trustee where confirmed case being voluntarily dismissed by debtors.** Court's order states that: (a) the language of this Court's standard Confirmation Order that "…all funds received by the Chapter 13 Trustee on or before the date of an order of conversion or dismissal shall be disbursed to creditors" is an instance where the Court "…for cause, orders otherwise…," as contemplated by Code section 349(b), and therefore takes precedence over the language

of Code section 349(b)(3) [dismissal of a case revests property of the estate in the entity in which such property was vested immediately before the filing of the case]. E.g., In re David and Mary Halterman, Bankr. W.D. VA., Case #07-50584, 6/8/10 Opinion by Judge Krumm; and (b) the doctrine of judicial estoppel prevents the Debtor in this case from now requesting a refund of the proceeds paid to the Trustee from the reverse mortgage. The Debtor agreed in his confirmed plan, and reassured concerned parties at multiple hearings before this Court, that he would refinance his property and pay those proceeds to the Trustee. The Court accepted the Debtor's assurances. The Debtor knew that the Trustee and mortgagee would rely upon these assurances, and they did in fact rely upon them in deciding not to prosecute their motions to dismiss and lift the automatic stay. The Debtor obtained a distinct advantage from these assurances: the continuation of his case and of the automatic stay. E.g, Id.

B69. **In re Chrystalene McCutcheon**, #09-64035, Bankr. WD VA, 10/6/10 order (Anderson). **Court lacks jurisdiction to hear objection to claim asserting that it is not a joint claim.** Court holds that it lacks jurisdiction to determine if the claim is the individual debt of the debtor or a joint debt with another person, because (a) the issue does not arise under, and is not related to, this case, and (b) the determination of this issue will not affect the payment of this claim or the administration of this case. 28 USC sec. 1334 and 157.

B70. **IN RE JAMES AND VIRGINIA SMITH**, #10-50687, Bankr. W.D. Va. 12/22/10 opinion (Krumm). **Can't avoid judgment lien against one debtor on T by Es property using 522(f).** A judgment against one spouse lodged as a lien against property owned by married debtors as tenants by the entireties does not attach to the property where, as here, both debtors are alive. Vasilion v. Vasilion, 192 Va. 735 (1951); Farrey v. Sanderfoot, 500 U.S. 291 (1991). Since the lien does not attach to the property, it does not fall under the scope of Code sec. 522(f) and cannot be avoided using that section of the Code. [S. Scott: see In re Benner, 253 B.R. 719 (Bankr. W.D. Va. 2000; Krumm), re the issue of post-case attaching of the lien.] [See also B 165, Randall; same result]

B72. **In re Sara M. Travis**, #08-71735, W.D. Va. Bankr., 1/19/11 opinion (Stone). **Debtor attorney fees denied for lift stay motion soon after confirmation of modified plan.** Request for debtor attorney fees for a lift stay motion 2 weeks after modified plan confirmed. Application denied b/c attorney failed to prove that legal services performed were actually necessary. Counsel's "reactive approach" to handling this case falls short of the Court's expectations for experienced Chapter 13 debtors' counsel in such matters. The modified plan he filed failed to take into account his client's mortgage arrears, and he failed to contact the creditor's attorney, which might have made the lift stay motion unnecessary. Trustee's decision to object to this $900 fee request (on top of $500 already awarded for the prior modified plan) is due "appropriate respect and weight." Time sheet reflects time for purely clerical or administrative tasks "which are not entitled to be compensated as professional services."

B73. **In re Randall and Tina Woods**, 10-62058, Banrk. WD VA, 1/27/11 order (Anderson). **Objection to claim based on S/L must provide evid.; "claim not listed in debtor's schedules" is not a grounds.** Debtor objected to POC: not listed on debtor's schedules; no documents to show that stat. of lim. has not run. Court held the first grounds was not relevant. For the second, the debtor had both the burden of production and of persuasion b/c the objection was based upon an affirmative defense; because he did not produce any evidence, this grounds for the object. was overruled. See Falwell decision.

B74. **In re Reginald Ponton**, #10-61515, Bankr. WD VA, 1/27/11 order (Anderson). **Second POC filed after repossession of collateral is a separate claim.** Creditor filed one claim as secured by a car; a second claim was filed by the same creditor as "supplemental" for "repossession or transport." Debtor objected that the second claim amended the first and should be disallowed or withdrawn. Court held that the claims were not the same claim, and overruled the objection.

B75. **In re George Tomaras**, #10-60785, Bankr. WD VA, 2/9/11 order (Anderson). **"Debtor has made other arrangements to pay the claim" is not a valid grounds for objecting to a claim.** Objection to claim based on assertion

that "debtor has made arrangements to pay claim outside of bankruptcy" is overruled because it is not one of the grounds listed in Code sec. 502(b).

B76. **In re Charles & Christine Rector**, #09-62669 (AP# 10-06011), W.D. Va. Bankr., 03/11/11 opinion (Anderson). **Debtor can still avoid a mortgage lien after he's surrendered the property in a confirmed plan.** T sought to avoid a mortgage lien because the deed of trust was lost and never recorded. Pre-petition, MERS had filed an action in state court to impose a first-priority equitable deed of trust on the property and had recorded a *lis pendens.* The debtors' confirmed plan had surrendered the property in question, and a subsequent order lifting the stay on the real estate was entered. The matter was before the Court on cross motions for summary judgment. MERS argued that *res judicata* barred the T from administering the property, and that neither the T nor the debtor had standing.

Held: The T is not barred by res judicata. The validity of a lien must be resolved in an adv. proceed; plan confirmation cannot have a preclusive effect as to validity (Cen-Pen, 58 F.3d at 93), and the confirmed plan had no provision allowing MERS' claim as to amount & character. Plan confirmation (sec. 1322 & 1325) determines how claims are to be treated, while the claims allowance process (sec. 502) determines the existence, amount, and character of each claim that is to be treated under the plan. In the absence of contrary provisions in the plan or confirmation order, the two processes are to be treated separately, and the latter process occurs after the former. Congress didn't intend for plan confirmation to terminate the claims allowance process. The 2nd Cir. Layo case (460 F.3d 289) is distinguishable because the confirmed plan contained a provision allowing the creditor's claim.

Held: regarding the standing issue, para. 3 only surrenders the RE to MERS *if* it has an allowed secured claim. And, in any event, even after surrender & foreclosure, the debtors (and the T as fiduciary for the unsecured creditors) retain a residual interest in the proceeds from the sale of the RE. The fact that the plan surrenders the RE to secured parties does not affect whether MERS has a secured claim.

Regarding MERS' state court action: if MERS were to prevail, its security interest would be perfected only as of the date the lis pendens was filed, and the T could avoid the transfer and the security interest under 547(b) and 544(a)(3). So it is not relevant whether MERS would have prevailed in its state court action.

T's motion for summary judgment is granted; MERS' motion is denied.

Judgment: MERS' lien shall be void and of no effect during pendency of the case; it shall be allowed as an unsecured claim. The lien shall be void for all purposes only if and when the debtors receive their discharge; only then can they record this judgment (with a copy of the discharge) in the state court. Upon sale of the property, the escrow agent shall pay all liens senior to the MERS claim, but shall distribute no money to MERS or any junior claim. The balance of the proceeds shall be paid to the Chapter 13 Trustee to be held in a separate account (which need not be interest bearing) pending further order of this Court. Upon the earlier of dismissal or discharge, the T shall notice all parties and the UST and request authority to distribute these funds: if dismissal, as if the MERS lien had not been avoided; if discharge, as if the lien had been avoided. [NOTE: case was appealed on 3/25/11]

B77. **In re James L. Perkins,** 10-63148, Bankr. WD VA, 3/31/11 opinion(Anderson). **Application of Va. Code sec. 34-29 to checking account funds.** In a Chap. 7 case, the Court held that the exemption contained in Va. Code sec. 34-29 applies to earnings that are subject to garnishment. It does not protect paycheck earnings deposited by the debtor into his bank account a few days before his bankruptcy petition was filed.

B78. **In re Frank & Sandra Zacchino**, # 10-62312, Bankr. W.D. Va., 4/8/11 Order (Anderson). **Fact that a claim is contingent or unliquidated is not a basis for disallowing a claim.** Debtor's ex-wife filed a priority claim for child support of $76,000. Debtor scheduled the claim at $0 and objected to it because it was on appeal in the NY state courts. Court states that the fact that a claim is contingent or unliquidated is not a basis for disallowing a claim. 502(c)(1) requires estimation of a contingent or unliquidated claim when failure to do so would unduly delay the administration of the case; Court has an affirmative duty to do so. Debtor's request to disallow the entire claim is not appropriate.

B79. **In re Russell and Karen Ebersole**, 453 B.R. 636 (Bankr. W.D. Va. 2011; Krumm). **There is a very strong presumption that a properly addressed piece of mail has been delivered.** To rebut the presumption the party must show "strong evidence to the contrary." Bosiger v. U.S. Airways, 510 F.3d 442 (4th Cir. 2007). The debtor's general denial does not

constitute "strong evidence." See also Hagner v. US, 285 U.S. 427 (1932): well settled rule that letter properly placed in a post office creates a presumption that it reached its destination in usual time and was actually received by the addressee.

B80. **In re Nicholas and Sabrine DeVincenzo**, Bankr. W.D. Va., #10-50900, 5/25/11 Krumm opinion. **Credit union loanliner and security agreements still valid even though not signed by debtors; endorsed checks incorporated the agreements.** Debtors financed a car through the credit union, using a loanliner-type of security-now-and-in-the-future agreement. They did not sign the agreement, but endorsed the check , which incorporated the security agreement. Same for a second car loan. Then the debtors obtained a signature loan. Held: the three security agreements are enforceable by the credit union even though the debtors never signed them; it has not waived its cross-collateralized interest in the signature loan. Citing Leftwich, Court held that the checks signed by the debtors incorporated the loanliner and security agreements, and by signing the checks the debtors agreed that the loans were issued under the loanliner agreement and the security agreements, and satisfied the authentication requirement of Va. Code 8.9A-203(b). The security agreements contain an enforceable cross-collateralization clause for future loans.

B82. **Didlake v. Wachovia (In re Didlake)**, 454 B.R. 349 (Bankr. WD VA), Case No. 09-73166 (A.P. #11-07003-ROA), 6/29/11 (Krumm). **Deed of trust that includes principal residence plus rents cannot be modified under 1322(b)(2).** Chapter 13 case holds that the inclusion of an assignment of rents provision in a deed of trust securing a debtor's principal residence does not cause the deed of trust to be secured by items other than the principal residence such that the deed of trust can be modified under § 1322(b)(2) even though the deed of trust is merely under secured. This is due to the fact that the definition of principal residence found in 11 U.S.C. § 101(13A) includes the term "incidental property" which 11 U.S.C. § 101(27B) defines as including rents. Therefore, the definition of principal residence includes rents.

B83. **In re Marvin & Wanda Crewey**, #11-71179, Bank. W.D. Va., 6/28/11 Opinion (Stone). **Pre-petition credit counseling session can be taken same day as filing, but must be taken before actual filing.** Debtor filed case having taken the post-petition personal financial management course, but not the required pre-petition credit counseling session. She took it the same day as filing, but two hours later. Code 109(h) has been amended to allow the debtor to take the pre-petition session on the same day of filing. But eligibility for filing is determined as of the moment of filing, so she wasn't eligible to file. Her case will be dismissed.

B84. **In re Palmer & Debra Goodbar**, #09-52018, Bankr. WD Va, 6/29/11 opinion (Krumm). **[Note: affirmed on appeal by Dist. Ct.; see B144] Fees requested by debtors' counsel significantly reduced by the Court.** Debtors' attorney requested $19,651 in fees and $1,492 in costs in main case, plus fees & expenses of $5,836 for an associated Adversary Proceeding. Chapter 13 Trustee and UST opposed the fee request. 4th Cir. Standard is a "hybrid of the lodestar method and the twelve factors set forth in Johnson ..." The applicant has the burden of proof. The attorney has only identified two matters that fall outside the scope of services set forth in his flat rate fee agreement of $2,650 for specified services: the motion to sell, and the A.P. Court will award $600 on the motion to sell because of the complexity of issues in this sec. 363 matter; the range in the WD of VA is $250 to $600. So his fee for the case will be $3,250. He has failed to meet his burden of proof on the copy charges: no evidence of the number of pages copied. Court will award $529 in expenses. (Atty only entitled to reimbursement for copies deemed necessary by the Court.) For the A.P., the Court finds that $5,814 in fees is appropriate, based on the complexity of the issues involved. Court takes issue with the "CM/ECF Notice "charges by the paralegal; merely clerical, not reimbursable. Court does not reach the issue of whether the attorney can charge more for court time than other time, but his $450/hr. charge is for a lawyer with his experience is "unnecessarily high"; the appropriate rate is $250/hr. Court will reduce fee by $487 for work performed where the description of what was done is inadequate. Court awards $252 in A.P. costs. Final award: $8,410 for fees and $782 for costs; atty shall have 30 days to supplement his request for copy costs.

B85. **In re Jeffrey A. Goodbar**, #10-51542, Bankr. WD VA, 6/29/11 opinion (Krumm). **Fees requested by debtors' counsel significantly reduced by the Court.** Fee agreement called for $4,500 for services to be rendered by the attorney.

There was a separate fee agreement for matters not covered by this fee agreement. Rates were $250/hr out of court, and $450/hr. in court. Atty filed application for $7,248 + $599.77 in costs. US Trustee objected to the fee application. In re C & J Oil, 81 B.R. 402 (WD VA Bank. 1987) sets forth the statutory framework for fee applications. 4th Cir. Standards is a hybrid of lodestar method and twelve Johnson factors… Court finds that customary fee in Chap. 13 in WD of VA is $2,500 to $2,750, and that there is no evidentiary basis before the Court to justify a fee in excess of $2,500. Only one matter falls outside the scope of the flat fee (MTLS); atty requested $386, and Court will award $240 (some of paralegal's entries are for clerical work). Court will award $2,740 in fees. Re costs, records are confusing and do not say how many pages being copied, but atty can provide supplemental information to the Court w/i 20 days for those. For now, $351.52 in costs are awarded.

B86. **In re Donald and Regina Wallace**, #10-72504, Bankr. W.D. Va., 7/8/11 Opinion (Krumm). **Court rules on specific monthly living expenses in below-median case; cigarette expense not allowed.** Ch. 13 Trustee objected to some of the debtors' expenses on Sch. J for a family of four. Held: debtors bear the burden of demonstrating that each expense is for their or their dependents' maintenance or support. $100/mo. for grooming expenses is reasonable. $90/mo. for household supplies was more reasonably provided for in the $800 food or $50 home maintenance expenses, so this expense is not necessary. $207/mo. for child school, social activities and needs is supported by the documents provided by the debtors and is reasonable. $152/mo. for wife's cigarettes is not necessary for support or maintenance, and is unnecessary, despite her claims that she has been unable to stop smoking. $14/mo. for Sirius Radio is unnecessary. $20/mo. for laundry and dry cleaning is reasonable. The Trustee's objection is sustained, and the Court finds that the debtors have an additional $256 in disposable income.

B87. **In re Cathy Knupp**, 461 B.R. 351, #06-50342, AP # 10-05012, 7/26/11 opinion (Krumm). **Revocation of debtor's discharge.** A case of first impression in WD of VA, Court notes. B/P is on the party seeking the revocation; all elements must be proven by a preponderance of the evidence. Must prove all 3 elements of 1328(e). (1) The one year period runs from date discharge order entered. (2) Fraud must be shown; not enough to prove equitable principles or grounds under 727(d). To prove fraud, must show debtor "knowingly and fraudulently committed an act or omission in connection with her bankruptcy proceeding, and… that the act or omission concerned a material fact." Here the debtor's knowing decision to pay off her case early in the hopes of obtaining her discharge without increasing what she had paid to her creditors was a fraud on the Court and on her creditors. The $98,668 she received was material, so her failure to disclose it concerned a material fact. (3) The Trustee did not know of the failure to disclose until after the discharge was received. Debtor's discharge is revoked.

B88. **In re Jeffrey A. Goodbar**, 456 B.R. 644 [# 10-51542, Bankr. WD VA, 8/10/11 order (Krumm)]. **Reimbursement for photocopying expenses.** Citing In re Wyche, 425 B.R. 779 (Bankr. ED Va. 2010), Court states that photocopying costs "incurred by an attorney in the course of acting as an attorney and thus incurred by a law firm as part of its business of offering legal services to the public" are not sufficiently necessary to render them chargeable to creditors of the estate; those that are "necessary for a particular client's bankruptcy case to proceed" are. Here the attorney failed to state why the copies were created, so the Court can't make the required determination. Therefore the attorney's request for reimbursement of these fees is denied.

B89. **In re Karen Helton**, 11-60126 (Adv. # 11-06028), Bankr. W.D. VA, 8/12/11 opinion (Anderson). **A Chapter 13 case filed close on the heels of a Chapter 7 case *can* avoid judgment liens even though the debtor is not eligible for a discharge, but confirmation of the proposed plan is denied because it was filed to avoid Dewsnup and was filed in bad faith.** Debtor is seeking to avoid 3 junior mortgage liens of creditors; Trustee is objecting to confirmation. Debtor received a Chap. 7 discharge in a case filed 7/8/09. This case was filed 1/18/11; there were no priority or general unsecured claims. The proposed plan sought to avoid the three liens and pay a dividend of 2.5% to the three lien holders as unsecured claimants…..

Long-held rule was that liens on property survive discharge. But Code sec. 506 changed that, allowing partially secured claims to be stripped down and fully unsecured claims to be stripped off. Dewsnup (U.S. Sup. Ct.) held that debtor can't strip down a lien in Chap. 7; 4th Cir. has held that can't strip off a lien either. Ryan v. Homecomings Financial

Network. Dewsnup doesn't apply to Chap. 13 because of 1322(b)(2), but Nobleman (U.S. Sup. Ct.) prohibits avoidance of a partially secured lien on a debtor's residence. All five Courts of Appeal that have considered the issue have held that a debtor may use 1322(b)(2) and 506(a) to avoid a *wholly unsecured* lien.

But after BAP & CPA, the issue is whether sec. 1328(f) and 1325(a)(5) combine to provide an exception to the rule in Dewsnup and Nobleman. This Court holds that 1328(f) [debtor's inability to obtain a discharge] does not prohibit the debtor from stripping off a wholly unsecured lien; "there is nothing in the Code that prohibits the debtor from avoiding wholly unsecured in rem claims even though she will not receive a discharge in this case." These claims exceed the value of the property securing them, and via 506(a) are therefore not "allowed secured claims."

Regarding the issue of confirmation, Trustee argues that the plan was not proposed in good faith. Deans v. O'Donnell (4th Cir., 1982) sets out the factors to be considered; a totality of the circumstances test. Relevant factors here are: the past filing; the nature and amount of unsecured claims; and the proposed payout percentage. Current case was filed < 6 mos. after Chap. 7 case was closed; her house and vehicle payments were current; no unsecured claims; 2.5% payout to $176,000 in unsecured in rem claims; 36 month plan. "The sole purpose of the current case is to avoid the liens of the Defendants that she could not avoid in the Chapter 7 case." The plan was filed in bad faith it violates "both the intent and the spirit of the Bankruptcy Code in that it is a clear attempt to circumvent… Dewsnup." The Trustee's objection to confirmation is sustained.

B90. **In re Edward Dunn**, # 11-60847, W.D. Bankr Ct., 8/18/11 opinion (Anderson). **Debtors' attorney ordered to disgorge $5,000 in fees received.** Attorney filed Chapter 13 for debtor in ED VA to stop a foreclosure; case was transferred to WD VA. There were numerous problems with the schedules; no disclosure statement was filed. Counsel failed to comply with the Court's deficiency orders. At a show cause hearing on 5/2, counsel said she would cure the problems. She failed to do so. On 6/21, substitute counsel was obtained and filed the correct schedules, and the plan was confirmed. At a 7/18 show cause hearing, substitute counsel proffered that the original counsel had advised the debtors to stop paying the mortgage and instead send her $6,500. Court issued another show cause hearing for 8/15 re disgorgement of fees. Held: Applying Code 330(a): attorney did stop the foreclosure; she filed a plan "patently unconfirmable on its face"; engaged in a loan modification effort that resulted in no benefit to the debtors; schedules filed were so incomplete as to be of no benefit to the debtors; she has *still* not filed a disclosure statement. Initial counsel is awarded fees of $1,500, and shall disgorge $5,000 in fees received. Counsel shall pay these disgorged fees to substitute counsel within 10 days, and he shall hold them in his trust account pending further order of the Court.

B91. **In re Bruce & Jane Slater,** # 10-62521, Bankr. WD Va , 09/06/11 opinion (Anderson). **Debtor's attorney fee request reduced to "no look fee" amount plus hard costs advanced.** Debtors' counsel had received $2,500 prepetition and was charging $300/hr. for Ch. 13 case. Firm filed for supplemental fees of $3,950 and costs of $267. Court begins by citing the factors listed in 330(a) for evaluating such fee requests.

---Bankruptcy Courts in the WD of VA "authorize compensation on the basis of a standard "no look" fee in Chapter 13 cases." Courts are not required to award fees based on a lodestar calculation. Most Federal Districts (80 of 92 in a 2010 survey) award no-look fees. No look fees are necessary "for efficiency reasons," and they "reflect the standard set forth in 330(a)(3)." "While each Chapter 13 case may have some nuance, virtually all consumer bankruptcy cases concern the same set of tasks at approximately the same level of complexity. Consequently they should consume approximately the same amount of time and …. skill and experience on the part of the attorney." The huge number of cases filed in this division in the past ten years shows that the no-look fee represents the market rate.

---The fact that the debtors agreed to the requested fees "is not determinative": Congress placed limits on such fees by enacting sec. 329 and 330.

---Court disagrees that this case required more than the usual amount of time and expertise. No adversary proceedings; Trustee testified he didn't see anything unusual here. The no-look fee is appropriate in this case.

---In any event, the requested fees could not be granted under the lodestar method due to "the disorderly nature of the application." 4th Cir. has adopted the 12 factor test of the 5th Cir. Johnson case. The Johnson factors should be considered in initially determining the lodestar figure, not in adjusting that figure upward; the novelty and complexity of a lawsuit should not be used to increase the basic fee award, as the special skill & experience required will be reflected in the hourly rate applied. Daly v. Hill, 790 F.2d 1077 (4th Cir. 1986), citing Blum v. Stenson, 465 US 886 (1984).

--Attorney's requested fee is high for someone in the WD of VA with his experience (chart showing that average fee awarded by the Court is $245/hr and average experience was 22 years). An appropriate rate for this attorney would be $200-$225/hr; Court will allow a fee of $225/hr. Court cannot discern the amount of time spent on individual tasks "given the severe extent to which tasks are bundled." Court will allow 1.6 hours for client consultation. For the time spent on schedules and pleadings (16.78 hours), the number includes clerical tasks billed at attorney's rates; the Court cannot ascertain the magnitude of the required adjustment, but it should not have taken more than 7-9 hours. Re travel, amounts were again bundled; one client should not bear the entire brunt of travel expense; and 1 hour will be allowed. Total time allowed would be 10.2-12.2 hrs x $225/hr = $2,295 to $2,745. So the lodestar analysis confirms that the no look fee is appropriate.
---Re reimbursement of expenses: out of pocket expenses will be allowed, but copying and postage are included in the no-look fee.
---Total compensation to be allowed: $2,500 in fees and $871 in expenses.

B92. **In re Jason & Nicole Robertson**, # 10-51260, Bankr. Ct., W.D. Va., 9/9/11 opinion (Krumm). **Second vehicle purchased under a credit union loanliner agreement is subject to a PMSI and cannot be crammed down.** Debtors executed a loanliner agreement with the DuPont Credit Union; the agreement provided that any advances would be secured by the vehicle being purchased and by future collateral as well. Debtors bought a Kia in 2007 and a Ford in 2009 on this account. Issue: did the advance to purchase the second vehicle constitute a PMSI, or can it be crammed down because the collateral consisted of more than the car being purchased? Held: it constituted a PMSI and cannot be crammed down. (1) The second loan is a separate and distinct loan; not merely "part of a larger umbrella lending arrangement." (2) The "lending disbursement receipt" constitutes a valid and enforceable security agreement under VC 8.9A-102(23). (3) The latter advance is covered by a PMSI even though the underlying agreement contains a cross-collateralization provision, but the creditor can only assert a PMSI against the second car under the terms of the second advance.

B93. **In re Nancy Vencill**, Bankr. W.D. VA., #10-72956, 9/11/11 opinion by Stone. **Application of the crime/fraud exception to the attorney/client privilege.** In Chap. 11 case, Court examines the crime/fraud exception to the attorney/client privilege in the context of a pre-petition transfer claimed to have been made with the intent to hinder, delay or defraud creditors. Relying on Judge Tice's decision in In re Andrews, 186 B.R. 219 (Bankr. E.D. Va. 1995), Court holds that the confluence of "badges of fraud" (debtor being pursued by his creditors, and lack of full consideration for the transfer) are sufficient to require the attorney to disclose any information about the transfer and any advice he provided her about it or how to report it in her bankruptcy schedules. Attorney's responses and debtor's separate responses shall both be placed under seal and not disclosed by the UST without Court approval.

B95. **In re Alan & Amy Askew**, Bankr. Ct. W.D. Va., #09-60155, 9/15/11 Opinion (Anderson). **Trustee will not be compelled to recover and redistribute properly-distributed funds in re-opened case.** Debtors had modified their confirmed plan to provide for the payment of post-petition income taxes. The debtors paid off their case early. Because the IRS never filed a claim, the case was closed without any payment by the Trustee to the IRS. The debtors received their discharge and the case was closed in the normal course. A month later the debtors reopened their case and moved to compel the Ch. 13 Trustee to recover funds previously (and properly) distributed so that the money could be re-distributed to the late-filed IRS claim. After the case was reopened, the IRS filed a claim for the post-petition taxes. The Trustee objected to the claim as not timely. *Held: the IRS claim is disallowed, so the Trustee has no authority to pay that claim, and there is no reason to compel him to recover previously distributed funds.*
---Even though a confirmed plan provides for payments on a claim, the creditor is not entitled to receive a distribution unless it has filed a timely proof of claim.
---sec. 1305 does not prescribe when a claim must be filed under that section; normal deadlines do not apply.
---The Trustee has sufficiently pled the elements of the defense of laches: unreasonable delay and prejudice to the party raising the defense. The Court agrees: the Trustee "administered this case in compliance of law. He should not be compelled to incur time and expense to correct a situation that was not of his own doing."
---The request of the debtors to hold this case open so that they can file another modified plan to pay this tax claim is denied; this goal would be better served by their filing a new petition.

B96. **In re Timothy Anders**, Bankr. W.D. Va., # 11-70995, 11/4/11 opinion by Stone. **Deadline for filing a non-dischargeability A.P. not extended by the Court.** Creditor filed adversary proceeding in Chap. 11 case seeking non-dischargeabiltiy of a debt after the deadline set by Rule 4007(c). Court notice failed to set a specific date for filing the A.P. as required by the Rule, but did give the 341 date from which the deadline could have been correctly calculated. Since creditor had actual knowledge of the case in time to file a complaint, Court will not exercise its power under Code 105 to disregard the explicit deadline of Rule 4007(c). Even though these facts are "unfortunate and embarrassing to the Court," there are no extraordinary circumstances here to justify such a holding.

B97. **In re Jennifer Ballard**, #11-62006 [and five other identical cases], Bankr. W.D. Va., 11/8/11 Opinion (Anderson). **Plan can, under certain circumstances, reimburse the attorney for advancing the filing fees, but not for costs of the credit counseling and financial management course.** Debtor's proposed plan in para. 2.A.2 (admin. expenses) sought payment by the Trustee of debtor's attorney's fees, plus reimbursement of the case filing fee ($274), the credit counseling fee, and the financial management course fee, all of which had been advanced by debtor's counsel. Debtor's counsel advised the Court that he would not seek reimbursement directly from the debtor for any of these fees, even if he was not reimbursed from the estate, and in this below-median, 60 month case the plan was using "extra" money (in excess of the amount required by the disposable income test) to cover the cost of these fees.

The issue is whether the fees advanced are "actual, necessary costs of preserving the estate.". *Held*: Generally, the burden of proof in this matter is on the claimant. (1) *The attorney may not advance the debtor fees to pay for the credit counseling course.* It creates an overt conflict of interest b/c it creates a pre-petition creditor-debtor relationship between the attorney and the debtor, giving rise to a pre-petition claim by the attorney against the estate. Also, such an advance is not necessary b/c "the debtor should have the funds to pay that fee before the petition is filed." If the debtor has disposable income sufficient to fund a Chapter 13 plan, he must have the financial ability to pay this $50 fee. (2) *The case filing fee is a post-petition expense and an administrative expense, and the attorney may advance it.* It is an actual, necessary expense of preserving the estate, b/c otherwise the case would be dismissed. (3) *The fee for the financial management course is not necessary for the preservation of the estate, so there is no reason for counsel to advance this fee.* Also, this course should probably be taken after a debtor has completed his plan, at which time he will have more than sufficient disposable income to pay this fee. (Court notes that only 40% of all Chap. 13 debtors complete their plan.) Conclusion: These conclusions are based on the fact that the attorney has waived any right to collect the filing fee from the debtor and the payment of this filing fee is "added to the end of the plan." Debtor may file an amended plan that provides for the reimbursement of the $274 filing fee, which plan need not be noticed.

[Note: The Court later made it clear that (i) the attorney's ability to advance the filing fee and be reimbursed in this manner is contingent upon he or she waiving any right to proceed against the debtors to recover this cost if the case is dismissed before the attorney is reimbursed, and (ii) this opinion only applies to the situation where the plan is paying for the filing fee with "extra money" (plan payments in excess of the amount required by the disposable income test.)]

B99. **In re Kenneth Mitchum and Meredith Buist**, #6-11-cv-00015, 2011 WL 6176215 (W.D. Va.,Conrad, 12/1/11 opinion), affirming Judge Krumm's decision (4/1/11, 455 B.R. 108). **Good example of District Court applying "clearly erroneous" standard to fact-based appeal on valuation issue.** Debtors' counsel [Dunn] appeals the holding of Judge Krumm that the second mortgage lien on this house is avoidable. Judge Krumm held that the current value of the property, plus the "cost to cure," was greater than the balance owed on the first mortgage, so the second mortgage lien was not avoidable. The opinion is a good example of an appellate court applying the "clearly erroneous" standard and upholding the decision of the trial court on a difficult fact-based case.

B100. **In re Nolan Burnett**, #11-71622, Bankr. W.D. Va. (Stone 11/18/11 Order). **Secured creditor cannot file as unsecured, and must amend its POC to secured.** Debtor objected to a mortgage POC that was filed as "unsecured" but had attached to it a perfected deed of trust. The claim was listed in the schedules as a fully secured second lien deed of trust, and the plan proposed to cure the arrearage and have the debtor continue to make the regular monthly payment directly. The creditor had informed debtor's counsel that it had made a "business decision" to file as unsecured even though it held a perfected lien, and declined to amend its claim. If the claim were treated as unsecured, it would frustrate the debtor's ability to pay his creditors in full. The Court found that "…*the intentional filing of an unsecured*

claim by the creditor which in fact has a fully secured claim and is being so treated in the Plan may violate Rule 9011(b)(1)(2) and (4) and subject the creditor to possible sanctions." Held: The objection is sustained and the creditor's claim is disallowed. The creditor shall, w/i 30 days, file an amended claim as a secured creditor and complete all appropriate sections of the official POC form, including the amount of the arrearage. Failing that, it will be bound by the amount of the arrearage set forth in the debtor's confirmed plan.

B101. **In re Mark & Wendy Murphy**, # 11-62465, Bankr. W.D. Va., 12/16/11 Order by Anderson. **Failure to extend stay under 363(c)(3)(A) inapplicable to property of the estate.** "The termination of the stay under Bankruptcy Code §362(c)(3)(A), however, does not terminate the stay as to property of the estate. The stay under Bankruptcy Code §362(a) is not terminated with respect to property of the estate and it shall remain in full force and effect with respect thereto."

B102. **In re Ricky and Carol Clark**, #10-63514, Bankr. WD Va., 12/19/11 bench ruling by Judge Anderson. **In joint case, plan can be confirmed in names of both debtors even if wife died prior to confirmation hearing.** Wife died after the 341 hearing but prior to confirmation of this 100% plan. The Judge ruled that the case could be confirmed, and proceed, in the names of both debtors.

B103. **In re Robert Brooks**, Banrk. W.D. Va., #09-61690, 12/22/11 bench ruling (Anderson). **No laches for 2nd lien holder on unsecured deficiency POC filed 18 mos. after foreclosure sale.** 2nd lien creditor had filed a timely secured POC. 1st lien creditor got stay lifted in fall, 2009; conducted foreclosure sale 2/26/10. 2nd lien creditor finally filed its unsecured deficiency POC on 8/25/11, some 18 months after the foreclosure sale. No reason given for the lateness of its POC. Plan was noticed at 30%; other GUCs have already received that amount. If this POC were allowed, all remaining disbursements would have to go to this creditor, who would eventually get about 29%. Trustee objected to the POC on basis of laches. Held: Since other creditors have received what they were noticed, it would be unfair not to allow this creditor to share in the distribution. Trustee will not be required to recover any prior distributions, but future distributions should equalize the total distribution between other creditors and this creditor to the extent possible. Court noted that this will not be a problem in the future, given the Court's current policy of stating in para. 11 of the plan, and in every order lifting stay, that any such unsecured deficiency claim must be filed w/i 180 days.

B106. **In re David Morrison & Kimberlee Frontain,** Bankr. W.D. Va, #11-51674 , 2/1/12 (bench ruling, Krumm). **Rule 3002.1 mortgage creditor notice of a post-petition charge is not a "claim" which must be provided for in a proposed plan before it can be confirmed.** Judge: since it's not included on the POC form, it isn't part of the creditor's "claim."

B107. **In re Larry and Deborah Sisler**, #11-50597, Bankr. W.D. Va., 1/31/12 Opinion (Krumm). **In above median case, the $200 old car deduction may not be taken on Line 27A.** Above median debtors own three vehicles; the Trustee objected to their claim of $688 on Line 27A (ownership expense) of form B22C: $244 for each of the first two vehicles, and an additional $200 for their old truck. Debtors argued that the "old car deduction" is supported by the IRS manual [part 5, Chap. 8, Sec. 5,8.5.20.3(5)] and a number of reported case decisions. Held: (1) "The IRS' Local and National Standards are not equivalent to interpretive guidelines from the IRS' Internal Revenue Manual… [they] are a subset of the Financial Analysis Handbook, which is a subset of the IRS' Internal Revenue Manual…the IRS's "***s***tandards" may allow a $200 old car deduction, however, the IRS' Local Transportation standards that are referenced by Form B22C do not allow for any such deduction. Ransom…" (2) The Ninth Circuit dicta in Ransom endorsing this deduction "is not dispositive" because it wasn't the issue before the Supreme Court. (3) Debtors' argument ignores the lack of statutory basis for the old car deduction, and ignores the post-Ransom caselaw holding that the IRS's Internal Revenue Manual is not incorporated into the Bankruptcy Code. (4) Code sec. 707(b)(2) references the National Standards and Local Standards; there is no mention of the Internal Revenue Manual guidelines. (5) Ransom means that "to reference the Internal Revenue Manual, a debtor must first find a statutory basis for a deduction in the National or Local Standards that needs to be interpreted. The Debtors seek to use the Internal Revenue Manual to create an otherwise unlisted deduction. To allow this would be to given the Internal Revenue Manual guidelines the same effect as the Bankruptcy Code…. Ransom expressly states to the contrary." (6) Post-Ransom caselaw: 5 of the 7 cases reject the concept that the

$200 old car deduction can be taken on Line 27A. "**The Court finds that the $200 old car deduction may not be taken on Line 27A of Form B 22C."**

B108. **In re Susan Holsinger**, #11-51720, Bankr. W.D. Va., 2/27/12 Krumm opinion. **Pro se debtor's request for an exemption from the pre-petition credit counseling requirement is denied, and her case dismissed.** Pro se Chap. 13 debtor filed an emergency case to stop a foreclosure on her home and a certificate of exigent circumstances as to why she had not taken the credit counseling prior to filing. She had signed up for credit counseling one week before filing her case, and stated that she was delayed in taking the credit counseling until about five weeks after filing. But it turns out that she had taken the personal financial management course, not the credit counseling. Held: Imminent foreclosure is an "exigent circumstance." But to trigger the exception under 109(h), the debtor must show that "the foreclosure sale would materially diminish the debtor's rights." No matter the circumstances, the debtor must have made an effort to seek credit counseling, and may only obtain relief if the agency could not provide counseling within 7 days of her request. Debtor has not provided any evidence to satisfy that last requirement. Debtor failed to properly allege that she should be granted an exemption under 109(h)(3)(A). Her exigent circumstances application is denied, and her case is dismissed.

B108A. **In re Kenneth E. Lane**, Bankr. W.D. Va., # 11 71402, 3/2/12 opinion (Stone). **Marital property division debts will be treated like support because of the debtor's failure to comply with the divorce court's orders to hold the spouse harmless.** Discussion of good faith, support obligations, marital property divisions, etc. Court finds that debtor's conduct in not applying the proceeds from the sale of the business to joint debts with the spouse was a division of martial property, and not a support obligation, but should be treated as a support obligation because of the lack of good faith on the part of the debtor. Debtor recklessly disregarded the orders of the divorce court in transferring assets to his new business entity instead of paying the joint debts as he had been ordered to. Court will not confirm the debtor's plan unless it protects the spouse from collection for the debts of the business entity and shows that the debtor is making all reasonable efforts to pay the obligations imposed by the divorce court.

B109. **In re Ricky and Carol Clark**, # 10-63514, Bankr. WD VA, 3/8/12 opinion, Anderson. **No-look fee affirmed; $12,072 in fees not reasonable. [Note: affirmed by Dist. Ct.; see B129]** Debtors' counsel filed a supplemental fee application for $9,572 and expenses of $429. The attorney was initially paid $2,576 pre-petition, so the total being sought is $12,072 in fees and $779 in costs. Held: [Note: In the first part of the opinion the Court sets forth the same analysis it used in the Slater case 9/6/11] (1) One adversary complaint filed, which was resolved by consent order. Only anomaly was that the wife passed away during the case; this required amended schedules. The majority of confirmation hearings were caused by the failure of counsel to timely respond to the concerns of the Ch.13 Trustee. (2) Court will adjust the fee upward $250 for the issues surrounding the wife's death, for a total of $3,000; and costs of $779. (3) For the lodestar calculation in this case, Counsel seeks fees at the rate of $275/hr.. As confirmed by a survey the Court took of experienced attorneys in this area, that is high for someone of his experience; proper fee would be $200-$225/hr. (4) The attorney seeks $4,400 for 3 court hearings and a creditors' meeting; half of the time billed was for travel to and from these hearings. This Court does not allow for travel time in Ch. 13 cases, in order to give incentives to specialize and create efficiencies from economies of scale. He charged $1,100 for each trip, but only paid another attorney $100 to appear for him at one. Fees for the lien avoidance complaint should have been part of the no-look fee; 23 hours for the plan and petition is twice what it should have been. The death of the wife should not have caused four amended plans. "There is nothing extraordinary about this case." Note: 3/27/12: This case has been appealed to the US District Court.

B111. **In re John and Connie Henson**, #11-72242, Bankr. W.D. VA (Stone), 3/23/12 opinion. **Above-median debtors cannot take a $148/mo. deduction for their child's choir expense on Line 43 of B22C**. Issue: whether above-median debtors can deduct on Line 43 $148/mo. for the expense of their teenage daughter participating in a youth choir under college auspices which the parents believe is very important to her education. Held: (1) There is no suggestion the child is mentally or physically challenged; no question that she attends public school, she has been a member of this choir, it has been beneficial to the child, and the parents have been spending more than $148/mo.on this activity. (2) The cost of this choir activity can't be included under the attending a private school language of B22C; judges are not authorized to "approve general educational expenses which they might determine to be reasonable and necessary"; this is a "voluntary expense …sponsored by a separate entity." (3) The need for a tutor might be more reasonably argued, but Congress has

decided that above-median debtors "may have to make some downward adjustments to the standard of living which they and their dependents have previously enjoyed in order to do right by their creditors." (4) Debtors have proposed a 59% plan that would have the unsecured creditors absorb $1,775/yr for their daughter's "worthwhile and beneficial extra-curricular activity" choir expense, but Congress in the language that it chose "has made the controlling policy judgment and has not left it to the determination by the Court." (5) The Trustee's objection to this expense is sustained.

B111A. **In re Ray and Deborah Jones**, Bankr. W.D. Va., # 11 71854, 4/6/12 opinion (Stone). [Ch. 7 case]. **Only wages earned by the debtor within the preference period which are subject to the lien of fieri facias are avoidable by the Trustee under 547(b).** The controlling "transfer" is not the date the checks for the garnished wages were sent by the state court to the creditor. (Court follows the holding of Hughson v. Dressler Motors, 74 B.R. 438 (Bankr. W.D. Va. 1987).

B114. **In re Palmer and Debra Goodbar**, #09-52018, Bankr. WD VA, Krumm 4/19/12 opinion. **Attorney's fees for defending initial partial award of fees.** Debtors' counsel filed for final compensation in this case; Chap. 13 Trustee and UST objected. [See Court's 6/29/11 opinion re initial request for fees; attorney requested $25,730 in fees and expenses; Court awarded $9,193.] Attorney requested $21,671 in fees and $1,299 for expenses, a total of $22,970. Discussion: Code 330(a)(6) says that the estate must compensate the attorney for time spent preparing a fee application; it does not say whether he should be compensated for defending an objection to a fee application. 330(a)(4)(A)(ii)(I) says the court shall not allow compensation for services not reasonably likely to benefit the debtors' estate. There is no benefit to the estate in this case from the time spent by the attorney defending against these objections. But a per se application of this section would unduly favor the objecting party, so this court will look to the good faith of the objection and whether the objecting party prevailed. No bad faith here; their objections resulted in a decision reducing the requested fees by 67%. Attorney now wants $18,000 for a defense that yielded only 33% of the fees he requested. Nunley v. Jessee case (Dist. Ct., 1988) held that a litigant who prevails on a fee award initially is entitled to additional fees required to defend those fees on appeal. Enactment of 330(a)(4)(A)(ii)(I) and (II) render the application of Nunley unnecessary. In this case the attorney did not "prevail" because 67% of his initially requested fees were disallowed. Held: Court will award $250/hr for the 5 hours spent on routine Chap. 13 services and $82.50/hr (~1/3 of the usual hourly rate) for the 72 hours spent in defense of his fee application. Total to be awarded will be $7,190.

B118. **In re Joseph and Karen West**, # 12-60595, Bankr. W.D. Va. (5/29/12 opinion; Anderson) **No relief from stay for secured creditor where debtor partly owns the car but is not liable on the note.** Secured creditor filed motion for relief seeking to repossess a car. Debtor wife's daughter and husband financed the car in their names, but title to the car was put into the name of the debtor wife and her daughter; the debtor wife did not co-sign the note. The debtors' plan will pay the claim in full, but at a lower than contract interest rate. Held: The debtor's interest in the car is property of the estate. The creditor has no claim against the debtor [footnote: *Court declines to address the issue of whether the debtor can provide for the debt owed by her daughter*]. Creditor's request for relief under 362(d)(1) must fail because it has no claim against the debtor and no lien on the debtor's interest in the vehicle. The fact that the daughter has failed to make timely installment payments would be grounds for granting relief from the co-debtor stay, but there is no co-debtor stay because there is no debt by the debtor here. Creditor can't claim a lack of ap over the collateral, because it has no interest in the debtor's interest in the car. No grounds for relief under 362(d)(2) re lack of equity in the collateral, because the debtor holds her interest in the car free and clear of the creditor's lien. Creditor's motion is denied.

B119. **In re Judith M. Burke**, # 11-51585, Bankr. Ct., WD Va (Krumm, 6/14/12 Opinion). **Late filed POC in Chapter 13 must be disallowed; Court has no discretion.** Debtor's *pro se* ex-husband filed his proof of claim 2 days after the bar date, and the debtor objected. The creditor testified that he did not receive a mailed copy of the debtor's objection, even though the debtor's service certification listed the correct address. There is a very strong presumption that a properly addressed piece of mail has been delivered. In re Ebersole, 453 B.R. 636 (Bankr. W.D. Va. 2011). He was therefore in default, but default is a matter within the Court's discretion, and the Court declines to enter a default order… Re the late filed POC: the creditor testified that he had difficulty getting access to PACER to file his claim; that he was in touch with the Clerk's office prior to the bar date; and that he had trouble getting access to a scanner and the

internet. Held: "It is not within the discretion of the Court to allow a claim that is late filed in Chapter 13." In re Nwonwu, 362 B.R. 705 (Bankr. E.D. Va. 2007). His claim is therefore disallowed.

B120. **In re Robert and Teresa Scott,** #12-60558, Banrk. W.D. Va. (Anderson; bench ruling, 7/16/12). **Court accepts u*nequal* equal monthly payments under 1325(a)(5)(B)(iii)(I) and plan para. 3.D. .** Court found that it was acceptable for debtor to propose post-confirmation monthly payments in paragraph 3.D. which "stepped up" once after a period of months, where step-up was the only way to pay within 60 months the amounts needed, where plan payments increased at that point and thereby made the step-up possible, and where the creditor and the Trustee were not objecting.

B121. **In re Angela D. White**, #11-60956 (AP # 12-06016), Bankr. W.D. Va. (Anderson, 5/29/12 opinion). **[Note: Opinion reversed by Dist. Ct.; see B133] Debtor cannot avoid the judgment lien of a creditor just because it files an unsecured claim.** Debtor listed Bank of America as a secured creditor with a recorded judgment lien against her home in the amount of $10,812. BOA filed an unsecured POC for $9,512. Debtor filed an A.P. to determine the extent and validity of the lien; the creditor did not file a response, and the debtor filed a motion for default judgment. Held: the facts as pleaded to not support the requested relief. Under 506(d) this claim is an allowed unsecured claim, but even though that section provides that a lien is void if it secures a claim that is allowed only as an unsecured claim, it is not true that neither of the exceptions apply. In this instance, 506(d)(2) applies: the lien is not void because the claim is not an allowed secured claim *only because* the creditor did not file a "secured" proof of claim. Pursuant to the rule of last antecedent, "such claim" in 506(d)(2) refers to the prior phrase "allowed secured claim." The creditor did not file a secured proof of claim, so the second exception applies and the debtor cannot avoid the lien.

B124. **In re Carl and Rita Lyall**, Bank. WD Va., #11-70535, 8/9/12 opinion (Stone). **Debtors will be allowed to amend their Sch. C exemptions post-confirmation because no bad faith present.** Debtors failed to claim any exemption on a 2004 truck on their Sch. C when case was filed. The creditor had a perfected security interest in the truck and other property of the debtors. The initially confirmed plan had the debtors continuing their payments to the creditor on this loan and curing a default. Under the proposed modified plan, the debtors want to avoid the lien on this truck as impairing the debtor's tool-of-the-trade exemption, which exemption had not previously been claimed. Forty days later the debtors filed an amended Sch. C claiming the exemption for the first time. Rule 1009(a)says that schedules may be amended at any time before the case is closed; there is little case law on this question. Because the Court finds no bad faith here (the debtors suffered a significant and unforeseen reduction of their income), and because the creditor was being paid sufficient amounts in the interim to provide it with at least adequate protection, the debtors will be allowed to amend their Sch. C post-confirmation.

B125. **In re Kimberly Bryant**, #12-61584, Bankr. WD Va. (Anderson, 8/23/12 bench ruling). **Above median debtor can pay required amount in a less than 60 month plan.** Above median case; debtor proposed a 48 month plan that paid to creditors more than they would have been entitled to according to Form B22C. Trustee expressed his concerns under 1325(b)(4)(B) and Baud v. Carroll, 132 S. Ct. 997 (2011) that case must go the full 60 months unless paying 100%. Judge ruled that because no one was really objecting, and because case was paying more than required and paying off early, this was "good for everyone," and the proposed plan would be confirmed.

B126. **In re Susan Jeffries**, #11-60219, Bankr. WD Va. (Anderson, 8/23/12 bench ruling). **Court's policy where mortgagee is seeking lifting of the stay on the debtor's residence and the debtor is in the process of obtaining a loan modification.** Where the mortgagee is seeking lifting of the stay on the debtor's residence, and the debtor is in the process of obtaining a loan modification, HAMP requires that no foreclosure be commenced. Court's policy will be to enter an order automatically lifting the stay 60 days in the future if the loan mod has not been completed. However, the debtor's attorney shall have the right to file, prior to the expiration of the 60 day period, a motion to extend the stay if there exist good reasons to keep the stay in place a while longer, and the Court will review the situation at that time.

B127A. **In re Lisa Rasnake and Ernest Coburn**, Bankr. W.D. Va., # 12 71221 & 12-71189, 9/24/12 opinion (Stone). **Virginia debtor can protect retirement accounts using either VC 34-34 or Bank. Code 522(b)(3)(C).** [Ch. 7 case.] Trustee

objected to the debtor's claim of exemption for retirement funds using 522(b)(3)(C), saying the debtor failed to use Va. Code 34-34. Held: The exemption for retirement funds, 522(b)(3)(C) applies even if the debtor lives in an opt-out state; the debtor can use either provision to protect retirement funds. Trustee's objection overruled.

B128. **In re Donna Hayes**, Bankr. W.D. Va., # 12-61487, 10/11/12 opinion (Anderson). **Under the facts of this case, there is no bad faith in the filing of the plan, and "Chapter 20" lien avoidance and confirmation of the plan will be allowed.** Mortgagee filed 2 motions for relief in the debtor's two prior Chapter 7 cases, the first of which was dismissed. The debtor obtained a discharge in the second case. Mortgagee, unsuccessful in trying to sell the property, agreed to modify the terms of the first lien. Debtor then filed a Chapter 13 case one year later. Plan called for payment of the attorney's fee and avoidance of the second lien on her residence; there were no unsecured or priority claims filed. Mortgagee signed a consent order avoiding the second lien; Trustee objected to the lien avoidance and the good faith of the filing on the basis of the Court's holding in the Helton case. Held: (1) the debtor may avoid this totally unsecured second lien even though she is not eligible for a discharge in this case. (2) Good faith in the filing of the plan requires review of the totality of circumstances. There are facts here that were not present in Helton: the mortgagee has consented to the lien avoidance, it was unsuccessful in trying to sell the property, and it has significantly modified its lien with the debtor. No bad faith here because the debtor has not "forced any creditor to accept a modification of its rights." Lien avoidance order will be entered, and the debtor's plan will be confirmed.

B129. **In re Ricky and Carol Clark (Stephens, Boatwright, et al, v. Beskin)**, Dist. Ct., W.D. Va., #3:12CV00020, 10/12/12 Opinion (Conrad). [**Note: Opinion affirms Bank. Ct. decision; see B109]** **No-look fee concept, Code sec. 330 factors, and Johnson factors properly applied in denying debtor attorney's $9,572 fee request.** Debtors' counsel filed a request for $9,572.50 in fees and $429.00 in costs. Counsel filed six plans before case was confirmed a year after filing. Wife was ill at filing, and died five months into the case. A second lien was avoided in an uncontested adversary proceeding. Trustee objected to the fees, recommending a fee of $2,750 + $250=$3,000, plus costs. Counsel appealed the Bankruptcy Court's ruling allowing $3,000 in fees and $779 in costs. Held: (1) The standard of review is for an abuse of discretion, since the Bankruptcy Court has "broad power and discretion" in determining fees. (2) The Court must look at the standards of Code 330(a)(3) and (a)(4)(B), and, says the Fourth Circuit , the twelve Johnson (488 F.2d 714, 5th Cir. 1974) factors. (3) The Court below used a $2,750 "no-look fee" as the starting point for evaluating the fee application. There is nothing improper about the Court's reliance on such a no-look fee. (4) The Court below did not give the no-look fee a "disproportionate amount of weight in its analysis." It considered the Code sec. 330 and Johnson factors to see if the no-look fee should be adjusted and provided several reasons for its decision. (5) The Court below properly addressed counsel's assertion that the death of the wife made the case particularly novel and difficult. (6) Given the degree of discretion accorded to the Bankruptcy Court in such matters, the fee award must be affirmed; it applied the appropriate factors, and made adequate findings of fact to support its decision.

B130. **In re Magic Wand, LLC**, Bankr. W.D. Va., #12-70404, 10/12/12 opinion (Stone). [Ch. 7 case]. **A POC's lack of documentation is not, by itself, sufficient grounds to object to a POC when the debtor has not disputed the validity of the debt.** Two unsecured claims were listed on the debtor's schedules as not being disputed. The creditors filed POCs without any documentation in the same amount as listed on the debtor's schedules. Ch. 7 Trustee objected to the claims because there was no supporting documentation. The creditors failed to respond. Held: 502(a) and Rule 3001(f) say that a properly filed POC is prima facie evidence of the validity and amount of the claim. As held by Judge Anderson in the Falwell case, the failure to file supporting documentation only deprives the claim of its prima facie validity. But a debtor's objection must be based on a good faith ground, and insufficient documentation is not such a ground. Here the Trustee's objections will be overruled. The account may or may not be based on a writing; if not, the requirement of Rule 3001 is not applicable. The burden is on the objecting party to "produce some evidence that the claim ought to be disallowed." Per Falwell, there must be "some asserted legal or factual basis to dispute the debt." The lack of documentation, standing alone, "is no reason to conclude that a debt which is in no way disputed by the debtor is not valid."

B131. **In re Henry L. Bolling**, Bankr. W.D. Va., #09-60353, 10/15/12 opinion (Anderson). **Creditor can obtain a state court judgment against the debtor on pre-petition corporate guarantees, but cannot record any such judgment as a lien.** Creditor sought relief from stay to obtain a judgment against the debtor on loans to a corporation that he had guaranteed; creditor sought to also record such judgments against the debtor's real estate in the state court. Trustee objected to the recording of any such liens because it would allow the debtor to amend his plan to avoid the liens and reduce the payout to the GUCs, and because if the case then converted to Chapter 7 it would put the creditor ahead of the other GUCs. Held: creditor can obtain a judgment in state court against the debtor based on the pre-petition guarantees, but may not record any such judgment.

B132. **In re Jerrilan Keys**, # 11-62887, Bankr. WD Va., 10/25/12 Order (Anderson). **Rule 3002.1 charge of $425 assessed by mortgagee against a totally current debtor disallowed, and debtor awarded $500 in attorney fees.** Debtor was current on mortgage pre-petition and remains current on mortgage post-confirmation. Mortgagee filed Rule 3002.1 notice assessing $425 in attorney fees against the debtor; there was no description of why the fees were incurred. Debtor objected, and sought disallowance of the fee and $1,000 in damages for the debtor's attorney fee incurred in objecting to this charge. Court ruled that the charge would be disallowed, and debtor's attorney would be awarded a $500 fee assessed against the mortgagee.

B133. **White v. FIA Card Services, et al (In re Angela D. White),** 494 B.R. 227, #4:12cv00022, Dist. Ct. WD Va., 11/7/12 opinion (Conrad). [**Note: Opinion reverses Bank. Ct. opinion; see B121] Secured creditor's lien should be avoided under 506(d) when it files an unsecured claim.** Creditor recorded a judgment lien of $10,812 against the debtor's real estate, and the debt was listed as a fully secured claim in this case. The bank's successor in interest filed an unsecured POC. The claim was transferred twice during the case. Debtor filed an A.P. seeking to avoid the judgment line via 506(d) because of the filing of the unsecured claim. There was no response. The Bankruptcy Court denied the debtor's motion, holding that the lien should not be avoided under 506(d). Held: [1] This Court agrees with the debtor that the term "such claim" in 506(d)(2) "refers not only to secured proofs of claim, but to a claim that is deemed unsecured only because of a creditor's decision to participate in the bankruptcy proceedings by filing an unsecured proof of claim" because(d)(2) refers to sec. 501, not 506(a). [2] (d)(2) "applies only when the creditor has failed to file a proof of claim of any type." [3] The Court distinguished Cen-Pen Corp. v. Hanson, 58 F.3d 89 (4th Cir. 1995). [4] The prior practice of allowing liens to remain enforceable if the secured creditor chose not to participate in a bankruptcy proceeding is still valid. Dewsnup; legislature history of the 1978 Code.]5] The creditor's claim will be paid in full through the plan, though without interest; now that the creditor has availed itself of this treatment by filing its claim, 506(d) requires that its lien be avoided now. Burnette decision (Bankr. W.D. Va., 11/18/11) cited; creditor cannot "have it both ways"; it can't have its claim paid under the plan and still retain its judicial lien. [6] The decision of the Bankruptcy Court is reversed and remanded for further proceedings consistent w/ this opinion. [**Note: the Court's 11/9/12 order says the lien shall be void for all purposes when the debtor completes her performance under the plan, and that she can't file this judgment with the state court until then or she has received her discharge.]**

B134. **In re Mary A. Mullen**, Bankr. W.D. Va., #12 61994, 11/30/12 opinion (Anderson). **Court declines to grant Trustee's request that confirmation in all cases with T by Es equity be continued beyond the bar date to review and ensure proper payment of joint claims.** Trustee objected to proposed plan because bar date had not run, there is T by E equity in the property, and the Trustee wanted to continue confirmation beyond the bar date to ensure that all joint claims were being properly paid. Trustee was requesting that the Court continue confirmation beyond the bar date in *every* case where there is T by Es property. Held: when an objection is filed, the burden is on the debtor to prove that the plan meets the statutory requirements for confirmation, including 1325(a)(4). Trustee reported that a modified plan was required in 65% of a random sample of cases with joint claims to correct payment of these joint claims. Trustee should focus instead on the percentage of cases with T by Es property—not joint claims—in which a modified plan is required. Trustee has 21 days to file a revised analysis of cases; Court will not enter an order on the merits at this time. [note: Trustee subsequently proposed a new process for the next year by which such cases would be confirmed before the bar date, the motion to dismiss would be carried out beyond the bar date to check on joint claims, and then, after a year, the Trustee would re-submit his motion to the Court with a year's worth of case date.]

B136. **In re Stephen and Kathy Akers**, Bankr. W.D. Va., #12-70999 & 12-70844, 12/10/12 Opinion (Stone). **When secured creditors can be compelled to release their liens.** Debtors' plan proposed that upon completion of all payments to the secured creditor, the creditor shall immediately mark on the title that the lien was released and deliver it to the debtor, or mark the judgment lien as paid in full in the state court land records. Neither case involved a cram-down; both involved pay-in-full claims. The Trustee objected to these provisions; the debtor asserted that since the creditors didn't object, they had consented to these provisions by their silence. Issue is whether the 1325(a)(5)(B)(i)(I) phrase "determined under nonbankruptcy law" modifies "debt" or "payment," and how Till should be applied to 1325(a)(5). Held: (1) 1325(a)(5)(A) contemplates an express rather than implied acceptance of a plan's treatment by the impaired creditor; Court will not interpret a creditor's failure to object as an acceptance that deprives the Trustee of his standing to make an objection. (2) Court cites Lundin for proposition that 1325(a)(5)(B)(II) means that the lienholder retains its lien until discharge even if the specific claim at issue is fully paid in accordance with the confirmed plan prior to discharge.

B137. **In re Kevin E. Hodnett**, Bankr. W.D. Va., # 12-71825, 1/14/13 opinion (Stone). **Debtor need no longer file a Homestead Deed to avoid a judgment lien against real estate where the exposed equity is less than the exemption which the debtor could claim.** Issue: whether the debtor must file a Homestead Deed to perfect a claim to exemption in order to avoid a judgment lien against real estate where there is some exposed equity in that property. Held: controlling authority from the Fourth Circuit [Botkin, 650 F.3d 396 (2011)] provides that no such deed must be filed, "which represents a change in the practice heretofore followed by this Judge." When there is no equity in the property in excess of non-avoidable liens, the debtor's right to exemption "is impaired as a matter of law"; "…there is no obligation upon the debtor even to claim any exemption" [Collier v. Jay Johnson Toyota, A.P. 7-00-00266, case # 7 00 02882 (Bankr. W.D. Va. 11/7/01)]. The Court hereby extends its holding in Collier to the situation "where the value of the exposed equity is less than the Homestead exemption which the debtor *could* claim." Because of Code sec. 348(b)(1)(B), any judgment liens so avoided will be treated as "conditionally avoided pending completion of the plans and issuance of a Chapter 13 discharge, at which time any lien avoidance granted will be considered final." The Court will add language to the confirmation order to that effect.

B138. **In re Michael and Anna Grayson**, Bankr. W.D. Va., # 12 71908, 1/25/13 opinion (Stone). **Court cannot waive the pre-petition credit counseling requirement.** Chap. 7 case. Pro se Debtors requested temporary waiver of the pre-filing credit counseling requirement because husband was seriously ill and wife had to stay home to care for him; the debtors understood that they would have to take the counseling within a time period specified by the Court, and did take the course a few weeks later. Held: sec. 109(h) is clear: debtors' statement must cite exigent circumstances and that they attempted but were unable to obtain counseling within 7 days of the request; without both, their certification is insufficient, and their case must be dismissed. The statute "does not excuse ignorance of its requirements." So these debtors are ineligible to be debtors in this case. Court cannot waive this requirement. Case dismissed without prejudice.

B139. **In re Bobby Bateman**, Bankr. W.D. Va., #12-62722, 1/29/13 Order (Anderson). **Disallowance of claim for failure to comply with Rule 3001(3).** Debtor objected to creditor's failure to comply with Rule 3001(3)-- POC failed to list last transaction, last payment date, date charged off—and asked for disallowance of the claim. Creditor failed to respond. Court entered default order disallowing the claim in full for failure to comply with Rule 3001.

B140. **In re Jean K. Mitchell**, Bankr. W.D. Va., # 12 70856, 1/30/13 opinion (Stone). **Discussion of liquidated, non-contingent, and undisputed debts under 109(e); Court must decide based on the schedules; debtor has the burden of proof.** Trustee contended that the debtor was not eligible for Chapter 13 because she exceeded the debt limits of 109(5). Held: (1) The critical time for determining compliance with this section is the date the petition is filed. In this case, counting the unsecured amounts on Sch. D, the amount of non-contingent, liquidated, unsecured debt is $384,819. (2) The debtor has the burden of proof in establishing eligibility, not the objecting party; Court will follow Judge Krumm in Mullins. (3) 4th Cir. Balbous decision requires the Court to add the unsecured portion of debts on Sch. D to the amount of unsecured debt. (4) The full amounts owing on joint obligations are treated as the debt for each borrower for

purposes of 109(e) eligibility. (5) The Court must evaluate the debtor's unsecured debt for purposes of 109(e) on the basis of the debtor's schedules. (6) Only collateral in which the debtor has an interest should be taken into account in determining to what extent a debt is unsecured for 109(e) purposes. (7) To be a contingent debt, the obligation to pay must be contingent on the happening of an extrinsic event or occurrence which has not taken place prior to the case being filed. Brockenbrough v. Commissioner, IRS, 61 B.R. 685 (W.D. Va. [Dist. Ct.] 1986). (8) Liquidated debts are those for which the amount is easily ascertainable using a simple mathematical calculation/ readily determinable be reference to an agreement. (9) Court will make this 109(e) determination based on amended schedules which correct some factual error, but not those amended for "a tactical litigation purpose." (10) Not relevant for 109(e) determination whether the creditor has filed a POC or even withdrawn a claim which was previously allowed. Even though the plan will pay the unsecured mortgage in full, etc., and the application of the law to these facts can "yield a result which may seen incongruous," Court holds that these debts are not unliquidated, disputed, or non-contingent; the debtor does not comply with the debt limits of 109(e); and unless she converts the case, it must be dismissed.

B141. **In re Leroy and Mary Jane Mull**, Bankr. W.D. Va., # 12 71486, 2/5/13 opinion (Connelly). **Debtor can't reopen a dismissed but still open case; Rule 9024 is the correct avenue.** Debtors' case was dismissed when they failed to file an amended plan within the time frame set forth in the Court's prior order. Then the debtors filed an amended plan and an improperly-docketed motion for request of additional time. Then they filed a motion to reopen the case. Held: (1) Because case had not been closed, sec. 350 doesn't allow the Court to reopen a case that hasn't been closed. Motion is untimely and procedurally improper. (2) Court will treat the motion as one under Rule 9024 to vacate the dismissal order. Motion denied, because no justification provided by the Debtors.

B142. **In re Leslie L. Ludwig**, Bankr. W.D. Va., #12 51167, 02/25/13 opinion (Connelly). **Factors in determining support obligation vs. property settlement obligation.** Debtor objected to the priority claim of her former spouse, alleging that it was a property settlement agreement and not in the nature of support. The ex-spouse had obtained a state court judgment against the debtor when she had to pay these debts herself. Held: (1) The creditor had the burden of persuasion that the debt fell under sec. 101(14A). (2) The critical question is whether the parties intended for this obligation to be in the nature of support at the time the agreement was executed. (3) Four factors to be considered: language & substance of the agreement; relative financial positions of the parties at that time; function of the obligation within the agreement; and evidence of overbearing at that time.(4) No intent her for this "existing debts" provision to provide for ex-spouse's common necessities; just provide for the "equitable division of the marital debts." (5) Obligation not in the nature of support, but a property settlement.

B142A. **In re Barry Randolph, UST vs. Darren Delafield**, Bankr. W.D. Va., # 12-71417, 3/7/13 opinion (Stone). **Court grants UST request for attorney to produce copy of his retainer agreement.** In this Chap. 7 case, the attorney will be allowed to redact sensitive provisions; Court denies UST request for fees against the attorney.

B144. **In re Palmer A. Goodbar**, Dist. Ct., WD VA, CA # 5:12cv063, 3/26/13 opinion (Urbanski). **Bankruptcy Court's award of interim and final fees requested by debtor's counsel is affirmed because it was not clearly erroneous and did not abuse discretion.** Background: Bankruptcy Court awarded debtor's counsel $9,192.62 in interim compensation ($2,650 for the main case, $5,160.50 for the A.P., $600 for the sale motion, and $782.12 in expenses). Attorney filed a final fee application for $21,671 for 77 hours or work and $1,299.15 in expenses; the Trustee objected. Bankruptcy Court awarded final fee of $7,190.00: 1/3 his usual fee for the 72 hours preparing and defending the interim fee application, and 5 x $250/hr for the services rendered directly to the debtor. Held: Court affirms the Bankruptcy Court decision and denies the Trustee's motion dismiss for lack of jurisdiction:
---(1) Trustee's arguments that the attorney's appeal did not reference both the Court's fee orders, and that it was not timely filed, do not have merit. The appeal was clearly being taken from the award of compensation for the whole case. Under Rules 8001 and 8006 this Court only dismisses an appeal when there is a failure to file a notice of appeal. Code sec. 330 and 331 make it clear that interim compensation orders are subject to later review and modification.
---(2) Such interim awards are interlocutory and not subject to review. In re Computer Learning Centers, Inc., 407 F.3d at 660 (4th Cir. 2005); In re Sandman Assoc, L.L.C., 251 B.R. 480 n. 12 (W.D. Va. 2000). [exception to that rule: when the

amount of compensation is no longer subject to modification.] "An appeal of the final order... of attorney's fees for the case as a whole preserves all issues addressed in previous interlocutory orders." In re J.T.R. Corp., 958 F.2d 602, 604 n. 1 (4th Cir. 1992).
---(3) Standard of review for the Bankruptcy Court's decision as to whether and in what amount to award fees is abuse of discretion; under all the facts and circumstances is it clearly wrong or erroneous? In re Dixon, 228 B.R. 166, 178 (W.D. Va. 1998); Rule 8013. For alleged errors of law the review is *de novo*. Here the Court's interpretation of the retainer agreement contract will be reviewed de novo; the amount of fees awarded will be reviewed under the abuse of discretion standard.
---(4) Court cannot consider the issues of whether the lower Court inappropriately (i) considered evidence of private settlement negotiations or (ii) applied the prevailing party doctrine because the attorney failed to brief these issues.
---(5) Code 329(b) requires this Court to carefully review attorney compensation and the Rule 2016(b) disclosure statement. Here there was a $2,650 flat fee, plus an hourly fee agreement for sales motions, A.Ps., etc. The Bankruptcy Court correctly concluded that the retainer agreement hourly fees did not apply to work associated with the main case. We reject the attorney's argument that the Rule 2016 disclosure and his retainer agreement are in conflict, thereby liberating him to charge fees in excess of the flat fee for work in the main case; it would render the 2016 disclosure meaningless, "contravene the goal of fee transparency of both sec. 329 and Rule 2016(b)," and "run counter to the attorney's ongoing duty to fully disclose fee agreements to the court."
---(6) The flat fee of $2,650 is a reasonable award of fees in the main case. The Court below has an independent duty to scrutinize the flat fee for reasonableness, and can require counsel to justify it. The burden of showing reasonableness is on the attorney. No abuse by the Bankruptcy Court in awarding this amount; it is below the standard $2,750 "no look" fee in the WD of VA.
---(7) The Bankruptcy Court did not abuse its discretion in deviating from the hourly rates set forth in the retainer agreement when awarding compensation for the sale motion and the A.P. The Court must look beyond the agreement and has an independent duty to examine the fees for reasonableness; the agreement is only one factor to use. Court must look at sec. 330 factors and the Johnson factors. The Court justified its reductions in the requested fees with an in-depth review of the time and expense records and well reasoned findings; there is no mistake here for this Court to disturb.

B145. **In re Robinette and In re Stamback**, #11-70557 and 11-71617, Bank. W.D. Va., 4/1/13 opinion (Stone). **Application of interim payments in a modified plan situation.** Issue: how wage order payments received between the time a modified plan is prepared and the date it's actually filed should be applied: to an existing delinquency under the confirmed plan or to the modified plan? Trustee is seeking to add an interim payment to the total of payments to be paid under the modified plan. Trustee argued that the only reason for the debtors not making all their required payments under the confirmed plan must be the incurring of a post-petition mortgage; such a failure cannot be the basis for reducing the unsecured pool, because there is nothing to suggest a change in their financial circumstances that justifies the reduction to GUCs. Debtors argued that the issue before the Court is only the narrow one of applying this interim payment consistently with the terms of the modified plan. Held: Trustee should have raised these failures to make post-confirmation mortgage payments before he recommended confirmation; he has not specifically objected to the plans on this basis. Adding this payment to the new plan wouldn't solve that larger problem. Debtors can expressly or implicitly include in a modified plan a waiver of payments due under a plan, and such a plan can be confirmed "where otherwise appropriate." Plan will be confirmed; Trustee's objections will be overruled.

B145A. **In re Dennis & Myrna Johnston**, Bankr. W.D. Va., #12-51263, A.P. #12-05066, 4/12/13 opinion (Connelly). **Debtors have the burden of proof in a lien avoidance action.** (1) Which party has the burden of proof in a lien avoidance action under 506(a) to determine collateral value is not defined by statute, and case law is not clear. (2) Since it's both a contested confirmation and claims allowance issue, Court could assign the b/p to either party. (3) Court will adopt Judge Stone's standard in In re Brown, 244 B.R. 603 (Bankr. W.D. Va. 2000): looking at the "underlying economic motivations of the parties," since the debtor is trying to prove the lowest possible value of the property , the debtor will have the burden to prove, by a preponderance of the evidence, that he's entitled to prevail. (4) The Court averaged the competing comparables provided by the parties, and adjusted some of them by the repair figures supplied by the

debtors. (5) Debtors failed to prove the property was worth less than the first lien, so the bank's lien is not wholly unsecured, so the request to strip the second lien is denied.

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

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

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

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

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

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

B150. **In re David and Amy Quesenberry**, #12,62001, Bankr. W.D. Va., 8/26/13 Consent Order (Connelly). **Rule 3002.1(c) notices are not claims, Trustee cannot pay them, and filing them is an administrative function.** Trustee sought a ruling from the Court that Rule 3002.19(c) notices were not claims that needed to be provided for in the debtors' plan. Court entered a consent order which stated that: (a) it was using the reasons set forth in In re Johnny and Christina Sheppard, #10-33959-KRH, Bankr. ED VA; (b) a post-petition Rule 3002.l (c) Notice of fees, expenses, or charges such as that filed in this case is filed for informational purposes only, and does not constitute a proof of claim or otherwise amend the proof of claim it is filed to supplement; (c) the Trustee is not obligated, and is not authorized, to make payments from estate property on fees, etc., set forth in Rule 3002.1 Notices, and is only authorized to make payments based upon proofs of claim filed under Code section 501 and allowed under section 502 or upon a specific Court order; (d) such post-petition fees, expenses, or charges shall not require modification of the debtor's plan to pay them; (e) instead, any such fees, expenses, or charges shall, if permitted by state or federal law and the applicable loan documents, and if not otherwise disallowed, be payable by the debtor outside the Plan unless the debtor chooses to modify his plan to provide for them and such fees, etc., are allowed claims in the case; (f) this ruling shall not prejudice or prevent Chase from recovering the fees and charges set forth in the Rule 3002.1(c) Notice outside the Plan and Chase expressly reserves all of its rights and remedies to collect such fees as permitted by state and federal law and the applicable loan documents; and (g) filing this supplement should be an administrative function that the creditor can accomplish entirely on its own without the need of an attorney.

B151. **In re Richard and Shirley Niday**, Bankr. W.D. Va., # 11 72491, 8/27/13 Opinion (Stone). **To pay off a confirmed 36 month case early, a below median debtor must modify his plan under 1329 and prove good faith.** Issue: Does 1325(b) provide below-median debtors in a confirmed 36 month, less than 100% plan with "an unqualified right to pay off early their remaining payments"? This was a 20% plan with significant litigation between the debtors and the primary lending bank. Trustee objected to the early discharge b/c there was $65K of life insurance on the wife for which the husband was the beneficiary; the wife died after confirmation. The beneficiary of the wife's life insurance was changed from the husband to the children at some point, but the timing is unclear. The husband was using money from an

exempt workers comp. claim settlement to pay off the case early. The Trustee refused to accept the payment of these proceeds to complete the plan payments, which caused the matter to be brought before the Court. Held: there is no such unqualified right, but the debtors may seek modification of the confirmed plan for that purpose under 1329. (1) Judge Krumm previously held, in an above-median case, that the ACP is a temporal requirement. In re Hylton. (2) There was no pre-BAP & CPA recognized right to pay off early that was retained after 2005 and that continues to remain viable for under-median debtors. (3) The ACP is "a material element of the confirmation bargain not subject to reduction absent a modification" under 1329. (4) The Court understands that "it arguably ventures beyond the rational employed by the Court of Appeals in *Arnold* and *Murphy,* but a "fresh analysis" is warranted b/c (i) both cases were governed by pre-BAP & CPA law that didn't contain expanded creditor rights under sec. 315(b)(2), 521, or the ACP concept, and (ii) focusing on the funding source to pay off a case "could easily lead to gamesmanship by canny debtors." (5) If this case were to be heard by the Court of Appeals now, it would approve an approach under which all of the relevant circumstances surrounding an early payoff would be taken into account in deciding whether to allow it. (6) So to obtain an early discharge, the debtors need to obtain modification of their plan to do so. See In re Fridley, 380 B.R. 538 (9th Cir. BAP 2007). They would bear the burden of showing compliance with 1329, including good faith. An evidentiary hearing will be necessary. [Note: Judge Connelly has stated that she will not require such a motion or showing if the Trustee has no objection after determining the source of the pay-off funds.]

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

subrogation presents an issue of first impression: would "Virginia law allow a secret creditor to be equitably subrogated to the rights of a previous creditor to the detriment of a BFP"? This remedy is another equitable remedy, and therefore a BFP would take the property free of this remedy. It is concerned with an invalid security interest, not one that the creditor failed to perfect, so equitable subrogation "would not be appropriate in these circumstances," as it would "reward a creditor's negligence to the detriment of others. " (11) The CR has also sought relief under Code sec. 105. But there is no Court order to effectuate, and such relief would be "contrary to the purpose of the Code." (12) The Trustee is granted summary judgment on his request to void the CR's unrecorded d/t; the lien will be removed as of the petition date. (13) Therefore the CR is an unsecured creditor who must file his POC within 90 days of the 341 mtg.; the CR's claim was filed 38 days late, and was therefore untimely. Because the Court may not extend the filing date, the CR's claim cannot be allowed under 502(a), and the Trustee is entitled to summary judgment on this count as well.

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

B153C. **In re Amanda Dotson**, Bankr. W.D. Va., #09-72188, A.P. # 13-07027, 10/16/13 opinion (Stone). [Chap. 7] **Post-discharge collection actions justify a judgment under Code sec. 105 for $9K in damages, but Court has no jurisdiction to award damages under FDCPA for such actions.** Action by debtor for post-discharge collection actions by a creditor. (1) Bankruptcy Courts do not have jurisdiction to hear Fair Debt Collection Practices Act ("FDCPA") cases arising out of post-discharge actions. (2) But the Court does have power under sec. 105 to enforce its discharge injunction by awarding damages and attorney's fees against a creditor who has ignored or defied the injunction. (3) Here the creditor's actions were in "reckless disregard of the existence of the discharge" and sufficiently egregious to justify an award of $2,663 in compensatory damages, $2,500 in punitive damages, and $3,840 in attorney's fees, plus a $10,000 judgment for contempt if the damages aren't paid in full within 30 days.

B154. **In re Glenn and Julie Hilton**, 12 61102, Bankr. W.D. Va., 12/02/13 opinion (Connelly). **Framework for burden shifting in an objection to a claim; insufficient documentation alone is insufficient grounds.** Debtor and Trustee objected to a deficiency POC following a surrender of real estate. Court overrules T's objection but sustains the debtors' objection. Facts: BB&T held the first mortgage; BB&T Commercial ("BB&TC") held the second mortgage. The plan proposed to surrender the RE that secured both liens. Both lienholders filed secured claims prior to the claims bar date. The confirmed plan provided that the lienholders must file any unsecured deficiency claim within 180 days of confirmation, and document the liquidation of the collateral and how the proceeds were applied. Within the 180 days BB&T filed a deficiency claim for a potential deficiency on BB&TC's claim, based solely on the appraised value of the house, since the property had not been liquidated. Both the Trustee and the debtors objected to the POC because it failed to document the liquidation of the collateral and how the deficiency was computed. Discussion: (1) Before sustaining an objection to claim based on violation of a confirmation order, the Court must first apply the burden-shifting framework of In re Harford Sands, 372 F.3d 637 (4th Cir. 2004). (2) In considering the effect of 1327, the plan language should be afforded considerable weight and be treated as a new and binding contract. (3) Confirmation order is generally treated as res judicata as long as creditors received notice sufficient to satisfy due process. Linkous. (4) Failing

to file the required documentation to a POC does not disallow the POC entirely, but only deprives it of its prima facie effect. FRBP 3001(c)(1) and (f). (5) Under Harford Sands, once a creditor files a prima facie valid POC, burden shifts to the debtor to introduce evidence to rebut the claim's presumptive validity that demonstrates a true dispute, negates at least one fact necessary to the claim's legal sufficiency, and has a probative force equal to the contents of the claim. Falwell. (6) But even if the POC lacks the requisite documentation required under Rule 3001, the debtor must have some other legally sufficient grounds for challenging the claim. (7) If the debtor carries his burden of making a proper objection, the burden shifts back to the claimant to prove the amount and the validity of the claim by a preponderance of the evidence. (8) The language of the confirmed plan enlarged the deadline and expanded the documentation requirements beyond Rule 3001. (9) The BB&T POC was filed timely, but lacked documentation sufficient to afford prima facie validity. But the burden still rested with the debtors, since this defect alone was "insufficient to defeat the claim." (10) Trustee's objection is overruled because it only alleges failure to comply with the documentation requirement. (11) Trustee's concern over finality and certainty could have been resolved using 502(c) for an estimated POC, which the Trustee can pay. The parties can agree on such a claim amount, or they can obtain Court approval of such a claim. But here there is no such estimated claim, and there is insufficient evidence to estimate the correct amount. The Court declines to consider BB&TC's deficiency claim to be a valid estimated POC. (12) Regarding the debtors' objection, it was sufficient to call into question the validity of the POC, because it alleged and put on evidence of other factors challenging the legal basis of the claim: failure to liquidate other collateral, no efforts by the creditor to foreclose, failure to apply proceeds, etc. The burden was shifted back to the creditor, and it failed to carry its burden to prove the validity of the claim by a preponderance of the evidence: no evidence of how BB&TC calculated the amount of the POC or why the amount was inconsistent with the amount claimed, and the value of its other collateral. (13) Court won't excuse BB&TC from the time frames of the confirmed plan: they were bound by them, failed to object to them, and failed to ask for an extension of them. Held: The deficiency claim fails, and any amended claim for a deficiency is hereby barred.

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

B157. **In re Robin Tomer**, #08-61265, Bankr. W.D. Va., Black opinion 03/14/14. **Creditor's request for debtor documents under 521 after debtor had completed plan payments is denied.** Creditor asking for debtor's tax returns in the 59th month of her plan under 521. Debtor's $171K debt to the CR had already been deemed to be non-dischargeable (criminal embezzlement). Debtor had completed her plan payments; Trustee opposed the motion. *Held:* Nothing here to support that this motion would assist in the administration of the bankruptcy estate or support a post-confirmation modification of the plan. 521 "not intended to be a discovery tool" to assist in the collection of non-dischargeable debts. CR has made no showing that this information cannot be obtained from any other source; he has no absolute right to these documents; the request must meet the A.O. standards published to safeguard confidentiality in these circumstances. Motion denied.

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

B159B: **In re Adina Sexton**, Bankr. W.D. Va., 508 B.R. 646, 4/1/14 opinion (Connelly). **[Chapter 7 case] The IRS' post-petition setoff of the debtor's exempted tax refund to satisfy a non-tax debt (Farmers Home deficiency) held to be a violation of the automatic stay.** Court: neither the Supreme Court nor the 4th Circuit have addressed what type of property interest a debtor has in a tax overpayment when the intercept provisions apply. 362(b)(26) exempts from the automatic stay a tax setoff with respect to a taxable period that ended before the case was filed, but it only covers tax liabilities, not liability on non-tax debts. The Debtor's right to a tax refund vested in her bankruptcy estate and instantly acquired the protections of the automatic stay. Settled law in the Fourth Circuit states that a properly claimed exemption

trumps a creditor's right to offset mutual prepetition debts and liabilities. The Debtor's interest in her tax overpayment becomes fixed at the close of the relevant year (at midnight on December 31st). The IRS *could* set off these amounts without getting relief from stay if the debt were a tax debt. The IRS is ordered to release the sequestered funds and reimburse the debtor for her actual damages. The IRS' actions were willful, but not sufficient to warrant the imposition of punitive damages. [Appeal to Dist. Ct. dismissed by order, 3/31/15]

B160. **In re Rachel Ulrey**, Bankr. W.D. Va., #13 70645, 6/2/14 (Black). **Debtor's rights to her residence still property of the estate even if foreclosure sale completed before case filed; bank bound by the confirmation order allowing her to cure the default.** Mortgagee moved to revoke confirmation and to obtain relief from the stay. Foreclosure of debtor's home was held ("knocked down") 45 minutes before the debtor filed her pro se case; the creditor bid in the property. The foreclosing trustee completed a brief memorandum of sale on the bidding instructions he had received from the mortgagee. The plan provided that the $10K in mortgage arrears would be cured without interest, *pro rata,* at the rate of $212.77/mo. for 47 months. *Held:* (1) Debtor and the Trustee allege that the memorandum of sale was legally deficient, so the debtor's legal or equitable interest was still in effect when this case was filed. (*In re Wolfe*, 39 B.R. 260, Bankr. W.D. VA. 1983.) Based on the standards laid down in *Holston v. Pennington,* 225 Va. 551 (1983), the Court finds that there was a sufficient memorandum of sale, and it was completed before the bankruptcy case was filed. (2) Trustee further argues that the creditor's motion is too late, that it is bound by the confirmation order (*Espinosa*). The Court, "by the thinnest of margins," finds that "the necessary circumstances sufficient to challenge the confirmation order are not present here." (3) Even though there's case law saying her property did not become property of the estate, she still had a possessory interest in the property and the right to challenge the validity of the sale; those rights survived the bankruptcy filing. Had Suntrust raised these sale issues before confirmation, the plan may not have been confirmed, but the Court does have jurisdiction in this matter. (4) Once the confirmation order was entered, debtor had obligations to the bank, and she is in default of those. She will be given 30 days to bring her plan payments current; if she fails to do that, the stay will be automatically lifted without further order of the Court. The filing of a modified plan to cure this arrearage will not be permitted.

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

B161B. **In re Christopher Martin**, Bankr. W.D. Va., # 12 60576, 11/10/14 order (Connelly). **Court denies debtor's attempt to avoid mortgagee's lien after stay lifted and two years after plan was confirmed paying arrears on this claim as secured.** In March, 2012, the Debtor's schedules showed the BOA first lien was less than the value of the Debtor's home and the BOA second lien had some equity on which it could attach. The Debtor's proposed plan, which proposed that the Trustee would make cure payments on both of BOA's liens, was confirmed. But BOA's POCs showed that the first lien was really MORE than the value of the RE. The Trustee began disbursing on the mort. arrears for both liens. Two years later, in July, 2014, BOA filed a MTLS—alleging that all but 5 post-petit. payments were in default--and the Court denied the motion [motion was *not* granted; see via 2/5/15 order correcting an error of fact in the order] . Two days later the Debtor filed a motion to avoid BOA's first lien based on sec. 506. BOA failed to respond. No one appeared at the scheduled pre-trial conf. on the motion for a default judgment. Held: The relief requested by the Debtor is "inappropriate" because: it is contrary to the terms of the confirmed plan; finding now that BOA is not a secured creditor

would violate the res judicata of the plan's confirmation; the Debtor has not explained why he waited 24 months after confirmation and the bar date to bring this motion; the Debtor had the necessary information to take this action prior to confirmation; the Trustee has been making disbursements on the mortgage arrears claims, and has been allocating funds to the GUCs based on that; to rule favorably on the Debtor's motion would make the plan unfeasible and call into question the Trustee's disbursements to BOA; this may result in "impossibility" because the Debtor may not be able to amend his plan to deal with the additional $44,301.14 in unsecured claims; and the Debtor (attorney) failed to appear at the pre-trial conf. Debtor's complaint against BOA is *dismissed. On 2/5/15, Court denied debtor attorney's motion to vacate the dismissal of the A.P. complaint, and amended the 11/7/14 order to state that the consent order denying relief is corrected to say that the debtor was current in his post-petition payments to Nationstar and the debtor opposed the motion for relief.*

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

B163. **In re Jeffrey and Kelly Kiser**, Bankr. W.D. Va., # 14 71331, 1/15/15 opinion (Black). **Secured creditor failed to carry its burden to prove its entitlement to post-petition, pre-confirmation fees.** Secured creditor Ally filed POC for $16,300. Car valued on schedules at $16,000. Debtor provided for claim in para. 3.C. and 3.D., AP payments at $250/mo. and then $15,000 at 5% interest to be paid at $250/mo. x 60 mos. Nothing put in para. 3.A. Ally objected, saying it was entitled to post-petition pre-confirmation atty fees of $375 based on its sales contract and because it is a 910 creditor; no evidence presented of it being an over-secured creditor. Ally later filed an affidavit saying its actual time was $1,617. *Issue: is Ally entitled to post-petition, pre-confirmation attorney's fees?* Held: (1) Ally's objection is not well taken. (2) Debtors failed to cram down the claim in para. 3.A., so creditor is entitled to balance owed on its debt. *In re Cassell, 13 71980, 2014 W.L. 1017622 (Bankr. W.D. Va. 3/14/14).* (3) Ally had the burden of showing the fees are reasonable. Court will look at the lodestar figure (reasonable # of hrs. x reasonable rate) using the 12 Johnson factors. (4) Ally failed to provide detailed description of its services or put on evidence to justify its fee, and its proposed resolution provides for the same terms the plan already gave it. It therefore failed to carry its burden of proof. *Ally's request for fees is denied, and plan is confirmed.*

B164. **In re Michael Chidester (Cincinnati Insurance Co. v. Chidester)**, Adv. Proceed 12-05008 (Case 11 51591) (Bankr. W.D. Va., 1/28/15 (Connelly). **[Chapter 7 case] Interpreting defalcation under Code sec. 523(a)(4).** Court grants Insurance Company's motion for summary judgment, finding that the debt owed it by the Debtor was a breach of his fiduciary relationship as guardian for his stepfather, and therefore it was non-dischargeable for defalcation under Code sec. 523(a)(4) Such a finding requires proof of subjective recklessness akin to criminal recklessness per the Bullock decision of the U.S. Supreme Court. The Court found in this case that the Debtor had "consciously disregarded a risk his actions could violate a fiduciary duty" and that such disregard was "substantial and unjustified."

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

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

---3/16/16: **District Court opinion: 5:15-cv-00026 (Dillon).** Court affirmed the Bankruptcy Court decision. (1) Va Code sec. 8.01-30 and -442 changed the common law doctrine of merger in these situations. (2) Court rejects debtors' arguments that the lower Court erred in interpreting and applying 8.01-30 and their "crabbed reading" of that provision. (3) Court's interpretation comports with the Restatement of Contracts, sec. 292(1). (4) The provision is not limited to actions where a debtor was sued and then non-suited. (5) The outstanding balance on the Mastercard debt is a joint debt.

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

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

B168. **In re William Fisher,** Bankr. W.D. Va., # 14 61076, 03/19/15 (Black). **Debtor has absolute right to dismiss case under 1307(b), but Court can impose conditions on the dismissal.** In 10/14, Court lifted the stay for two secured creditors. Debtor later filed an A.P. against one of the creditors, and began proceedings in state court. After adverse rulings in both courts, and facing multiple objections to his proposed plan, the debtor moved to dismiss his case under 1307(b). A creditor moved to convert the case to Chapter 7, and the Trustee advocated for dismissal. Debtor argues his right to dismiss is absolute; the creditor says it may be limited by bad-faith conduct or abuse of the bankruptcy process. Held: Debtor's motion to convert is granted via 1307(b), but, applying 109(g)(2), there will be a bar to refiling for 180 days from dismissal. (1) Courts were split on this issue, but Law v. Siegel "changed the playing field." (2) A Bankruptcy

Court does not have discretion when ruling on a 1307(b) motion if the debtor makes the request and the case has not been previously converted. (3) Bad faith concerns do not curb the debtor's right to dismiss; courts cannot graft a bad-faith exception if the statute itself contains no such basis. (4) Sanctions for bad faith exist independent of 1307(b). See, e.g., 109(g)(2), 362(c)(3) and (4), 349(a). And nothing in 1307(b) prohibits dismissal on terms and conditions. (5) To allow a creditor to convert a Chapter 13 case to Chapter 7 would allow the creditor to effectuate an involuntary petition without satisfying Code sec. 303. (6) This situation is different from that in Marrama, where the Supreme Court interpreted 706(d) to say that a debtor's bad faith conduct barred him from being eligible to be a debtor in Chapter 13, and such eligibility was an express condition of that section. (7) Regarding opinions that have held otherwise (e.g, Mitrano), 706(d) is different from 1307(b) because of "may" vs. "shall," and because of the eligibility requirement that is not present in 706(d),so this situation is distinguishable from that in Marrama. (8) Applying a bad faith exception to 1307(b) would contravene the code and exceed the authority of the Bankruptcy Court, and would contravene the Supreme Court's guidance in Law v. Segal for the Court not to contravene specific statutory provisions. (9) The Court finds a sufficient causal nexus between the order granting relief and the motion to dismiss to warrant the application of sec. 109(g)(2).

B169. **In re John and Donna Randall**, Bankr. W.D. Va., # 14 61552, 3/31/15 opinion (Connelly). **Cannot use Code 522 to avoid a judgment lien against one debtor if property owned as tenants by the entirety.** Debtors filed a motion to avoid two judgment liens under 522. The two judgments are against only the husband, and their property is owned by them as Tenants by the Entireties. Debtors argue these judgment liens impair their T by Es "exemption." Held: "When a party owns property as a tenancy by the entirety, a lien against one tenant is not a lien on the property." So these liens do not attach to the debtors' property. *See* In re Smith, #10 50687, Bankr. W.D. Va. 12/22/10 (Krumm opinion) [B70]. Debtors motion to avoid the liens is denied.

B170. **In re Michael Ingalls**, Bankr. W.D. Va., #14 62427, 6/5/15 (Connelly). **Upon conversion of Chapter 13 case to** Chapter 7, Court cannot order the Trustee to disburse to debtor's counsel funds on hand from the debtor's post-**petition wages .** 5/27/15: debtor's counsel applies for fees in an unconfirmed Chapter 13 case; 6/2/15: attorney filed to convert the case to Chapter 7 before any order on the fees had been entered. *Issue*: Does the Court have the authority to grant the application for attorney fees to be paid from funds held by the Chapter 13 Trustee in light of the conversion to Chapter 7? *Held*: Citing Harris v. Viegelahn, Court says that upon conversion the Chapter 13 Trustee is no longer authorized to disburse funds held for the benefit of the debtor's creditors, including counsel for the debtor. Code sec. 348(e). The Trustee must return all funds still held by him post-conversion to the debtor. Court therefore may not now order the Chapter 13 Trustee to disburse the debtor's post-petition wages to the attorney, as that would be inconsistent with Harris.

B171. **In re Philip Groggins,** Bankr. W.D. Va., # 14 71033, 6/24/15 opinion (Black). **Grounds existed to convert pro se debtor's case to Chapter 7 on Chapter 13 Trustee's motion.** Pro se debtor filed case on 7/23/14; it was dismissed 8/14/14, with a 180 day bar from refiling; upon reconsideration on 9/9/14, the Court reinstated the case. It was continued multiple times to track the status of the debtor's criminal case pending in the District Court; it was still unconfirmed when the Trustee filed a motion to convert to Chap. 7 on 5/29/15 b/c the debtor was sentenced to 27 mos. in prison for unpaid taxes and bankruptcy fraud. Trustee alleged multiple non-disclosed assets and income in his motion. Debtor said he had set aside funds, his daughter has a POA, and he wanted to play a role in any subdivision of his long-time property. Held: (1) It's been 10 mos. since the case was filed; it is unlikely that the debtor will be able to obtain a confirmable plan at this time; no plan has been filed, only a one page statement about how payments will be made, and no provision has been made for the $832,175 secured and unsecured claim filed by the bank. (2) There exists cause to convert the case to Chap.7 b/c the debtor's inability to file a confirmable plan constitutes an unreasonable delay that's prejudicial to creditors, 1307(c)(1). (3) Conversion is in the best interests of creditors and the estate, b/c there may be equity in the real estate, and since he's proceeding pro se, appointment of a Chap. 7 Trustee will facilitate final resolution of the case. (4) Case shall be converted to Chapter 7.

B174. **In re Cynthia Harris**, Bankr. Ct., WD VA, # 15 61016, 9/8/15 Order (Connelly). **Motion to avoid judgment lien filed within 90 days under Code sec. 547 is denied.** Debtor and Trustee sought avoidance of a judgment lien filed by Discover Bank within 90 days of the filing of this case. Discover did not respond to the motion. The motion is *denied: (1)* Insufficient facts were pled upon which to base relief under Code sec. 547; (2) no facts pled to show that the creditor would have received more than it would have under a Chapter 7 liquidation; (3) judgment liens docketed within the 90 day period "are not *per se* preferences; (4) actions to avoid liens under grounds other than 522(f) are governed by Part VII of the FRBC, and should be filed by an adversary proceeding, not a motion.

B174A. **In re Timothy and Amy Alther**, Bankr. W.D. Va., # 14 62429, 9/11/15 opinion (Connelly). [**Chapter 7 case.] Motion to dismiss for abuse under 707(b)(2): special circumstances, 401-k loans, potential Chapter 13 dividend, etc.** UST brought a motion to dismiss this Chapter 7 case as presumptively abusive; Court held that the debtors had failed to prove special circumstances, and the case was dismissed under sec. 707(b)(2) unless the debtors convert to Chapter 13 within 21 days. Their current income was $182,154/yr gross, but their line 56 claimed additional expense claims totaled $2,252/mo., which caused their sixty-month disposable income to become negative. Held: (1) To rebut a presumption of abuse under sec. 707(b)(2), debtors must demonstrate "special circumstances," which must be "unusual, yet necessary." (2) A 401-k loan "is not a secured debt, so payments on it are not "secured debt monthly payments" under sec. 707(b)(2). (3) Court declines to address the issue of whether the debtors can claim a "clunker expense" on line 56. (4) Voluntary 401-k contributions are not "special circumstances" under sec. 707(b)(2) because they are not unusual and there is a reasonable alternative of not making them; whether the debtors can claim this expense as a deduction in a Chapter 13 case does not alter this conclusion. (5) The alleged income reduction will not be allowed because it is not based on fact, and debtors are required to provide documentation and explanation of any such income adjustments. (6) The dividend that the debtors could pay in a Chapter 13 case is not a "special circumstance" or grounds to rebut the presumption of abuse under sec. 707(b)(2). The Koonts opinion by Judge Anderson (1/12/10, 08 61880) only applied to abuse under sec. 707(b)(3)

B175. **In re Sandra Colston**, Bankr., WD VA, # 15 70654, 10/14/15 opinion (Black). **Court analyzes good faith requirements under 1325(a)(3), 1325(a)(7), and 1307(c).** Creditor filed an objection to confirmation, alleging undue influence, fraud, and willful and malicious injury to property by the Debtor. Trustee recommended confirmation. The objection was sustained by the Court, and the case dismissed. (1) The Debtor "preyed upon ...[Ms. A's] weakness of mind and clear affection for her...", received over $414,000 in money transfers from Ms. A, and charged over $39,000 on Ms. A's credit card. (2) This case was filed two weeks before a state court trial seeking judgment for fraud, undue influence, etc., was scheduled to begin; that Court entered a judgment for $225,000 and $167,000 in attorney fees against the Debtor. (3) The Debtor's proposed plan would have required her mother to make a contribution of $433/mo. toward the plan payments. (4) Pre-petition misconduct is but one factor to consider in evaluating the good faith requirement under Neufeld v. Freeman (4th Cir.). (5) "The technical sufficiency of a chapter 13 plan does not necessarily satisfy good faith in filing a bankruptcy petition." In re Tomer, Dist. Ct., WD VA, 7/14/09, # 4:09CV008, 2009 WL 2029798. (6) Under Code sec. 1325(a)(3), the Debtor bears the burden of proving by a preponderance of the evidence that the plan was proposed in good faith. That burden has not been met here: the estimated 33% distribution was actually 4%; there would only be a nominal payment on a potentially non-dischargeable claim; the case was filed solely to impede Ms. A from recovering the assets taken by the Debtor; there's a substantial likelihood that this debt would be declared non-dischargeable in a Chapter 7 case; the Debtor was unremorseful about this debt in her testimony; and the Debtor failed to disclose in her schedules a last-minute transfer to her mother of a $10,000 home generator. (7) The Court does not reach the issue of feasibility in this case, but notes that a family member's gratuitous payments to a Debtor may not constitute "regular income" under Code sec. 109(e). (8) Under Code sec. 1325(a)(7), the Debtor bears the burden of proving by a preponderance of the evidence that the petition was filed in good faith. Ultimately, the inquiry is whether the filing is "fundamentally fair to creditors... and fundamentally fair in a manner that complies with the Bankruptcy Code." Looking to the standards used in evaluating motions under 1307(a) is helpful. The last minute filing and de minimis repayment on a highly likely non-dischargeable claim support a finding of lack of good faith. (9) As to the proper remedy: authorizing additional time to file a second amended plan is not in the best interests of creditors, as it would be

"fruitless." The petition is dismissed under Code sec. 1307(c)(5). Conversion to Chapter 7 is not in the best interests of the creditors because there are no significant assets or avoidable transfers. (10) The Debtor can refile in the future if her situation changes and she can "file a more meaningful plan."

B176. **In re Charisse Vaughan**, Bankr. WD Va., # 12 61986 & 15 62035, 12/18/15 order (Connelly). **Debtor can, under certain circumstances, file a Chapter 13 case while her prior Chapter 7 case is still pending and the case will not be dismissed under Local Rule 1017-2.** Debtor received a discharge in her Chapter 7 case on 12/20/12. Trustee then filed an asset report. The Trustee and the debtor agreed that she would pay the Trustee six monthly installments to prevent the Trustee from trying to collect an avoidable transfer. The debtor defaulted on the payments, and the Trustee obtained a default judgment on 6/17/13. While that case was still pending, the debtor filed a Chapter 13 case on 10/28/15, so that she had two cases pending at the same time, in violation of Local Rule 1017-2. Debtor amended her proposed plan to pay the avoidable transfer claim to the Chapter 7 Trustee as an administrative claim, and acknowledged she was not eligible for a Chapter 13 discharge and was not seeking to satisfy debts that were discharged in the Chapter 7 case. At a hearing, all parties urged the Court to allow the Chapter 13 case to proceed. *Held:* Citing In re Brown, 399 BR 162 (Bankr. WD Va. 2009, Judge Krumm), the Court stated that the bar of LR 1017-2 is limited to cases where the petition seeks to discharge the same debts, or to materially hinder the administration of the earlier case. The debtor in this case is not seeking to do either, so the LR does not require dismissal of the Chapter 13 petition. Both cases will remain open pending further order of the Court.

B177. **In re Yolanda Mosley-Ridley**, Bankr. Ct. W.D. Va., # 14 60323, 12/23/15 opinion (Connelly). **Chapter 7 case. In reviewing the reasonableness of debtor attorney fees, the Court may consider the attorney's unethical conduct in scheduling, and failing to amend, property value he knew to be incorrect.** UST sought review of attorney fees paid to debtor's counsel ($1,500) based on alleged violations of the Va. Rules of Professional Conduct [Rules 3.3 and 4.1: ethical obligation not to make false statements to a tribunal] and on excessiveness. Property was listed in debtor's schedules as being worth $117,500 based on a BPO; the mortgagee later submitted a reaffirmation agreement that stated a value of $218,200. Chapter 7 Trustee has noticed the case as an asset case. *Held:* (1) In reviewing fees under Rule 2017(a), the Court may impose sanctions for violations of the rules of professional conduct, and may under Code sec. 329 use unethical conduct as a factor in analyzing the reasonableness of fees paid by a debtor. (2) The duty of candor requires professional conduct analogous to conduct required under FRBP 9011, which substantially conforms to FRCP 11. (3) The Court notes the discrepancies between the property value set forth in the schedules and the position taken by the attorney in these proceedings on the one hand, and the content of some intra-office memos on the other, and finds it "troubling" that no one in the attorney's office believed the property to be worth the value set forth in the schedules. (4) Under Code 707(b)(4)(D) the attorney has a duty to verify that the information disclosed in the schedules is "accurate and substantiated." (5) The attorney knew the true value of the property exceeded the amount scheduled, and should have amended the schedules. He therefore "has violated his ethical duties under the Va. Rules of Professional Conduct of candor toward the Court and truthfulness to others." (6) Previous reprimands of this attorney did not remedy the misconduct, so the Court will hold a hearing on the imposition of sanctions. (7) The Court declines the UST's request to reduce the attorney fee "at this point in the case."

--Dist. Ct., W.D. Va., #3:16-MC-00001, 2/17/16 opinion (Conrad). **Attorney's interlocutory appeal is not appropriate in this case.** The Bankruptcy Court's 2/23/15 order was not a final order and did not finally dispose of the dispute between the parties, as the Court had not yet ruled on any sanctions.

B178. **In re Phillip and Brandy Robertson**, Bankr. Ct. W.D. Va., # 13 71986, 12/30/15 opinion (Black). **Debtors may provide that Rule 3002.1 post-petition charges be paid by the Trustee, but they must add additional funds to the plan to cover these charges; they should not be paid from funds earmarked for the unsecured creditors.** Chapter 13 Trustee filed a motion to pay Rule 3002.1 post-petition fees, expenses, and charges in 9 separate cases, both already-sought fees and future fees, in these cases and in other cases. The Trustee proposed that the fees were to be paid subject to certain conditions: (1) there would be no impact on Chapter 7 test requirement; (2) all of the debtors' disposable income has been committed to the plan; (3) payment of the charges would not reduce any noticed 100% dividend; and (4) due process would be satisfied by the use of standard notice language to be put in paragraph

11 [advising the unsecured creditors that the actual percentage payout may vary from the noticed percentage because the Trustee will pay 3002.1 charges from the general unsecured creditors pool; if you object to this proposal, you must object before confirmation]. The Trustee referred to the process in Kansas, where such notices are treated as an amendment to the creditor's claim and the debtor's plan, and all delinquent mortgages must be paid through the plan.

The Court stated that this district does not follow that procedure; the other Chapter 13 Trustee does not "buy in" to what is being proposed; this process would make this part of the District an outlier to the other part of the District and to the ED of VA.; only 1 of the 9 cases here is a conduit case; and most of the fees sought are relatively small. The Court quoted from the ED VA Sheppard case as to the history and purposes of Rule 3002.1. Held: (i) The Court will allow the payment of these fees by increasing the Chapter 13 plan payments without having to file a modified plan, but not from the unsecured pool; (ii) the request to pre-approve language in future cases is denied. A rift between Courts need not be caused by this issue. Trustee can alert counsel, and counsel can alert the debtors, about any such fees, and a simple motion to increase plan payments (not an amended plan) could be filed; the Court is not opposed to considering a modification to Standing Order 15-1 to address such a motion. Increasing the plan payments to cover these charges over the remaining life of the plan should not be overly burdensome to the Trustee, the debtors, or debtors' counsel. This will provide the paper trail to show that the debtors are current on the mortgage at plan completion. Because the Court believes that the cost of maintaining the debtors' principal residence should be shouldered by the debtors, it will not pre-sanction a provision which takes the funds to pay additional charges "from the pockets of the unsecured creditors." In this case, the Court will grant the debtors' request to pay $200 to cover certain 3002.1 charges, but the debtors will have to increase their plan payment by that amount, plus the Trustee's commission. The Trustee and debtors' counsel may bring additional motions to increase plan payments should future charges be incurred and noticed.

B178A. **In re Jeffrey and Nancy Livingston**, Dist. Ct., W.D. Va., # 1:15CV00036, 1/4/16 opinion (Jones). **[Chapter 7 case.] Is a debt non-dischargeable because of the debtor's failure to serve a creditor at a correct address; proper test to use.** Issue: Did the Bankruptcy Court apply the correct test to determine whether a debt owed to a creditor is non-dischargeable due to the debtor's listing of an incorrect address for the creditor on the schedule of debts? Held: Because the debtor's reason for listing the wrong address is a question of fact, the case will be remanded for further proceedings. ... Debtor filed a Chapter 7 bankruptcy while the creditor's suit in state court was pending. In the bankruptcy case the debtor noticed the creditor at the mailing address of his state court suit counsel, and the creditor did not receive notice of the bankruptcy case prior to the deadline for filing a claim. The creditor filed a claim after the bar date but before the Chapter 7 Trustee had finished collecting assets. The Bankruptcy Court held that the creditor had a non-dischargeable debt. (1) The Fourth Circuit has not spoken on this issue. (2) A mechanical application of sec. 523(a)(3)(A) "produces a result that is contrary to the unequivocally expressed intent of the legislature." (3) The equitable approach of the 5th, 6th, 7th, and 11th Circuits applies the appropriate balancing test. (4) On remand the Bankruptcy Court should apply the 3-part test articulated in Stone v. Caplan, 10 F.3d 285 (5th Cir. 1994) and consider (i) the reasons the debtor failed to list the creditor, (ii) the amount of disruption that would likely occur, and (iii) and prejudice suffered by the listed creditors and the unlisted creditor in question. (5) Sec. 726(a)(2)(C) analyzed.

B180. **In re Earl Addison**, Dist. Ct., W.D. Va., # 1:15CV00041, 1/19/16 opinion (Jones). [**Chap. 7 case] Automatic stay prevents the IRS from offsetting a pre-petition non-tax debt against an income tax refund for a return filed after the bankruptcy case was filed.** Debtor owed USDA $80,989 from a home foreclosure deficiency when he filed his Chapter 7 case, and was due federal tax refunds of $8,957 for 2011 and 2012, which returns he filed after he filed his bankruptcy case. He homesteaded $2,319 under Va. Code 34-4. Two months after his case was filed the IRS notified the debtor that it was applying his refunds to a "non-tax federal debt." The debtor filed an adversary proceeding to have the money refunded to him and to the Chapter 7 Trustee. The Bankruptcy Court held that the government had violated the automatic stay and entered judgment against the government for the full $8,957 amount of the offset. On appeal is the issue of whether summary judgment was appropriate for the debtor's $2,319 claim (the Trustee's claim was settled with the IRS). Held: (1) Code sec. 541 does not create or confer property interests; such interests are created by non-bankruptcy law. (2) IRC sec. 6402 is the operative provision here. (3) There is a split in authority as to whether a bankruptcy stay prevents the government from offsetting tax refunds. (4) In 2005, the Bankruptcy Code was amended to add sec. 362(b)(26) to allow a setoff of an income tax refund for a pre-petition taxable period against an income tax

liability. The fact that this exception to the stay only applies to income tax liabilities "suggests that Congress intended for the automatic stay to preclude the offset of non-income tax liabilities" such as this one. (5) Court rejects the government's argument that "whenever a tax payer overpays, the overpaid funds belong to the government until it decides to issue a refund...Absent the IRS effectuating a sec. 6402 offset, the overpaid funds belong to the taxpayer." The funds do not belong to the government until a federal agency has provided notice, and an offset has taken place. If the stay occurs first, the funds are protected by the stay. (6) Nothing in sec. 6402 suggests that the power to make credits or refunds using overpaid tax funds trumps the automatic stay. (7) Bankruptcy Court judgment is affirmed.

B181. **In re David and Candace Morris**, Dist. Ct., WD Va., # 3:15-CV-00021, 2/8/16 opinion (Conrad). **CHAPTER 7 CASE**. **Claiming one year's tax refunds in a Homestead Deed will not protect refunds for a different year.** Debtors filed a Homestead Deed on 2/4/15 exempting $375 in projected 2015 tax refunds; on Sch. C they exempted "other liquidated debts including tax refunds" of $1.00. The creditors meeting occurred on 2/20/15. On 3/2/15 the Debtors filed an amended Homestead Deed exempting $8,100 in 2014 tax refunds and increased the Sch. C exemption to $8,147. The Trustee objected to the exemption as untimely filed and filed a turnover motion. The Bankruptcy Judge found that the amended Deed was not timely filed and disallowed the 2014 tax refund exemptions. *Held:* The decision of the Bankruptcy Court is affirmed. (1) Debtors' reliance on Sharkey v. Leake, 715 F.2d 859 (4th Cir. 1983) [date of the tax return exempted was "immaterial" and Court would not add this requiremen, because only one year's tax refunds were involved] is misplaced. Here there are two tax refunds at issue, and the Debtors are seeking to exempt additional refunds beyond those "explicitly listed" in the original Deed. (2) The Bankruptcy Court believed it could not construe the 2014 and 2015 refunds as anything but refunds for those specific years; there was no clear error in this finding by that Court. (3) Va Code sec. 34-17 [Homestead Deed must be filed within 5 days of the creditors' meeting] "must be accorded strict interpretation," and the failure to comply with it precludes an exemption in bankruptcy. (3) Using de novo review, Court concludes that the Bankruptcy Court correctly applied Virginia law in this case. Debtors can't rely on Sharkey to say that they could amend their Deed after the five day limit, because this was not a "clarifying amendment" or the correction of a "scrivener's error"; an amendment may not set apart additional items not included in the original Deed. (4) There was no evidence in the record that the Deed was timely filed because its recording was delayed solely by the inaction of the state court clerk's office, as in In re Nguyen, 211 F.3d 105 (4th Cir. 2000). There was no clear error in the Bankruptcy Court's finding as to timeliness. [Note: affirmed by the Dist. Ct., being appealed to the 4th Cir.: 4/1/16]

B182. **In re Lloyd Robinson, Jr.,** Bankr. WD VA, # 15 71689, 2/4/16 opinion (Black). **Automatic stay in second Chap. 13 case filed while prior Ch. 13 case is still pending voids a foreclosure sale that took place after the second case was filed.** Debtor moved to vacate the Court's dismissal order and reinstate his Chapter 13 case; the motion was granted and the case reinstated. *Facts:* Debtor filed a Chapter 13 case at a time when his prior Chapter 13 case was still pending. The stay had been lifted against the mortgagee in the pending case, and it had begun the foreclosure process. The debtor had completed his (100%) plan payments under the pending plan, but the Trustee could not file his report of completion because money was still being deducted from the debtor's wages, so the debtor had not received his discharge as of the scheduled foreclosure date. Two hours before the scheduled sale, the debtor filed the second Chapter 13 case. It is unclear whether the mortgagee knew of the second filing. The sale was held, the property sold, and a trustee's deed was later recorded. When the second case was referred to chambers, because of Local Rule 1017-2 [a debtor can only maintain one case at a time], the second case was dismissed *sua sponte* and without a hearing; the debtor failed to disclose any prior cases on the second petition. *Analysis*: (1) Judge Connelly's ruling in In re Vaughan, #12 61986, 12/18/15 opinion [Ch. 13 case was filed while a pending Ch. 7 case was still being administered; the bar of LR 1017-2 is limited to cases where the later petition seeks to discharge the same debts or materially hinder the administration of the earlier case] and Judge Krumm's decision in In re Brown , 399 B.R. 162, must be considered here. (2) There is no *per se* rule that prohibits multiple bankruptcy filings; the real issue is whether the second case was filed in good faith in light of the pendency of the first case. (3) Generally, courts look to two tests: the "single estate rule"—the same property can't be the asset of two bankruptcy estates at the same time—and the Freshman v. Atkins, 269 US 121 (1925), principle that a debtor cannot treat the same debt in simultaneous cases. Under the former test, since the bankruptcy estate consisted of only such earnings as were necessary to make his payments, and since he had made all

his payments, there was no need to replenish his estate, and the second filing is not a problem. Under the latter test, discharge has been delayed through no fault of the debtor and the same debts do not have to be dealt with at the same time. (4) The Court has now issued its notice of impending discharge absent objections, so the first case is close to discharge and closing. (5) The Court makes no ruling on the "omnipresent requirement of good faith"; the mortgagee can pursue that if it chooses, and the Court reserves ruling on the motion to dismiss pending further hearing. (6) The automatic stay of the second case was in effect when the foreclosure sale was conducted, so the foreclosure was void. That ruling is not changed by the fact that the case was later dismissed and reinstated. (7)Simultaneous filings are disfavored and ought to be permitted "only in exceptional circumstances, but this case fits within the exception.

B183. **In re Clifton Ervin**, Bankr. W.D. Va., # 15 70467, 2/23/16 opinion (Black). **(Chap. 7 case). Rulings on several items in the means test in an above-median case: expenses of non-filing spouse, medical expenses, and vehicle operating expense.** Court issued a number of rulings regarding items on the above-median means test for disposable income: (1) Line 3c: debtor failed to substantiate wife's alleged monthly payment to her employer, its actual payment during the six months, and evidence as to the ramifications of non-payment, so the deduction will not be allowed; (2) the burden of proof as to deductions that would negate the presumption of abuse [Code sec. 707(b)(2)] is on the debtor; (3) Line 25: only contributions to a Health Savings Account may be claimed here, not contributions to a Flexible Spending Account; (4) debtor failed to prove on Line 22 that an amount for medical expenses greater than the amount on Line 3 was justified; (5) debtor will be allowed to claim on Line 12 a vehicle operating expense for two vehicles where the daughter drives one to and from work, since both are necessary for the "care and support of the debtor and his daughter." (Court found that a presumption of abuse did arise in this case, and the case would be dismissed unless the debtor converted the case to Chapter 13 within 21 days.)

B184. **In re Todd Webber**, W.D. Bankr., # 15 70705, 4/7/16 opinion (Black). **Court dismissed a motion to sell real estate and abstained from determining debtor's rights in the property; such matters should be resolved in the state court.** Debtor sought permission to sell real estate. The property owners association objected, arguing that the attached boat slip and easement had been improperly conveyed to the debtor. Concerned that its ruling might affect other landowners with similar interests who were not parties to this suit, the Court denied the sale without prejudice, abstained via sec. 1334(c)(1) from determining the rights of the parties involved, and allowed the litigation to proceed in state court. (1) In the Fourth Circuit, Courts follow the 12-factor test of In re Republic Reader's Service, Inc., 81 B.R. 422 (Bankr. S.D. Tex. 1987), in deciding when to exercise permissive abstention. (2) The Court reviewed all twelve factors and found, inter alia, that the underlying issues involving property rights are issues of state law that are best resolved by state courts that regularly handle such matters; while this is technically a "core" proceeding, it primarily involves potential property rights of non-debtor third parties who have not had the opportunity to assert their interests; the parties may want a jury trial; and the debtor is free to renew its motion once this matter has been resolved in state court.

B184A. **In re Todd A. Webber,**, Bankr. W.D. Va., # 15 70705, 5/2/16 opinion (Black). **Divorce-related mortgage payments held not to be a DSO.** Debtor objected to ex-wife's claim which purported to assert a domestic support obligation. The Debtor claimed that the required mortgage payments were part of an equitable division of property. The Court found that there was no DSO because the ex-wife failed to carry her burden of proof to show that the debt was "in the nature of alimony, maintenance or support." The opinion reviews the four factors to be considered in making that determination.

B186A. **In re Marcus Stanley**, Bankr. W.D. Va. # 15 70378, 7/29/16 opinion (Black). **Auction sale where auctioneer failed to disclose his relationship to the purchaser: sale approved, but auctioneer's fees denied.** Debtor filed a motion to sell his real estate free and clear of liens, then sought Court approval of the resulting auction sale, *then* requested that another sale be held because the sales price was "very insufficient" (less than 1/3rd of its fair market value). The auctioneer purchased the property through a wholly-owned corporation without providing notice of that relationship. Held: Court approved the sale, but denied the auctioneer's 5% commission and reimbursement of expenses based on the lack of disclosure of the relationship between the auctioneer and the purchaser. (1) The auctioneer violated regulations of the Va. Auctioneers Board by bidding on this property without providing proper notice. (2) Auctioneers in

a bankruptcy case must be "disinterested persons": sec, 327(a), 101(14)(A). Here the auctioneer was neither a "statutory insider" nor a "non-statutory insider." But once he started bidding without proper notice, the question becomes whether he violated his fiduciary responsibilities as a professional person employed pursuant to Bankruptcy Court order. (3) The Court adopts the "inherently fair" approach, rather than the per se approach, to answer this question. So the burden is on the auctioneer to show the transaction was inherently fair and was in the best interest of the estate. (4) Despite the non-disclosures, the evidence shows that the sale satisfies that standard. There is no evidence that the property would bring a higher price at a second sale.

B 187 **In re Helen Stinnie**, Bankr. W.D. Va., 555 B.R. 530, # 16 60846, 8/4/16 opinion (Connelly). [Chap. 7 case]. **Case dismissed because credit counseling course taken a day after case was filed; discussion of the exceptions in sec. 109(h).** Debtor's Chapter 7 case is dismissed because, contrary to the statement on her petition, it was later determined that she took the credit counseling briefing the day *after* she filed her case. (1) None of the exceptions in sec. 109(h)(1) apply here. (2) The requirements of 109(h) , while not jurisdictional, are not discretionary or "freely waivable at the court's discretion." Failure to comply means the person "does not qualify to be a debtor in bankruptcy." (3) The Court has the equitable power to decline to dismiss a case in these circumstances, but there are no exceptional or extraordinary circumstances in this case.

B188. **In re Ema Wilburn**, Bankr. W.D. Va., 14 70032, 8/22/16 opinion (Black). **Above median debtor is allowed to modify a confirmed plan to reduce monthly payments and plan duration from 60 months to 39 months.** Above median debtor had a confirmed plan for 60 months at $700/mo. total of $42,000, plus any tax refunds, that paid 15%. He experienced an unexpected reduction in his income as a financial advisor. He filed a modified plan that proposed to pay $700/mo. x 29 months, then $400/mo. x 10 months, a total of $24,300, plus any tax refunds. The Trustee objected, stating that the debtor could reduce monthly payments or plan duration, but not both, per Code sec. 1329(a), because that section is disjunctive. Held: (1) Sec. 1325(b) is not applicable to plan modification under 1329(a). See, e.g., *In re Davis, 439 B.R. 863 (Bankr. N.D. Ill 2010) [Wedoff].* (2) The "modification options set forth in sec. 1329(a) are not mutually exclusive, and are available either separately or in combination, provided the applicable elements of Sec. 1329(b)(1) are met." (3) Sec. 102(5) says that in this title "*or* is not exclusive." (4) "There is no contention or evidence that any other requirements for modification approval are unsatisfied." (5) The Trustee's objection is overruled.

B189. **In re Sean and Melinda Hite**, Bankr. W.D. Va., 15 51191, 9/6/16 opinion (Connelly). **Medicaid—provided Public Partnership payments to debtor parents of an adult disabled child living in their home are not to be included in disposable income calculations.** Below median Debtors have proposed a 60 month, 20% payout plan. Debtors' adult son is severely disabled; the debtors have no legal obligation to care for him, and he is eligible to be placed in an institution at government expense. Medicaid provisions of the Social Security Act ("SSA") allow states to provide funds for such disabled adults so that they can be cared for in a family home setting (the "Medicaid waiver program"). The son is a qualified beneficiary of this program, and the Debtors have chosen to personally care for him at home through the Medicaid-approved Virginia Public Partnership ("PP") program. The Trustee argues that the entire $3,200/mo. which the Debtors receive through this program is disposable income; the Debtors argue that none of this is disposable income because it all qualifies as protected Social Security benefits. *The issue for the Court is: do Debtors who are themselves caring for a qualified beneficiary in their home need to include all funds they receive through the Medicaid waiver program to make payments to their unsecured creditors?* (1) These PP payments are excludable from disposable income if they are either received under the SSA or if they are foster care payments. (2) The PP payments received by the Debtors on their son's behalf *are* benefits received under the SSA. (3) In In re Adinolfi, 543 B.R. 612 (B.A.P. 9th Cir. 2016), the 6th Circuit held that adoption assistance payments qualified as benefits under the SSA. Like the PP payments, those benefits fell under the umbrella of the SSA, were paid out through state agencies, and the federal government covered 50% of the cost. The Trustee made many of the same arguments in that case that the Trustee makes in this case. This Court finds the analysis of the 6th Circuit to be persuasive, and, like the 6th Circuit, rejects all of the Trustee's arguments. (4) It is not necessary that the money be actually received from Medicaid or the federal government; Code sec. 101(10A)(B) does not require such exclusive control. See also the joint federal-state nature of the SSI program. (5) The fact that the son has the choice of hiring someone other than his parents, and that he is the real recipient of the Medicaid

benefits, does not change this result. The Debtors chose to allow their son to continue to live in their home—it was not the child's decision-- and this separates them from a third-party caregiver who works in someone else's home on an hourly basis: "caring for ... [him] is not a day job; it is their life." (6) The analogy to a doctor receiving Medicaid payments does not apply, because these payments are for personally caring for their son in their home to avoid hospital placement. (7) This situation is different from that where a person receives PP payments to spend a number of hours a week working as a health aide in someone else's home: in this case the avoidance of institutionalized care requires the beneficiary to live with the care provider, and " the exceptional personal sacrifice and commitment by such care providers may render these circumstances a rarity." (8) These PP payments are also excluded from disposable income because they are "foster care payments" under Code sec. 1325(b)(2). In 2014 the IRS determined that Medicaid-waiver "difficulty of care" payments to care providers who live with the beneficiary are not taxable income, regardless of their relationship to the beneficiary. The IRS thereby expanded the definition of qualified foster care. This Court recognizes this treatment of "foster care payments" by the IRS. Thus the Debtors are, under 26 USC sec. 131, foster care providers for their son for purposes of Medicaid waiver benefits. (9) The Trustee's objection to confirmation is therefore overruled, and the Debtors need not amend Form 22C-1, Schedule I, or their plan.

B190. **In re Calvin Bruce**, Bank. W. D. Va., 16 60489, 9/6/16 opinion (Black). **Separation agreement obligation found to be primarily a division of marital debt, not a DSO.** Separation agreement between the debtor and his ex-wife required him to pay $33,420 to her as his portion of the marital debt; this amount included $2,820 in back child support. The Debtor's plan first categorized this entire claim as a DSO claim, but later changed it to a non-DSO claim. The ex-wife objected to confirmation of the amended plan, and the debtor objected to her POC. Held: (1) The debtor produced sufficient evidence (the provisions of the separation agreement) to prove that the intent of the parties was to divide marital debt rather than create a DSO, so the burden was shifted back to the ex-wife to show that the parties intended to create a DSO. (2) The Court analyzed whether the obligation was "in the nature of alimony, maintenance or support" using the four factors cited in Ludwig,502 B.R. 469 (Bankr. W.D. Va. 2013): the language and substance of the agreement; the relative financial positions of the parties at that time; the function of the obligation within the agreement; and evidence of any overbearing at that time. (3) The debtor's statement that he intended the obligation to be a DSO "cannot make it so" when the weight of evidence in the agreement shows that it does not meet the requirements of the Code. (4) The ex-wife has not met her burden to overcome the language of the agreement. (5) The ex-wife will have a priority claim for $2,820, and a general unsecured claim for $30,600.

B191. **In re Vibha Buckingham**, Dist. Ct. W.D. Va., # 3:16-cv-00031, 9/13/16 opinion (Moon). **2nd lien d/t creditor whose claim was clearly fully unsecured did not need to file an amended deficiency claim in compliance with plan paragraph 11.** Debtor's schedules listed real estate worth $143,600, with a 1st lien d/t of $170,630 and a 2nd lien d/t of $35,813. Para. 3B and 11B of the Debtor's plan stated that she would surrender her interest in the property, that any resulting deficiencies would be paid as unsecured claims, and that any unsecured deficiency claim must be (i) filed within 180 days of plan confirmation or order lifting stay, (ii) and must show documentation showing the collateral was properly liquidated in accordance with state law. United Bank, the 2nd lien holder, filed a "secured" claim (#3) for $37K, its entire debt, stating it was for a "recorded mortgage," leaving the "amount of secured claim" box blank and entering the full $37K in the "amount unsecured" space. Its attached documents also stated that the claim was "wholly unsecured." Debtor objected to the claim, arguing that the creditor had failed to file an amended claim for an unsecured deficiency in compliance with paragraph 11B. The Bankruptcy Court overruled the objection, stating that it was not necessary for United to re-file a claim with documents because the claim was "unambiguously unsecured." Held: (1) the claim was an unsecured one not bound by paragraph 3B or 11B; its claim was not secured by any value in the Debtor's property. Valueless junior mortgage claims are unsecured for bankruptcy purposes. *In re Davis, 716 F.3d 331 (4th Cir. 2013) [F44]; Code sec. 1322(b)(2) and 506(a)(1).* (2) That United had trouble fitting its claim into the "regimented boxes of a proof of claim form does not trump that fact that [its] ... claim was substantively unsecured." (3) The judgment of the Bankruptcy Court is affirmed. [**Note: 7/7/17: This case is on appeal to the 4th Circuit and is currently being briefed.**]

B191A. **In re Rickey Young**, Dist. Ct., WD of VA, # 4:16-cv-00016, 9/29/16 opinion (Kiser). **[Chap. 7 case] Can't dismiss under 105 and 707(a)** [identical to Sec. 1307(c)(2)] **for failure to pay court fees without notice and a hearing.**

Bankruptcy Court (Judge Black) dismissed debtor's Chapter 7 case *sua sponte* for failure to pay the administrative notice fee in the time period ordered, and barred him from refiling for 180 days given his history of failing to prosecute a number of prior cases. Debtor appealed, arguing that Sec. 707(a)(2) required that such dismissal could only occur after notice and a hearing. Held: The Bankruptcy Court overstepped its Sec. 105(a) authority when it dismissed the case without a hearing or sufficient notice. The dismissal is vacated, and remanded back to the Court for further proceedings.

B192. **Hall v. JP Morgan Chase (In re Hall)**, Bankr. W.D.Va., # 12 51245, 9/30/16 opinion (Connelly). [Chap. 7 case]. **Mortgagee can pursue its reformation of defective deed action in state court post-discharge, but not its constructive trust claim.** Debtors obtained a Chapter 7 discharge in a case where unsecured creditors received no distribution because the debtors' home was owned as tenants by the entireties and none of the creditors had joint claims. Three years later mortgagee Chase filed a state court action to correct its defective security interest in the residence because only Mr. Hall had signed the note and deed of trust. Debtors claimed this action violated the discharge injunction of sec. 524(a)(2); Chase stated that it was only seeking in rem relief against the property. The Bankruptcy Court issued a temporary injunction against Chase pursuing its remaining counts (reformation and a constructive trust) pending further order from the Court, and referred the issue to state court, which sustained the Debtors' demurrer. Held: Debtors' motion for a permanent injunction is denied and the temporary injunction is dissolved; Chase's request to show that it may have grounds to permit reformation of the deed of trust does not infringe on the discharge injunction, but it will run afoul of that if it continues to litigate its efforts to establish a constructive trust through unjust enrichment; Debtors' motion for sanctions is denied. (1) It is not a violation of the discharge injunction to seek only in rem relief against the Debtors' property. (2) It is irrelevant that Chase waited 3.5 years to file the state court action. (3) Chase's unjust enrichment claim could be applied to all unsecured personal loans that are routinely discharged in bankruptcy. It seeks to create a new equitable lien, unlike its reformation claim, which only seeks to rely on an equitable claims that survived the bankruptcy discharge. (4) This Court has no statutory authority to hear Chase's reformation claim; it should be heard in the state court: whether Chase wins or loses, it will have no effect on the Halls' bankruptcy estate. (5) Debtors are not entitled to damages because they haven't had to litigate the unjust enrichment count, and Chase made it clear it wasn't seeking any personal recovery from them.

B193. **Robbins v. Prince Law, LLC, et al**, [6 consolidated **Chapter 7** cases], 15 70886, etc., Bankr. W. D. Va. , 11/15/16 opinion (Black). **Imposition of civil penalties and civil contempt awards against national law firm and its partners for failure to provide promised services to clients.** US Trustee filed motions against a national law firm and some attorneys involved with it for civil contempt of the Court's 5/5/16 order. That order revoked the privileges to practice law before this Court of Jason Searns and Brent Barbour, the principals in the national law firm, required disgorgement of certain fees, and fined each of them $2,500; the latter was also found to have conducted the unauthorized practice of law (use of non-licensed legal personnel to prepare documents). A third attorney, Barry Proctor, who, unlike the first two, appeared in Court, was ordered to disgorge some fees but was subject to no further sanctions. Because the first two attorneys failed to certify compliance with the Court's order, the UST filed these motions for civil contempt.... To illustrate how this business model worked, the Court discussed how local attorney Darren Delafield agreed to enter into a partnership agreement with Prince Law; he would be paid $125 to meet with the client, review the schedules, and obtain signatures, and an additional $75 to attend the creditors meeting. In a Chap. 13 case he would be paid $450 at signing, and the balance of his fees through the plan. The Court described in detail the relationship between Delafield and Prince Law, and how it changed over time. He resigned from the firm on 9/30/15 due to his dissatisfaction with the poor quality of the work product being sent to him. He declined Prince's offer to purchase its W.D. Va. practice as the firm was winding down. The Court then described the roles of Mr. Searns and Mr. Prince in the development and history of Prince Law. There have been disgorgement orders against the firm in a number of other states. Held: (1) The fees paid by these debtors to the firm (not just the costs) shall be disgorged and returned to the clients within 60 days, because they were not earned, and the Court hereby voids the fee contracts in these cases. (2) Civil penalties of $500 to $1,500 per case are imposed, to be paid within 60 days. (3) Fines for contempt of $2,500 are imposed upon attorney Brent Barbour (plus the $2,500 previously ordered), and he is permanently disbarred from this Court. $2,500 more is imposed on the firm and Searns, in addition to the $2,500 previously imposed, payable within 60 days. Both the firm and Searns

are prohibited from practicing in the WD of Va. (4) These cases represent the "Pandora's Box of ethical issues" opened by multi-jurisdictional practice through the national law firm business model.

B193A. **In re Samuel Boyd**, Bankr. W.D. Va., # 08 71119, A.P. # 16 07008, 11/29/16 opinion (Black). **[Chap. 7 case] Damages assessed against a bank for violation of the discharge injunction.** Debtor sued bank for violation of the discharge injunction. *Facts:* Debtor obtained a discharge in a prior Chapter 7 case on two notes with the bank secured by a credit line deed of trust on two properties; he did not reaffirm the debts. After his discharge, he continued to voluntarily make payments to the bank to enable his father to stay on the property. He renewed the note twice with the bank to keep the property from being foreclosed upon; at no time did the bank advise him that his personal liability had been discharged and he had no obligation to sign any new note. Held: (1) The Court previously ruled that the bank had violated the discharge injunction. (2) While Sec. 524 does not explicitly authorize an award of monetary damages for violation of the discharge injunction, they may be awarded under Sec. 105(a). (3) The payments made by the Debtor on the original note are not recoverable because the bank made no efforts to collect the debt at that time. But the 2nd and 3rd notes violated the discharge injunction, and all payments made on those shall be refunded by the bank. (4) Debtor's payments for taxes, insurance, and utilities did not stem from his obligations on the noted, and are therefore not refundable. (5) The amount of the Debtor's attorney's fees and court reporter fees not in dispute will be paid by the bank, but the Debtor failed to provide evidence of any additional fees. (6) While the bank acted willfully, there is insufficient evidence of "the requisite degree of malevolence" to justify an award of punitive damages. (7) Debtor is awarded $11,796 in actual damages, $5,500 in attorney's fees, and $586 in court reporter fees; there is no basis for an award of punitive damages.

B194. **In re Lillian Haskins**, Bankr. 563 B.R. 177, W.D. Va., # 15 60644, 1/27/17 opinion (Connelly). **Plan confirmation does not constitute *res judicata* so as to prevent the debtor from subsequently objecting to a general unsecured claim filed pre-confirmation.** Debtor and creditor agree that LVNV's unsecured claim, filed prior to confirmation, is barred by the statute of limitations. LVNV asserts that the debtor's objection, filed 13 months after confirmation, is barred by the res judicata effect of plan confirmation. The deadline to file claims was two months after the scheduled confirmation hearing; no creditors objected to the proposed plan. (1) Debtor's plan provided for her unsecured creditors collectively, not individually. (2) The Code does not require the plan to establish the allowed amount of each such claim; the filing of a claim establishes the allowed amount unless a party objects, and the Code provides a specific procedure for determining allowed unsecured claims [sec. 501-502]. (3) By contrast, the plan must expressly provide for each secured claim [sec. 1325(a)(5)]. (4) The Code does not, with some limited exceptions, have a similar process for establishing the allowance of general unsecured claims prior to the filing of a proof of claim. The claims allowance process of sec. 502 "is independent from the plan confirmation process." (5) So the confirmation order "established that the plan meets the statutory requirements of confirmation, which in this case did not establish the amount or validity of particular general unsecured claims." (6) Because each bankruptcy case involves an "aggregation of individual controversies," bankruptcy court judgments "may not always fit neatly into the res judicata paradigm which stems from ordinary civil litigation." The confirmation order has preclusive effect on "those issues that were litigated or determined at confirmation," but it only precludes "an issue or matter that was either litigated or necessarily determined at confirmation." (7) [FN 9:] Fourth Circuit's equitable doctrine of res judicata should not be applied "to thwart a debtor's statutory rights." (8)The claims allowance process is s "separate and unique statutory process." (9) The Court did not, by confirming the plan, determine the amount of LVNV's general unsecured claim; it only determined the amount to be disbursed to general unsecured claims as a class. (10) Neither sec. 502 nor FRBP 3007 set any deadline for the filing of an objection to claim; by asking the Court to rule than an objection to a claim must be filed prior to confirmation, it is asking this Court to impose requirements not present in either. (11) LVNV's claim was initially allowed by the operation of sec. 502(a), not by the confirmation order. (12) Though the debtor's objection to claim is "subsequent litigation," it is not precluded by the confirmation order. (13) As for the Fourth Circuit's decision in Covert, it is not a decision addressing the claims allowance process, and is therefore inapplicable. Those debtors never objected to the LVNV claims in their bankruptcy cases; the cases concluded and a discharge was granted without the debtors ever raising a defense to the liability or the proofs of claim. By using a non-bankruptcy court to seek personal remuneration based on non-bankruptcy law at the end of their bankruptcy cases, the debtors were in effect asking for damages for the filing of the claim without having objected to the

claim. Covert reaffirms that debtors who fail to object to claims during their case are barred by res judicata from taking an inconsistent position and challenging the validity of the claims through separate, subsequent litigation. (14) As for the validity of the proof of claim, under the process set out by the Fourth Circuit in In re Harford Sands, Inc., the debtor has met her burden of making a proper objection and LVNV has failed to prove the validity of the time-barred claim. The objection is sustained. *[Note: LVNV advised the Court at oral argument that it would appeal an adverse decision, but it did not do so. The case of LVNV v. Harling has similar issues and was argued before the Fourth Circuit on 1/27/17, but in that case the form plan in South Carolina had language reserving rights to the debtor to object to claims .]*

B195. **In re Glenda Buchanan**, Bankr. W.D. Va., # 16 70378 PBA, 0/31/17 Order Confirming Plan (Black). **Rate of interest to be paid to general unsecured creditors where plan must pay 100%.** Plan was required to pay 100% to general unsecured creditors based upon the Chapter 7 test, Code sec. 1325(a)(4). The plan provided in para. 4A that unsecured creditors were to be paid in full "plus interest to achieve present value," but it did not set a particular rate of interest to apply. Trustee asked for the federal judgment interest rate, but the Court determined that the appropriate rate of interest was 2%, based on "the U.S. Dept. of Labor, Bureau of Labor Statistics Consumer Price Index ("CPI") change for one year, rounded to the nearest upward half percentile." The Court used the percentage change from the one year period immediately preceding the filing of the case.

B196. **In re Terry Properties, LLC**, Bankr. W.D. Va., # 16 71449, AP # 16 07038, 2/3/17 opinion (Black). [Chap. 12 case] **Transfer of land from the debtor to the mortgagee deemed not to violate Code sec. 548.** Debtor filed an A.P. to avoid certain transfers by the Debtor to Farm Credit as fraudulent or voluntary conveyances pursuant to Code sec. 544 and 548 and Va. Code sec. 55-80 and 55-81. The Court granted Farm Credit's motion for summary judgment and dismissed the Debtor's complaint. (Good discussion of what constitutes a "transfer" and a "depletion of the bankruptcy estate" under sec, 548.)

B 197. **In re Barry Webb**, Bankr. W.D. Va., #16 61525, 3/30/17 Order (Connelly). **Sec. 1326(a)(2) requires that where case has been dismissed pre-confirmation, Trustee's funds on hand must be returned to the Debtor rather than be sent to the DCSE pursuant to a state garnishment order.** Case was dismissed pre-confirmation. Shortly thereafter, the Va. Div. of Child Support Enforcement (DCSE) issued and served on the Trustee an order to withhold, seeking to have the [$2,784] funds on hand sent to it for the Debtor's delinquent child support obligation [$70K+] rather than returned to the Debtor pursuant to Code sec. 1326(a)(2). Held: The funds must be returned to the Debtor. (1) The Court recognizes a split in authority as to whether a Trustee is subject to garnishment in this situation. (2) The language of 1326(a)(2) is "clear and unambiguous," and must be enforced. (3) DCSE did not assert a right to a claim under sec. 503(b) or 1326(a)(3). (4) The Court will not create a "race to the Trustee," which is what would happen if the Court declined to enforce 1326(a)(2). (5) This ruling will return all of the parties as closely as possible to their respective positions had the Debtor never filed for bankruptcy. **[4/13/17: This ruling has been appealed to the District Court by the DCSE.]**

B198. **In re Kerie Benson**, Bankr. W.D. Va., 566 B.R. 800, # 16 70245, A.P. # 16 07023, 4/3/17 opinion (Black). **[Chap. 7 case] IRS's setoff of the Debtor's subsequent tax refund against a pre-petition non-priority tax claim prevails over the Debtor's attempt to exempt the refund.** Case was filed 3/2/16. IRS held non-priority unsecured claims for 2006 and 2011 tax years totaling $12,730. Debtor still owed $10,882 for 2006 taxes as of 5/9/16. Debtor amended her schedules to exempt a tax refund for 2015 in the amount of $6,417, and on 5/19/16 amended her Homestead Deed to protect $5,993 of the refund. But the IRS processed her 2015 return on 5/9/16, and offset all of the $6,417 against the 2006 tax liability. *Issue: Could the Debtor shield her 2015 federal income tax refund from offset under 26 USC sec. 6402 by claiming it as exempt under VaC 34-4 and filing a homestead deed?* Held: (1) IRS and the US government have waived sovereign immunity via sec. 106(a) and this Court has jurisdiction to hear these matters. (2) Regarding the apparent conflict between the right of set-off in sec. 553 and the right of exemption in sec. 522(c), the most appropriate reading of sec. 506 and 553 requires that "the preservation of the setoff right should be paramount to the right to claim an exemption giving full accord to the statutory language." (3) *Taylor v. Freeland & Kronz* provides that a failure to timely object to the validity of an exemption is fatal to the objection, but a debtor can't claim an exemption in something subject to a valid

sec. 553 offset and then claim the exemption invalidated the offset because no one objected. (4) The focus in *Addison* was whether there was an automatic stay violation, not on the interplay between 522(c) and 553; sec.362(b)(26) only excepted a setoff against an income tax liability. Here the setoff of a tax refund was against an income tax liability, so that section provides an express exception to the stay and allows setoff. (5) The IRS' setoff was proper and within the bounds of sec. 553; its motion for summary judgment will be granted.

B199 **In re Lane**, 2017 Bankr. LEXIS 1992 (Bankr. W.D. Va. 7/19/17) (Black). **Debtors could exempt personal injury settlement proceeds despite their having been commingled with other funds, where the exempted funds were clearly traceable.** Funds were commingled with tax refunds in a bank account after case filed but prior to 341 meeting, and three days later the amount of the tax refunds were transferred out of the account. In overruling the Trustee's objection to the claimed exemption, the Court noted that Workers Comp proceeds remain intact even if commingled and exemptions are determined as of the petition date.

B200 **In re Terry Properties, LLC**, Dist. Ct. WD VA, # 1:17CV0004 [16 71449, A.P. #16 07038], 8/30/17 Opinion (Jones). **[CHAPTER 12 CASE] The Debtor's attempt to avoid the granting of a security interest as an uncompensated transfer that rendered it insolvent is denied.** In the Bankruptcy Court, Debtor sought to avoid per Code sec. 548(a)(1)(B) a transfer by the Debtor to Farm Credit; the Court granted summary judgment as to Farm Credit. Debtor appealed. Facts: The Debtor, an LLC, three individual Terrys, and a testamentary trust for which they were the trustees were indebted to Farm Credit on five obligations secured by three credit line deeds of trust. In March, 2015, they sought to restructure these loans. Part of the agreement was that the trust would be dissolved and its assets transferred to the Debtor, subject to the deeds of trust, and the Debtor and the LLC would assume all of the obligations of the trust under the 2009 notes, deeds of trust, etc. On 10/19/15 a deed of assumption was executed conveying the property to the Debtor, and simultaneously three credit line deed of trust modifications were executed. The deed of assumption was recorded 30 minutes before the modified deeds of trust. Held: (1) Debtor seeks to avoid a transfer of a security interest in its assets (the modification of a $518,000 deed of trust) for the benefit of the LLC and certain guarantors because it did not receive reasonably equivalent value in exchange and became insolvent due to the transfer. (2) The modification did not transfer a security interest in the property and did not increase the credit limit of the former deed of trust; the 2015 loans were already included in the 2009 deed of trust. (3) The Debtor did receive reasonably equivalent value: it received ownership of the property in return for becoming liable for all of the Trust's debts. (4) A 30 minute gap between recording the deed of assumption and the modification does mean that the second recordation was a separate transaction: this was one consolidated transaction. (5) The Debtor did not become insolvent as a result of the alleged transfer, because there was never a time the Debtor owned the property free and clear of the lien of the deeds of trust. (6) Farm Credit is entitled to summary judgment: there was no fraudulent transfer as a matter of law. (7) Allowing amendment of the Debtor's complaint would be futile: the new claims are identical to the prior ones, so the Court's analysis would be the same. (7) The decision of the Bankruptcy Court is affirmed.

(B201. **Bellinger v. Buckley**, # JKB-17-0068, Dist. Ct. MD, 08/29/17 (Bredar) **[Maryland Dist. Ct.]** Case implies that for a case where there was a T by Es property interest by the debtor that ceased when the non-filing spouse died post-petition, sec. 1306 and Carroll v. Logan provide for that property interest to become part of the bankruptcy estate. A different result in Chapter 7.)

B202 **In re Charles King, Sr.**, Bankr. W.D. Va. # 17 60094, 10/2/17 Order (Connelly). **Request for loan modification denied because the total consequences to the Debtor outweigh the benefits.** Debtor sought permission to enter into a proposed loan modification. His confirmed plan would cure a pre-petition mortgage default of $26,339. The proposed loan modification would have reduced the interest rate and monthly payment slightly for the first six years, but for the last 34 years would have kept the interest rate approximately the same and reduced the monthly payment by only about $33/mo.. Overall, it would have lengthened the Debtor's mortgage payments by 8.25 years and increased his total payments by $74,754. The Court "fails to find ... that the temporarily reduced monthly payments and interest rate outweigh the total consequences to Mr. King." The Debtor's motion was denied without prejudice.

IMPORTANT CASES: FOURTH CIRCUIT

F1. **Barber v. Kimbrell's, Inc.**, 577 F.2d 216 (4th Cir. 1978), *cert den.,* 439 U.S. 934 (1978): **Factors to be considered by the Court in reviewing attorney's fees.** The twelve factors originally articulated in *Barber v. Kimbrell's, Inc.***,** 577 F.2d 216 (4th Cir.1978), *cert. denied*, 439 U.S. 934 (1978) are: (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorney fees awards in similar cases. *Harman v. Levin*, 772 F.2d 1150, 1151, n. 1, citing *Barber v. Kimbrell's Inc*., 577 F.2d at 226, n. 28.

F2. **Anderson v. Morris,** 658 F.2d 246, 249 (4th Cir. 1981). **Considerations for attorney fee applications**. The Fourth Circuit expanded on the lodestar principles, holding that courts reviewing fee applications should: (1) ascertain the nature and extent of the services supplied by the attorney from a statement showing the number of hours worked and an explanation of how these hours were spent; (2) determine the customary hourly rate of compensation; (3) multiply the number of hours reasonably expended by the customary hourly rate to determine the initial amount of the fee award; (4) finally, adjust the fee on the basis of the other Barber factors, briefly explaining how they affected the award.

F3. **Harman v. Levin**, 772 F.2d 1150 (4th Cir. 1985). **Fourth Circuit specifically adopted the Johnson v. Kembrell's, Inc., factors for use in determining fee awards under Code sec. 330(a) to professionals in bankruptcy cases**.

F3A. **In re H. Wayne Ford (Ford v. Poston)**, 773 F.2d 52 (4th Cir. 9/18/85). **Transfer of RE from debtor to him and his wife as T by Es on eve of bankruptcy evidenced fraudulent intent, and Chapter 7 discharge is denied.** Chap. 7 debtor was denied discharge because Bankruptcy Court determined that he had fraudulently transferred real estate to himself and his wife as T by Es. Property had originally been transferred by his parents to him alone. Seven months later—and one day after the creditor had obtained a judgment against him—he transferred it to him and his wife as T by Es. He said he was merely correcting a mistake that had been made in the prior deed from his parents. A homestead deed protecting his interest in the property, and this case, were filed one year after the T by Es transfer. Creditor alleged a violation of 727(a)(2)(A). *Held: (1)* Mere conversion of property from non-exempt to exempt, even if the purpose is to shield it from CRs, is not enough to show fraud. (2) If the transfer occurred within one year and there is other evidence to indicate a fraudulent purpose beyond mere conversion of non-exempt property, the claimed exemption is subject to the fraudulent transfer provision of 727. (3) The timing of this deed (right after the judgment was entered) was sufficient for the Bankruptcy Court to find an intent to defraud, and that finding is not clearly erroneous. Bankruptcy Court's decision is affirmed.

F4. **Sumy v. Schlossberg**, 777 F. 2d 924 (4th Cir. 1985). **Joint creditors are entitled to be paid from T by Es property in a Chapter 7 case, so they must be paid similarly in a Chapter 13 case.**

F5. **Neufeld v. Freeman**, 794 F.2d 149 (4th Cir. 1986) [and **Deans v. O'Donnell**, 692 F.2d 968, 972 (4th Cir. 1982)]. **Good faith: totality of the circumstances.** Whether a Chapter 13 plan has been proposed in good faith is governed by a totality of the circumstances inquiry. Factors: proposed % payout; debtor's financial situation; proposed period of repayment; debtor's employment history and prospects; nature and amount of unsecured claims; past bankruptcy filings; debtor's honest in presenting facts of the case; nature of the pre-petition conduct giving rise to the debts; are debts dischargeable in Chap. 7; any other unusual problems facing the debtor.

F6. **Harford v. Moore Bros. Co. (In re Harford)**, 802 F.2d 451 (4th Cir. 1986). **Bad faith factors in Chapter 13 include lack of honesty in representing facts to the court and burden on the Trustee.** The Court observed that, "'the totality of the

circumstances must be examined on a case by case basis' in determining whether a plan meets the general good faith standard of § 1325(a)(3). One factor in determining good faith is the debtors' honesty in representing facts. The Eighth Circuit Court of Appeals has expanded the Deans catalogue of factors to include 'the burden which the plan's administration would place upon the trustee.' Misrepresentations place a burden on the trustee because 'most of the burden of checking upon debtors' schedules falls upon the Chapter 13 trustee and upon counsel for the Chapter 13 debtor.'" (citations omitted).

F7. **West v. Costen**, 826 F.2d 1376 (4th Cir. 1987). **Objection to discharge by creditor not allowed; plan payments can run for five years from first payment due after initial confirmation.** Creditor who did not object to confirmation of debtor's plan that compromised claim that would have been nondischargeable in Chapter 7, and who did not appeal denial of her own motion for modification of the debtor's plan, cannot object to debtor's discharge under sec, 1328(a) on the basis that the repayment plan defrauded unsecured creditors. Payments under the plan may run for five years from the "time that the first payment under the original confirmed plan was due," which is the date of the first payment due after initial confirmation. [See also *In re Morris,* ED NC, #12-03694, 7/31/14: Court approved a 75 month plan.]

F8. **Arnold v. Weast (In re Arnold)**, 869 F.2d 240, 243 (4th Cir. 1989). **1329: Post-confirmation substantial & unanticipated change in circumstances.** Bankruptcy Court did not abuse its discretion by increasing a debtor's monthly payment from $800 to $1,500 b/c debtor's salary went from $80K/yr to $200K/yr. Res judicata prevents modification of a confirmed plan via 1329(a)(1) or (2) unless the party seeking modification demonstrates "that the debtor has experienced a 'substantial' and "unanticipated' ["could not have been reasonably anticipated at the time the plan was confirmed"] post-confirmation change in his financial condition."

F9. **Harford v. Moore Bros**, 802 F.2d 451 (4th Cir. 1986). **Bad faith factors in Chapter 13**. Factors include lack of honesty in representing facts to the court.

F10. **In re Alvin E. Rife (Grundy Nat. Bank v. Rife)**, 876 F.2d 361 (4th Cir. 6/5/89). **Secured creditor's right to an administrative expense claim and interest when debtor modifies plan to surrender collateral which was being retained under the initially confirmed plan.** Debtors' confirmed plan called for them to retain several cars on which the bank held a lien. Debtor's schedules omitted the bank's lien on a 1976 car. When the bank filed a motion to lift stay to recover the collateral and to recover as an administrative expense the debtor's missed payments under the plan, the debtor filed a modified plan surrendering one of the cars in full satisfaction of the debt on that car. Held: (1) 507 converts a creditor's claim where there has been a diminution in value of its secured collateral by reason of a 362 stay into an admin. exp. claim under 503(b). A contrary rule would unjustly enrich the debtor. (2) The creditor is entitled to the greater of (i) the payments the debtor should have made under the plan and adequate protection orders, or (ii) the diminution in value of the car between the filing date and the date the car is surrendered to it. (3) The creditor can also recover interest, at the market rate, on the payments it should have received under the plan or had it been able to liquidate its collateral. (4) The lower Court must provide notice to affected parties before continuing the automatic stay in the face of a motion to lift, so that they may request a hearing.

F11. **Brown & Co. Sec. Corp. v. Balbus (In re Balbus)**, 933 F.2d 247 (4th Cir. 1991) **Computing "unsecured debt" under 109(e).** In determining the amount of unsecured debt allowed under Code 109(e), "the Court must add the amount of unsecured debt to the amount by which secured creditors are undersecured.." Where the debtor is retaining the collateral, the expenses of liquidation should not be taken into account in determining the extent to which creditor's claim is unsecured.

F12. **Green v. Staples (In re Green),** 934 F.2d 568 (4th Cir. 1991). **Dismissal of Chapter 7 case for abuse [pre-BAPCPA].** To dismiss a Chapter 7 case for substantial abuse, must show something more than the debtor's inability to fund a Chapter 13 plan. Must use a "totality of the circumstances" test. The Court reversed a finding of bad faith based solely upon the debtor's $638/month disposable income and remanded. [Query whether this is still good law after the 2005 amendments. *See*, Calhoun v. United States Trustee, 09-1646, May 3, 2011 (4th Cir. 2011)(affirming dismissal of above-

median chapter 7 case with reference to Green factors)] [Judge Anderson, in In re Lynch, stated that Green's conclusion that dismissal under 707(b) when no other factor than a debtor's ability to pay is present "is not applicable under the BAP & CPA. P. 11]

F13. **Coker v. Sovran Equity Mortgage Corp. (In re Coker)**, 973 F.2d 258 (4th Cir. 1992). **Deduction of liquidation costs in 506 lien avoidance.** In connection with Chapter 13 debtor's motion to avoid lien of allegedly undersecured creditor, hypothetical disposition costs of collateral are not to be deducted in determining extent to which a creditor is secured under sec. 506(a).

F14. **Piedmont Trust Bank v. Linkous**, 990 F.2d 160 (4th Cir. 1993). **Due process requires notice to secured creditor of 506 hearing before its secured claim can be altered.** Debtor's plan summary mailed to the secured creditor failed to mention that secured loans would be treated as only partially secured. Creditor failed to appear or object to the proposed plan. 4th Cir. held that while a Bankruptcy Court confirmation order generally is afforded a preclusive effect, that cannot be allowed where it would result in a denial of due process in violation of the 5th Amendment. Since notice received by the creditor failed to state that a sec. 506 hearing would be held, the creditor received inadequate notice of the debtor's intent to reevaluate its secured claim. The Bank. Ct. should hold a sec. 506 hearing and determine the secured nature of the creditor's claim; Ct.'s order is vacated re these secured claims but will remain intact otherwise.

F15. **Cen-Pen Corp. v. Hanson**, 58 F.3d. 89 (4th Cir. 1995). **Avoidance of liens by plan terms w/o Adv. Proceed violates due process.** Debtors contended that liens on their primary residence were avoided because the creditor received notice (by means of a copy of the proposed plan) that the underlying debt was being treated as unsecured but neither objected to confirmation of the plan nor filed a proof of its secured claim. (Plan provided that: "all claims to be allowed must be filed; to the extent that the holder of a secured claim does not file a proof of claim, the lien of such creditor shall be voided upon the entry of the Order of Discharge....") 4th Cir. held that because the debtors failed to take appropriate steps to avoid the creditor's liens, those liens survived confirmation; where the Bankruptcy Code and Bankruptcy Rules specify the notice required prior to entry of an order, due process generally entitles a party to receive the notice specified before an order binding the party will be afforded preclusive effect.

F16. **Solomon v. Cosby (In re Solomon)**, 67 F.3d 1128 (4th Cir. 1995). **IRA not accessible to Chapter 13 creditors.** Fourth Circuit overruled the Chap. 13 Trustee's objection that the debtor's plan failed to include that portion of the debtor's IRA accounts that he was eligible to withdraw; disposable income only includes income that a debtor is actually receiving. If the debtor's IRA accounts were exempt under state law and therefore not accessible by his Chapter 7 creditors, they should be not accessible to his Chapter 13 creditors. Court also said that debtor "must still meet the separate requirement of demonstrating that, under the totality of the circumstances, his plan was proposed in good faith under 1325(a)(3)."

F16A. **Williams v. Peyton (In re Williams)**, 104 F.3d 688 (4th Cir. 1997) "Virginia law . . . provides that **property held by spouses as tenants by the entirety is exempt from individual (i.e., non-joint) creditors, but is not exempt from the claims of joint creditors."**

F17. **Colonial Auto Ctr. v. Tomlin (In re Tomlin)**, 105 F.3d 933, 937 (4th Cir. 1997). **Bad faith factors**. Debtors' fifth bankruptcy case was dismissed "with prejudice." When they later filed their sixth bankruptcy petition (under Chapter 7) in seven years, the creditor filed an action to have his debt declared nondischargeable because of the prior filings. Dispute arose as to whether "with prejudice" meant against refilling for 180 days or against ever obtaining a future discharge of such debts. Serial filing may be a factor in determining good faith.

F18. **Witt v. United Companies Lending Corp. (In re Witt)**, 113 F.3d 508, 513 (4th Cir. 1997). **Ability to bifurcate claim secured solely by lien on residence.** Case holds that 1322(b)(2) prohibits a Ch. 13 debtor from modifying in any way the terms of an undersecured claim if that claim's only security is the debtor's principal residence (here a mobile home and lot). Debtor can only extend payments to end of plan.

F19. **Deutchman v. IRS (In re Deutchman)**, 192 F.3d 457 (4th Cir. 1999). **"Providing" for a tax lien.** Where debtor did not object to IRS proof of claim, did not challenge the lien by adversary proceeding, and did not seek valuation under sec. 506, completion of payments under plan that understated IRS secured claim did not extinguish IRS' lien on the debtor's property. In order to "provide for" a creditor for the purpose of sec. 1327(c), the plan must clearly and accurately characterize the creditor's claim throughout the plan.

F20. **Ryan v. Homecomings Financial Network**, 253 F.3d 778, 782 (4th Cir. 2001). **Debtor can't completely strip off a lien in Chapter 7.** Court extends Dewsnup holding from strip downs to strip offs.

F21. **Tavenner v. Smoot**, 257 F.3d 401 (4th Cir. 2001), *cert. denied*, 122 S. Ct. 926. **An exemption which could properly have been claimed by a debtor may be forfeited as a result of his pre-petition transfer of the otherwise exemptible asset.** There were $217K in personal injury proceeds; the Trustee could avoid the transfer under Code sec. 548; and the Debtor exempted the proceeds under her Schedule C.

F22. **In re Christopher and Diane Banks**, 299 F.3d 296 (4th Cir. 2002). [Mark Peterson's case]. **Discharge of interest on student loan debt by plan provision instead of adv. proceed.** Debtor attempted to discharge all post-petition charges on his student loan debt by providing for it in his plan but not filing an adversary proceeding as required. Sallie Mae received the plan and confirmation order, and did not object. Creditor tried to collect additional charges after case completed, and debtors reopened their case. Cir. Ct. held that giving the Bank. Ct.'s order preclusive effect in this instance would result in a denial of due process under the 5th amendment; the creditor did not get the notice required by Bankruptcy Code and the creditor therefore did not receive adequate notice. Provision of the plan purporting to discharge the student loan creditor's interest is therefore not entitled to preclusive effect. **(Note: see Supreme Court's decison in Espinosa (2010), which effectively overturns this opinion.)**

F23. **Litton v. Wachovia (In re Litton)**, 330 F.3d 636 (4th Cir. 2003). **Curing default under consent order from prior case.** Debtor could use Chapter 13 to cure default under consent order that was entered in a prior Chapter 13 case.

F24. **Tidewater Fin. Co. v. Moffett (In re Moffett)**, 356 F.3d 518 (4th Cir. 2004). **Curing prepetition repossession of a car in a Chapter 13 case.** Creditor lawfully repossessed debtor's vehicle prepetition as a result of debtor's default, and debtor filed bankruptcy shortly thereafter. The Fourth Circuit found that debtor's right of redemption under Va. Code § 8.9A-623(c)(2) was made property of the estate. Debtor could therefore exercise her right to redeem, and demand turnover of, the vehicle by making payments over time in a Chapter 13 plan, adequately protecting the creditor.

B24A. **In re Harford Sands**, 372 F.3d 637 (4th Cir. 2004) **Framework for burden shifting in an objection to a claim.** [See Judge Connelly's 12/02/13 opinion in In re Hilton, B154]

F25. **In re Educational Credit Mgmt. Corp. v. Frushour (In re Frushour)**, 433 F.3d 393, 400 (4th Cir. 2005). **Adopting the *Brunner* three-part undue hardship test for dischargeability of student loans.** The Court observed that in order to prove an undue hardship "a debtor must show: (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans."

F26. **Murphy v. O'Donnell (In re Murphy) and O'Donnell v. Goralski (In re Goralski)**, 474 F3d 143 (4th Cir. 2007). **1329: Post-confirmation substantial & unanticipated change in circumstances.** Once Bank. Ct. has determined that a debtor has experienced a change in his post-confirmation financial condition that is both substantial and unanticipated, it can inquire whether the proposed modification is limited to the circumstances provided in 1329(a). If it meets one of those circumstances, Court can turn to whether the modification complies w/ 1329(b)(1). In Goralski, a cash-out refinancing is

not a substantial change in their financial condition. (his income was reduced by ½, and they refinanced an existing mortgage to meet their plan obligations; they simply eliminated a portion of their equity for cash in exchange for a corresponding amount of debt; a loan is not income; no change in their balance sheet. In Murphy, the debtors had a 51.6% increase in 11 months in the value of their home, which they sold. The money received by him represented a "substantial improvement in…his financial condition" upon receipt of this income. Trustee sought to modify the plan from 37% to 100%. Court rejected the debtor's argument that the fact that his property had vested in him upon confirmation prevented the Trustee from seeking to modify his plan.

> F26A. [[interesting language in the lower court opinion re the role of "disposable income" in this setting: In re Murphy, 327 B.R. 760 (Bankr. E.D.Va., 2005): "The Fourth Circuit's holding in *Arnold* is not phrased in terms of changes in the debtor's disposable income , but rather in terms of the debtor's "financial condition," which is a broader concept. The requirement in *Arnold* that the debtor share any substantial and unanticipated improvement with his or her creditors is not grounded in the disposable income test, but rather in the fundamental requirement of good faith under § 1325(a)(3). *See also Solomon v. Cosby (In re Solomon), 67 F.3d 1128 (4th Cir. 1995)* holding that "disposable income" did not include imputed income from exempt IRA's where the debtor, although eligible to withdraw without penalty, was not actually doing so; but remanding for determination of good faith). Thus, whether the proceeds from the sale of the condominium constitute "disposable income" in a technical sense is not controlling on the good faith analysis."]

F26B. **In re White**, 487 F.3d 199, 207 (4th Cir. 2007). **Can a debtor amend his plan to surrender collateral late in the case?** The Fourth Circuit has, in dicta, cited approvingly to *In re Nolan*, 232 F.3d 528, 529 (6th Cir. 2000), for the proposition that Section 1325(a)(5)(C) only permits surrender prior to or at the time of confirmation of the plan: "A fair reading of § 1325(a)(5)(C) is thus that the surrender must be completed at or before the confirmation of the plan."

F27. **Branigan v. Bateman (In re Bateman) and Branigan v. Graves (In re Graves)**, 515 F.3d 272 (4th Cir. 2008). **Ineligibility for discharge not a bar to filing.** A debtor may meet the good faith qualifications even if not eligible for discharge due to a prior discharge. Chapter 13 debtor who obtained a discharge in a Chapter 7 case w/i the 4 year period can still file a Chapter 13 case.

F28. **Tidewater Finance Co. v. Kenney (In re Kenney),** 531 F.3d 312 (4th Cir. 2008). **Surrender of collateral in full satisfaction of the debt is prohibited.** The Court held that, "a Chapter 13 debtor surrenders a 910 vehicle in accordance with § 1325(a)(5)(C), the hanging paragraph does not extinguish a 910 creditor's unsecured claim so long as state law, in conjunction with the parties' contract, allows for such claim."

F29. **Ennis v. Green Tree Servicing (In re Donnie R. Ennis)**, 558 F.3d 343 (4th Cir. 2009). **Cram down mobile home w/o land.** Where a mobile home is still personal property (certif. of title still valid), even though it is the DR's primary residence it can be crammed down. In re Witt, 113 F.3d. 508 (4th Cir. 1997), distinguished, b/c in that case the lower court had determined that the mobile home was real property, and lien was on both the mobile home and land.

F30. **Wells Fargo Fin. Acceptance v. Price (In re Price)**, 562 F3d 618 (4th Cir. 2009). **Negative equity is part of a PMSI and cannot be crammed down.** For purposes of Code 1325(a)'s "hanging paragraph," the car lender had a security interest in the entire loan, including the amount used to pay off the negative equity in the vehicle the chapter 13 debtors traded in.

F31. **Educational Credit Management v. Lisa M. Kirkland**, 09-1379, 4th Cir. 3/12/10. **Lack of jurisdiction of Bankruptcy Court to decide post-petition interest and collection costs on a student loan.** Bank. Ct. held that debtor owed the student loan creditor all principal due on the loan since it had received a (mistakenly sent) refund from the Trustee and nothing had been paid on this loan; awarded $185 in post-petition interest on the loan; and denied collection costs b/c the creditor had not provided any statutory or factual basis for such cost. 4th Cir. holds that Judge Anderson lacked

subject matter jurisdiction over post-petition interest and collection costs that the debtor may owe the student loan creditor. District Court's judgment affirming the Bankruptcy Court's order is reversed. [Note: Does the Supreme Court's decision in United Student Aid Funds v. Espinosa affect the holding in this case?]

F32. **Daimler Chrysler Fin. Services , LLC, v. Jones (In re Jones)**, 591 F.3d 308 (4th Cir. 1/11/10). **Chap. 7 "ride through" option has been eliminated by BAP & CPA.** Code 521(a)(2)(c) and (a)(6) eliminate the ride through option that was recognized by this Court in In re Belanger, 962 F.2d 345 (4th Cir. 1992). When the debtor failed to timely reaffirm or redeem his vehicle, the automatic stay was terminated and the property was no longer part of the bankruptcy estate, and the creditor was entitled under sec. 521(d) to enforce its *ipso facto* default clause and repossess the vehicle.]

F33. **Suntrust Bank v. Millard (In re Derrick & Tracie Millard),** #09-2266, 404 F.App'x 804 d (4th Cir. 12/15/10), affirming 414 B.R. 73 (D. Md. 2009), [per curiam]. **Wholly unsecured consensual liens that attach to debtor's real property may be avoided under sec. 506 and are not subject to the anti-modification protection of sec. 1322(b)(2).** Fourth Circuit affirms per curiam the District Court's order affirming the Bankruptcy Court's order granting the debtors' motion to avoid a second lien on its primary residence. Suntrust v. Millard, #8:08-cv-03002-MJG, 08-17964 (D. Md. 11/07/08 & 09/28/09). District Court adopts the majority rule (6 other Circuits) which interprets Nobleman to say that the anti-modification provision of 1322(b)(2) "protects only those homestead liens that are at least partially secured, as that term is defined by 506(a), by some existing equity after accounting for encumbrances that have senior priority."

F34. **Maryland v. Ciotti (In re Ciotti)**, 638 F.3d 276 (4th Cir. 3/14/11 [Md.]). **Chapter 7 debtor's failure to file report with Maryland tax authorities precluded discharge of state tax liabilities**. A Chapter 7 debtor's failure to file with Maryland tax authorities a report of the amount of changes to the debtor's federal adjusted income precluded the discharge of the corresponding Maryland tax liabilities. The required report was sufficiently similar to a tax return to trigger the exception to discharge for the failure to file, despite the contention that the report need not contain the information necessary to compute the debtor's adjusted state tax liability. The report was required to include a complete copy of the federal audit and attached exhibits, and although the debtor was not required to sign the report under penalty of perjury, Maryland law provided that giving false or misleading information in the report with the intent to evade payment or collection of tax was a misdemeanor punishable by a fine of up to $5,000 and imprisonment of up to 18 months.

F35. **Goldman v. Capital City Mortage Co. (In re Walter Nieves)**, 648 F.3d 232 (4th Cir., 6/10/11, # 08-2160). **Trustee's rights and burdens re recovering property under sec 544(b) and 550(a).** Code sections 544(b) and 550(a) allow a trustee to avoid a transfer of an interest of the debtor in property that's voidable under applicable law by a creditor holding an unsecured claim, and to recover it from the initial transferee or any immediate or mediate transferee. The latter two transferees have an affirmative defense if they take for value, in good faith, and without knowledge of the voidability of the transfer. The transferee has the B/P. "Knowledge" includes only actual notice (Smith v. Mixon, 788 F.2d at 232 (4th Cir. 1986)), but that means "actual knowledge of facts that would lead a reasonable person to believe that the transferred property was voidable." "Good faith" under 550(b)(1) should be determined under an objective standard: what the transferee knew or should have known, taking into consideration the customary practices of its industry; no good faith if they "remain willfully ignorant in the fact of facts which cry out for investigation."

F36. **Botkin v. DuPont Commun. Credit Union (In re Anne L. Botkin)**, 650 F. 3d 396 (4th Cir. , 6/13/11; # 10-1681) [CA 5:10CV00018, U.S. Dist. Ct. WD VA (5/17/10 opinion, Conrad)]. **Sec. 522 lien avoidance does not require the filing of a Homestead Deed. (**Fourth Circuit upholds the District Court opinion.) Debtor filed a Homestead Deed in her Chap. 7 case, but did not exempt any equity in her home. She then tried to avoid a judgment lien on the property. Issue: can a debtor avoid a judicial lien under sec. 522(f)(1) without claiming an exemption in the property subject to the lien. Citing Owen v. Owen, 500 U.S. 305 (1991), Court says the issue is "not whether the lien impairs an exemption to which the debtor is in fact entitled, but whether it impairs an exemption to which he would have been entitled but for the lien itself." The Code "plainly provides that debtors need not claim an exemption as a precondition of avoiding a lien that the debtor contends impairs that exemption." Court rejects creditor's arguments that this will "deny creditors the right to

object" ; that the court will be "unable to determine the amount of the exemption at issue or whether the exemption is impaired"; and that this will allow the debtor to "gain all the benefits of 522(f) without having to bear the consequences of having to use her limited exemptions." (Note: There was no equity in this property for the debtor to protect, and she was still allowed to use 522(f) to avoid this lien.)

F37. **McDow v. Dudley,** 662 F. 3d 284**,** #10,1732, 2011 U.S. App. LEXIS 23809 (4th Cir. November 30, 2011) **Denial of motion to dismiss is a final & appealable order. Debtors can't convert from Ch. 13 to Ch. 7 unless they are eligible according to the means test/disposable income test.** A Bankruptcy Court's order denying a § 707(b) motion to dismiss a Chapter 7 case as abusive is a final (appealable) order within the meaning of 28 U.S.C. § 158(a)). The ruling comes in appeal from a Chapter 13 bankruptcy case originally filed in August 2008 by a couple in Virginia. After initiating the case and beginning proceedings with the bankruptcy court, the couple reportedly requested permission to convert their Chapter 13 case into a Chapter 7 bankruptcy case. The court granted that permission and the couple converted its case. However, the bankruptcy trustee overseeing the case challenged the conversion because the couple did not pass the Chapter 7 means test; in fact, they had a reported $2,000 in disposable income each month. The limit to file under Chapter 7 of the U.S. Bankruptcy Code is about $167 in disposable income per month. The filers insisted that, because they had initially filed under Chapter 13, Section 707(b) of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005, which outlines the statutory Chapter 7 income limits, did not apply to their case. The bankruptcy court agreed with the debtors. The trustee opted to legally appeal that ruling, but the District Court that would have heard the case ruled that it could not because it did not have jurisdiction over the matter. Its argument was that, because of the unusual nature of bankruptcy cases, which involve multiple creditors and can change rapidly, the denial of the trustee's request for dismissal was not yet a final order. However, when the trustee turned to the Fourth Circuit Court, a panel of judges ruled that BAPCPA made Chapter 7 eligibility a mandatory threshold question. In other words, the panel concluded that BAPCPA is designed to prevent filers with too much disposable income from filing for Chapter 7 bankruptcy. The Fourth Circuit Court then reportedly returned the case to the District Court to rule on the particular case at hand.

F38. **Behrmann v. National Heritage Foundation**, 663 F.3d 704, #10-2015, 4th Cir., 12/9/11. **Non-debtor release in Chap. 11 allowable.** A bankruptcy court may approve nondebtor release, injunction, and exculpation provisions as part of a final Chapter 11 plan, but must find facts sufficient to support its legal conclusion that a particular debtor's circumstances entitle it to such relief. The court encourages bankruptcy courts to review the factors provided in Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.), 280 F.3d 648, 658 (6th Cir. 2002).

F39. ***Lee v. Anasti* (*In re Lee*), No. 10-1772, 2012 WL 29185 (4th Cir. Jan. 6, 2012) (unpublished) (Shedd, Duncan, Osteen) Ch. 13 debtor stopped from using 544 to avoid lien b/c she had no exemption to protect.** (Cause for dismissal of avoidance action under § 544 that debtor was collaterally estopped by state court determination that debtor had no interest in disputed real property.), *aff'g in part, dismissing in part,* 432 B.R. 212 (D.S.C. May 7, 2010) (Anderson) (Citing *Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.,* 530 U.S. 1, 120 S. Ct. 1942, 147 L. Ed. 2d 1 (May 30, 2000), Chapter 13 debtor lacked standing to exercise § 544(a) avoidance power. As explained by the bankruptcy court: "Debtor's rights and powers . . . appear to be limited to § 522(h), which permits a debtor to avoid a transfer of property to the extent the debtor could have exempted such property under (g)(1) if such transfer is avoidable by the Trustee under § 544 and the Trustee does not attempt to avoid such transfer. . . . In her Complaint, Debtor has failed to plead a cause of action under § 522(h) or set forth facts which would identify the transfer or obligation that she seeks to avoid."), *aff'g,* 432 B.R. 208 (Bankr. D.S.C. Feb. 1, 2010) (Waites) (Debtor's avoidance power under § 544(a) is limited by § 522(h) to protecting exemption under § 522(g)(1).).

F40. **McDaniel v. Blust,** 668 F.3d 153, #10-1776, 2/9/12 Opinion, 4th Cir. **Barton doctrine applied: cannot sue a Chap. 7 Trustee (and his retained firm) in state court without prior permission from the Bankruptcy Court.** Chap. 7 Trustee had retained his firm to bring an adversary proceeding against the Plaintiffs. The plaintiffs sued the firm for civil obstruction of justice for conduct by the firm during the suit. The District Court, citing the Barton doctrine [before another court can obtain subject matter jurisdiction over a suit filed against a receiver for acts committed in his official capacity, the plaintiff must obtain leave of the court which appointed the receiver], had dismissed the Plaintiffs' claims. The 4th Circuit affirmed the District Court's decision. The doctrine serves the principle that a bankruptcy trustee "is an officer of the

court that appoints him" and that therefore the court "has a strong interest in protecting him from unjustified personal liability for acts taken within the scope of his official duties." The Trustee did not need to have specifically directed the challenged actions. The allegations that the challenged conduct was wrongful or intentional do not preclude the application of the Barton doctrine.

F41. **In re John G. McCormick (SunTrust Bank v. Northen)**, 669 F.3d 177, # 10-2027, 4th Cir., 2/10/12. **Improper filing of deed of trust means that Trustee could avoid the bank's lien using 544(a)(3).** Bankruptcy Trustee in an involuntary case commenced an action under 544(a)(3) to avoid a lien of Suntrust Bank on the debtor's tract I because the bank's deed of trust, while recorded on the county's official recordation index as to tract II, was not so recorded as to tract I. Held: Because a bona fide purchaser of tract I in 2006,when the bankruptcy petition was filed, would not be charged with notice of the bank's 1999 lien based on an examination of the county's PIN index, the Trustee is likewise not imputed with knowledge. Therefore the Trustee was properly allowed to avoid the bank's lien under 544(a)(3).

F42. **Morris v. Quigley (In re Susan Quigley)**, 673 F.3d 269, #09-2102, 4th Cir., 3/7/12 Opinion. **Lanning requires that ATV payments not be deducted from disposable income.** Above median Ch. 13 debtor was surrendering two ATVs in her plan, and her boyfriend was making the payments on a truck. She listed all three payments (totaling $471/mo., or a total of $9,800) on form B22C, and thereby calculated her disposable income at $0/mo. Her plan nevertheless proposed to pay $7,992 (26%) to unsecured creditors. Trustee objected to these deductions, since the debtor would not actually be making any of these payments. Both the Bankruptcy and District Court ruled against the Trustee on the two ATV payments, but did require the debtor to increase her payment by the amount of the boyfriend's truck payment. Held : Issue is whether the debtor's "projected disposable income" must be equal to her "disposable income," and whether the former "should reflect changes that have occurred or that will occur and that are known as of the date of plan confirmation." Citing Lanning (which had been decided after both lower courts had entered their decision) and Darrohn (6th Cir.), the Court stated that the Supreme Court decision controls even though it dealt with a change in income and this case deals with a change in expenses. The Court rejected the debtor's argument that the amounts involved were so small as not to warrant the Court's consideration of them, stating that to deny the unsecured creditors an additional $9,800 and not increase the disposable income by two-thirds would be the kind of "senseless result" referred to in Lanning. The Court also disagreed with the debtor's contention that the lower Court was not required to consider that she would not actually be making the payments. District Court decision is reversed and remanded to the Bankruptcy Court. *[In re Tatyana Paliev, Bankr. ED VA, #11-17647-BFK, 8/18/12 opinion (Kenney): this case "disallows a* secured creditor deduction for property to be surrendered under the Debtor's plan."]

F43. **Johnson v. Zimmer (In re Tanya R. Johnson)**, 686 F.3d 224, (4th Cir.) # 11-2034, 7/11/12. **It was not error for the lower court to use the "fractional economic unit" approach to determine household size for purposes of Form B22C.** [a direct interlocutory appeal; 41 page opinion]. Issue: how to calculate household size in Chapter 13. Held: no error in the Bankruptcy Court's method of using a "fractional economic unit approach" (basing household size on how many individuals operate as an "economic unit"), so Court's denial of confirmation is affirmed. Facts: above-median debtor and ex-husband shared joint custody of two sons; neither paid child support, both shared the expenses; children are with the debtor 204 days/year. Debtor's current husband has joint custody of three minor children from a previous marriage; they live with them about 180 days/year. Debtor's plan claimed a household of 7 members. Bankruptcy Court opinion: The Bankruptcy Court reviewed the three different approaches to this Code-undefined problem: the Census Bureau's "heads-on-beds" approach, which does not factor in financial contribution or dependency; the "income tax dependent" method used by the IRS; and the "economic unit" approach, which includes those who are dependent on, or who support, the debtor and those whose finances are inter-mingled with the debtor's. The Bankruptcy Court chose the third method as the most flexible and most consistent with the purpose of the Code, and counted part-time residents as part-time members of the household, dividing the children into fractions. It determined that each of the debtor's sons constituted .56 members of the household, and each of the three step children constituted .49 members. That total of 2.59 members was rounded up to 3 children, and the debtor was given leave to claim any particular expenses needed for a family of seven in an amended Form B22C (with documentation). [note: the 19 year old step-daughter was counted because she was financially dependent on the debtor.] Discussion: (1)There is no statutorily mandated approach to this

issue. (2) Court declines to address what the term "dependents" means for purposes of 707(b)'s means test calculations. (3) Nothing in 1325 directly or indirectly incorporates the Census Bureau's broad definition of "household": that agency has a demographic purpose different than the purpose of the Bankruptcy Code, and would tend to be over-inclusive by including individuals who have no financial impact on the debtor's expenses. (4) The economic approach, on the other hand, is consistent w/ 1325, BAPCPA, and the Code, and avoids under-inclusive and over-inclusive results. It correctly focuses on the inter-mingling and inter-dependency of the income and expenses of others with those of the debtor. It also more accurately reflects the increasingly common nature of families today. (5) The income tax dependent approach fails to match the goals of BAPCPA and the Code, and tends to be under-inclusive. (6) The "mathematical precision" used in this case may not be possible in every case, but it was an appropriate way for the court to "try to get to the bottom of the debtor's true financial circumstances, rather than merely to ballpark a figure based on the approximate number of "whole" dependents." (7) This decision is consistent w/ Lanning's recognition that "bankruptcy courts possess flexibility to look beyond a mechanical application of 1325(b)'s calculations in order to account for variations readily apparent in the record…" (8) No error here in the court's "recognizing that the debtor's actual household size fluctuated based on the changing number of part-time members" or in its "exercising its discretion to accommodate this reality… by representing the individuals as fractional full-time members of the household and then rounding to a whole number." Dissent (Wilkinson): There is no statutory foundation for the Court to break children into fractions for purposes of the means test; cannot do it in claiming income tax dependents, for example. This approach will cause courts to conduct more intrusive and litigious proceedings.

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

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

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

--*Same result:* In re Tahisia Scantling, 11th Cir., # 13-10558, 6/18/14 opinion: lien stripping in Chapter 20 is not prohibited.

F44A. **Wilson v. Dollar General Corp.**, 717 F. 3d 337, 339 (2013). **Debtor's ability to bring suit on his pre-petition claims.** Citing to Sections 1303 and 1306 and Rule 6009, the Court stated that "we align ourselves with our sister circuits and conclude that because of the powers vested in the Chapter 13 debtor and trustee, a Chapter 13 debtor may retain standing to bring his pre-bankruptcy petition claims."

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

F46 (6/20/13 EM from D. Little) In an opinion worth of Franz Kafka, the 4th Circuit held yesterday that the filing by a creditor of a Form 1099-C serves only to satisfy an IRS reporting requirement and is not, by itself, prima facie evidence that the creditor has discharged or forgiven the debt. FDIC v. Cashion, 12-1588.

F47 **Mort Ranta v. Gorman (In re Ranta)**, 721 F3d 241 (4th Cir. 7/1/13, opinion by Gregory). **Social Security benefits are excluded from a debtor's projected disposable income for both above and below median debtors, but can be voluntarily offered by the debtor to show plan feasibility; Court's refusal to confirm a proposed plan is an appealable order.** [case summary by H. Hildebrand] Robert Mort Ranta filed a Chapter 13 petition and indicated that his "Current Monthly Income" was $3,097.46. On his Schedule I, however, Mort Ranta indicated that the average monthly income for his household was $7,492.10. The Schedule I income included both employment income Mort Ranta and his wife earned and also their combined monthly Social Security benefits. Initially, Mort Ranta's payments to the Trustee were equal to the amount of his Schedule I income minus is Schedule J expenses. After the Trustee challenged his over-stated expenses, the amount of net income indicated that Mort Ranta could pay, in full, all of his debts. Mort Ranta argued, however, that his Projected Disposable Income, calculated based upon his Current Monthly Income minus his expenses, did not require him to pay anything to his unsecured creditors. This was because, after excluding the Social Security income from his available income, he was left with no Projected Disposable Income, even after subtracting the reduced expenses. The Bankruptcy Court agreed with Tom Gorman, the trustee. The overall view of the case demonstrated that Mort Ranta could afford to pay more than he was proposing to pay, because there were funds that were available to pay debts but were not being so used. Confirmation was denied. Although the Fourth Circuit spent a great deal of the opinion discussing whether a refusal to confirm a proposed plan was an appealable order (concluding that it was), the substance of the decision brought the Fourth Circuit in line with every other appellate court in holding that Social Security income is totally excluded from the calculation of "Projected Disposable Income." Although Congress may have hoped that BAPCPA would compel debtors to pay what they could afford to pay, Congress also clearly stated that Social Security income would not be considered income that would be required to fund a Chapter 13 plan. "Because the Code expressly excludes Social Security income from 'current monthly income,' and thus, 'disposable income,' it follows that Social Security income must also be excluded from 'projected disposable income.' Indeed, every other circuit to address this issue has arrived at the same conclusion." The Circuit Court rejected the trustee's argument that *Lanning* permits the court to consider the availability of Social Security income as part of the debtor's Projected Disposable Income even though it is excluded from "disposable income." "In *Lanning*, however, the Court held only that foreseeable changes in

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

F48. **In re Jose Alvarez (Alvarez v. HSBC Bank USA,NA)**, 733 F.3d 136, #12-1156, 4th Cir. , 10/23/13 Opinion. **A married debtor cannot use 506(a) to strip a valueless lien off T by Es property if his wife is not a co-debtor.** *Issue*: Did the Bankruptcy Court err in refusing to strip off a "valueless lien" against certain real property owned by the debtor and his non-debtor-spouse as tenants by the entireties on the ground that the spouse's property interest was not part of the bankruptcy estate? (The strip-off complaint was filed by both the debtor and his non-debtor spouse.) *Held*: Based on the Bankruptcy Code and Maryland law, the Bankruptcy Court correctly held that it lacked authority to strip this lien because the complete entireties estate was not before the Court; the lower Court decision is affirmed. (1) Court does have the authority, under 506(a) and 1322(b)(2) [not 506(d)], to strip off a completely valueless lien on a debtor's primary residence. Branigan v. Davis. (2) Under Maryland law, in a T by Es situation the property is not owned by either spouse individually, but by the "marital unit": each has an undivided interest in the whole property. (3) Under Code 541, a debtor's undivided interest in T by Es property becomes part of his bankruptcy estate. (4) The filing of a bankruptcy petition by one of them does not sever the T by Es estate created by Maryland law, but that does not mean that the whole of the T by Es property became part of his bankruptcy estate; only his individual undivided interest as it existed before the case was filed became part of the bankruptcy estate. (5) A confirmed plan binds only the debtor and the debtor's creditors; so the Court is without authority to modify a lienholder's rights with respect to a non-debtor' s interest in property held as T by Es. (6) The wife joining in the lien strip complaint did not bring her interest in the property before the Court and did not alter the property rights contained in his bankruptcy case. (7) Code 363(h) is only a "narrow legislative exception to the general common-law rule prohibiting any unilateral severance of an entireties estate"; it does not authorize the elimination of a lienholder's rights with respect to a non-debtor's interest in property.

F49. **In re Rickey and Cheri Carroll (Logan v. Carroll)**, 735 F.3d 147, 4th Circuit, #13-1024, 10/28/13 opinion, **1306(a) extends 541 in Chap. 13 to include in the debtors' estate an inheritance received more than 180 days after filing, and to allow the Trustee to add those funds to the debtors' plan.** *Issue*: whether Code sec. 1306(a) extends the 180 day time limit of sec. 541 for identifying property that may be included in a bankruptcy estate. *Held*: we affirm the Bankruptcy Court's inclusion of the Debtors' post-180-day inheritance in their Chapter 13 estate. *Facts:* Case was filed 2/09; a 3.8% payout plan was confirmed; husband's mother died in 12/11 and he anticipated a $100K inheritance. Debtors advised the Court of all this in 8/12. Trustee then moved to modify their confirmed plan to include the inheritance. *Reasoning:* (1) Congressional history shows that Congress intended to broaden the definition of property of the estate contained in sec. 541 by enacting sec. 1306 to apply to Chap. 13; it intended to capture those kinds of property but not retain the 180 day restriction. (2) The kind of property is a distinct concept from the time at which the

debtor's interest is acquired. (3) "When a Chapter 13 debtor's financial fortunes improve, the creditors should share some of the wealth." Arnold. (4) Debtors' argument that we must give effect to every word of the statute requires us to reach this conclusion. (5) 1306 is more specific than 541, so the Debtors' other argument also fails. (6) 1306(a) "blocks the Carrolls from depriving their creditors a part of the windfall acquired before their Chapter 13 case was closed, dismissed, or converted." Lanning.

F50. **Pliler v. Stearns (In re Joe and Katherine Pliler)**, 747 F.3d 260, #13-1445, (direct appeal from Bankr. Ct. E.D. N.C.), 3/28/14 opinion. **Above median debtors with negative disposable income on B22 must remain in Chapter 13 for the full 60 months if their unsecured creditors have not been paid in full.** *Issue:* Whether above median debtors with negative disposable income must maintain their Chapter 13 plan for 5 years when their unsecured creditors have not been paid in full? *Held*: Yes; Bankruptcy Court order is affirmed. *Facts:* Debtors' disposable income was *minus* $291/mo. on Form B22. Proposed 55 month plan ($1,784/mo. x 15 mos. + $1,784/mo.x 40 mos. = $88,640) would pay $0 to unsecured creditors. Plan contained early termination language that would have allowed plan completion and discharge in 55 months. Bankruptcy Court judge denied confirmation, held the applicable commitment period (ACP) to be a temporal requirement requiring 60 months regardless of projected disposable income, and ordered the Trustee to move for a plan that would pay 60 months x $1,784/mo. and an 85% dividend to the unsecured creditors. *Discussion:* (1) ACP is a temporal and "freestanding plan length" requirement; all Circuits now agree on this. (2) There's nothing in the statute to suggest that the ACP is related to, or dictated by, the debtor's projected disposable income. (3) Lack of projected disposable income at confirmation does not necessarily mean that additional funds to satisfy claims will not later surface, and sec. 1329 allows for plan modification to devote such funds to plan payments. (4) Plain meaning of sec. 1325 mandates an above-median debtor maintain his plan for 5 years unless all unsecured creditors are paid in full "irrespective of projected disposable income." (5) "Problematic" that Court below said it was at liberty to abandon the Code formula for disposable income in favor of Schedules I and J simply because there is a disparity between the formula and the debtor's actual income as set forth on Schedule I. (6) But we also recognize that projected disposable income (forward looking concept) and disposable income (based on the past) are not identical; we have "no doubt" of the Bankruptcy Court's "ability to consider Sch. I and Sch. J or other pertinent evidence to capture known or virtually certain changes to disposable income," as the Supreme Court did in Lanning. (7) But here the Court relied upon the plan payment figure proposed by the Debtors; it just stretched out that figure to the full 60 months; no error in doing that. (8) On remand the Debtors must be given an opportunity to present evidence regarding the feasibility of the $1,784/mo. 60 month plan ordered by the Judge.

F51. **Kingston at Wakefield Homeowners Ass'n, Inc. v. Castell**, 585 F. App'x 837 (4th Cir. 2014). **HOA claim was not secured due to failure to comply with state law and HOA covenants.** Debtor was delinquent in her HOA dues as of filing. HOA filed a secured claim saying it was secured by a lien on the Debtor's real property. Debtor argued that the claim was not secured, because the HOA never obtained a lien in accordance with North Carolina law. Bankruptcy, District, and Fourth Circuit Courts all sustained the Debtor's objection and held that the claim was unsecured, because it failed to secure a lien in accordance with the NC law and the recorded HOA covenants.

F52. **Covert, Haworth, Ayele, and Brown v. LVNV Funding, Resurgent Capital Services, and Sherman Originator**. 779 F. 3d 242, #14 1016; 3/3/15 opinion. **Where Chapter 13 debtors failed pre-confirmation to object to creditors' allowed unsecured claims or to raise issues of statutory violations, the res judicata effect of plan confirmation bars debtors from bringing a class action post-confirmation for alleged violations of the FDCPA and state law.** Creditors filed unsecured claims against all four debtors in Chapter 13 cases filed in 2008, and all the debtors made payments on these claims in their cases. In 3/13 the debtors filed a putative class action against the creditors alleging a violation of the Fair Debt Collection Practices Act (FDCPA) and various Maryland laws for filing these POCs in Maryland without a Maryland debt collection license. Held: Fourth Circuit affirms lower court's dismissal of all claims on res judicata ground: (1) LVNV acquired from Sherman Originator default judgments against each debtor; it filed a POC in each case through its servicer, Resurgent Capital Services. None of the defendants was licensed to collect debts in Maryland. (2) The District Court dismissed all the statutory claims, finding that filing a POC was not a "collection activity" within the meaning of these statutes. (3) The prior bankruptcy judgment has res judicata effect here because all three conditions for applying the

concept have been met: it was final [confirmation of the plan], on the merits, and rendered by a court of competent jurisdiction; the parties are identical or in privity; and the claims in the second matter are based upon the same cause of action as the earlier proceeding. (4) Even claims that do not directly contradict confirmed orders, but merely assert rights that are inconsistent with those orders, are sufficient to satisfy the third requirement. (5) Once a bankruptcy plan is confirmed, its terms are not subject to collateral attack through suits that raise claims inconsistent with the confirmed plan. (6) Res judicata bars not just the claims that were actually raised during prior litigation, but also those claims that could have been raised; here, the debtors could have objected to the filed proofs of claims in the bankruptcy proceedings. (7) Debtors do not claim that there was any information unavailable to them at confirmation, so they should have raised these statutory claims prior to confirmation. (8) To allow these kinds of post-confirmation collateral attacks would destroy the finality that bankruptcy confirmation is intended to provide. (9) In deciding that these statutory claims were not barred by res judicata, the District Court relied upon Cen-Pen, 58 F.3d 89 (1995). That reading of the case is "too broad." That case dealt with secured claims, which generally pass through bankruptcy unaffected; and in that case the creditor did not participate in the case, its liens were not mentioned anywhere in the debtor's plans, and there was no adversary proceeding filed to avoid its lien as required by the Code. No lack of notice here, because it's the debtors bringing the collateral attack.

F53. **In re Matthew Jenkins**, 784 F.3d 230, #14 1385, 4/27/15 opinion. **Requirements for concluding a 341 meeting.** To conclude a 341 meeting it is not enough that the Trustee intended to conclude the meeting, nor is it enough to say on the record that the meeting is not concluded and that will be continued. Rule 2003 requires that it be continued to a time and date certain and that a notice of a continued meeting be filed with the Court. Since that wasn't done in this case, the Chapter 7 Trustee's objection to discharge was not timely filed within 60 days of the conclusion of the creditors' meeting as set forth in the Court's order extending the time for the Trustee to file his complaint.

F53A. **Houck v. Substitute Tr. Servs. Inc.** , 791 F.3d 473 (4th Cir. 7/1/15). **Notice required for willful violation of 362(k) need not comply with 342(c)(1).** Notice sufficient to support finding of "willfulness" for stay violation purposes under sec. 362(k) need not comply with technical requirements of sec. 342(c)(1). We agree with the debtor that because the complaint alleges that the foreclosing substitute trustee had *actual notice* of the debtor's bankruptcy petition when it sold her homestead, it sufficiently alleges sale without notice was "willful." Sec. 362(k) does not include any provision for a particular form of notice.

F54. **Anderson v. Hancock**, 820 F.3d 670, # 15 1505, 2016 WL 1660178, 4/27/16 opinion (Wilkinson). **Debtors can stop a foreclosure and cure a default on a residential mortgage, but sec. 1322(b) prevents them from reinstating the initial rate of interest.** Background: The debtors borrowed money from the Hancocks to purchase a home in North Carolina. In exchange, the debtors granted the Hancocks a deed of trust and executed a note requiring monthly payments based on an interest rate of 5% over thirty years. The note also provided that upon a default of being past due for 30 days, the interest rate would increase to 7%. The debtors defaulted, and the Hancocks noticed that the default rate had gone into effect. Subsequently, the Hancocks initiated foreclosure proceedings and the debtors filed bankruptcy. The chapter 13 plan proposed to pay both the mortgage arrears and the monthly payment at the original 5% rate. Procedural History**:** The Hancocks objected to confirmation of the plan, arguing that the arrears and monthly payment should be paid at the 7% default rate of interest. The bankruptcy court sustained the objection. The debtors appealed and the district court affirmed. The debtors appealed. Issue: Whether a "cure" under section 1322(b) allows a chapter 13 plan to bring post-petition payments on debtors' residential mortgage loan back down to the initial rate of interest in a case in which the rate of interest was increased upon default. Holding: The Bankruptcy Code does not allow the plan to reinstate the initial rate of interest, because a change to the interest rate on a residential mortgage is a "modification" barred by the terms of section 1322(b). The Fourth Circuit disagreed with the debtors that a cure under the Bankruptcy Code may bring the loan back to its initial rate of interest, noting that "the cure lies in decelerating the loan and allowing the debtors to avoid foreclosure by continuing to make payments under the contractually stipulated rate of interest." [synopsis by Caleb Chaplain]

F55. **In re Eric Dubois (Atlas Acquisitions LLC v. Branigan and Grigsby**, 834 F.3d 522, #15 1945, 8/25/16 opinion (Floyd and Thacker; Diaz dissenting). **The filing of claims barred by the Maryland statute of limitations does not violate the federal FDCPA.** In two Chapter 13 cases filed in Maryland, creditor Atlas filed proofs of claim based on debts that were barred by Maryland's statute of limitations; these debts were *not* listed on the Debtors' schedules. It was not disputed that the debts in questions were beyond Maryland's 3 year S/L. Atlas stipulated to the disallowance of these claims, and the Debtors filed adversary complaints alleging FDCPA violations. The Bankruptcy Court granted Atlas' motion to dismiss under FRCP 12(b)(6), and an appeal was taken directly to this Court. *The Fourth Circuit holds that Atlas' conduct does **not** violate the Fair Debt Collection Practices Act (FDCPA) where the statute of limitations does not extinguish the debt* [Note: under Maryland law,, the statute of limitations "does not operate to extinguish a bit, but to bar the remedy." *]*. (1) Federal Courts have consistently held that a debt collector violates the FDCPA by filing or threatening to file a lawsuit to collect a time-barred debt. Atlas alleges that filing a claim does not constitute debt collection activity, but is merely a "request to participate in the bankruptcy process." (2) Court holds that "filing a proof of claim is an attempt to collect a debt." (3) Under Maryland law, a time-barred debt still constitutes a right to payment and is therefore a "claim" that the holder may file under the Bankruptcy Code.; it does not need to be enforceable. (4) While the Code says that time-barred debts are to be disallowed, it does not say that they are not to be filed in the first place. See the new requirements of Rule 3001. (5) When a S/L does not extinguish debts, a time-barred debt falls within the Bankruptcy Code's broad definition of a claim. (6) If a bankruptcy proceeds as contemplated by the Code, a time-barred claim will be objected to by the Trustee, disallowed, and discharged. (7) The Court appreciates the harm that can be wrought if time-barred claims go unnoticed because of insufficient Trustee resources, but the solution is to "improve the Code's administration," not to impose liability under FDCPA that would categorically bar the filing of such claims. (9) In most cases time-barred claims will not increase the amount that debtors must pay into their plan, so it may be preferable to them to have such claims filed even if they are not objected to. (10) The unfair and misleading problems of suits on such time-barred claims are "considerably diminished" in the bankruptcy context. (11) Interests in discharge and collective treatment convince the Court that FDCPA liability should not attach where a debtor fails to schedule a time-barred debt.

[Judge Diaz filed a lengthy dissent; he would vacate the lower court ruling and remand the case for further proceedings. (a) "There is reason to doubt the efficacy of the trustee as a vigilant steward of the debtor's estate"; trustees in this district do not object to claims based on the S/L, partly because it is impractical for trustees to examine the details of virtually every unsecured proof of claim. (b) The fling of such a claim is an "unfair and misleading practice." (c) Atlas' attached note shows it was aware that the claims might be outside the S/L. (d) Such conduct "games the bankruptcy process" and constitutes a violation of the FDCPA. (e) The Circuits are split on whether FDCPA actions may be brought in the context of bankruptcy; I would state that they can. (f) A creditor can comply with both statutes "by not filing unscheduled, time-barred proofs of claim." (g) We held in Covert that an FDCPA claim may be brought during bankruptcy proceedings.]

F56 **In re Thomas Lovegrove (Lovegrove v. Ocwen Home Loans Servicing, LLC)**, _____ F.3d _____, # 15 2158, 12/20/16 opinion (Shedd), [Chap. 7 case] **No FDCPA or FCRA violations where mortgage servicer sent post-discharge notices with non-collection disclaimers and immediately corrected its incorrect report.** Debtor filed a Chapter 7 case and received a discharge in 2011; the case included a $1.2 million debt to Bank of America on a promissory note that was secured by a deed of trust on a home owned by the debtor. Ocwen became the servicer of the mortgage in 10/12, and began sending notices to the debtor which contained non-collection disclaimers in the event the debtor had filed bankruptcy. Until 5/13, Ocwen improperly reported to the credit reporting agencies ("CRAs") that the debtor still owed the discharged debt. The debtor complained to Ocwen in 7/14, and on the same day Ocwen advised the CRAs to remove the incorrect report. The debtor in 6/14 filed a Fair Debt Collection Practices Act (" FDCPA") action in District Court for Ocwen's misreporting of his obligation on the discharged debt. The District Court held, on summary judgment, that Ocwen was not attempting to collect on a debt, that FDCPA claims were precluded by the Bankruptcy Code, and that there was no cause of action under the Fair Credit Reporting Act ("FCRA"). Held: (1) Ocwen's communications did not constitute an attempt to collect a debt. They were for informational purposes only, and contained clear disclaimers. (2) There is no FCRA violation because Ocwen immediately corrected the credit reporting error once it was notified of a dispute. (3) The FCRA claims were not violations of the FDCPA. The District Court judgment is affirmed.

F57. **Lynch v. Jackson**, 853 F.3d 116, #16-1358 (4th Cir. 1/4/17) (Thacker). **[Chapter 7 case] Section 707(b)(2) permits a debtor to take the full National and Local Standard amounts for expenses even though the debtor's actual expenses are less**. The (North Carolina) bankruptcy administrator argued that Form 22A's instructions are erroneous and that the expense deduction amounts listed in the IRS Standards represent a cap on how high an expense amount may be claimed for certain expenses, but that if the actual amount is less, the debtor must use the lesser amount. In *Ransom*, the Court addressed application of the IRS Standard expense deductions in the context of abuse under section 707(b). That Court held that, in order to take the IRS Standard expense deduction, a debtor must actually incur the type of expense designated, i.e. the "vehicle ownership" expense requires that the debtor have lease or loan payments on the vehicle. But that Court left open the question of whether, once the expense is found to be "applicable," the debtor may take the full IRS Standard amount regardless of actual expenses. The Fourth Circuit found the answer in the plain language of the statute: "[t]he debtor's monthly expenses *shall be* the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards. 11 U.S.C. § 707(b)(2)(A)(ii)(I)." The fact that Congress used the word "actual" elsewhere in the same statute indicates that it made a distinction between applicable and actual. The court also recognized the absurdity of punishing a frugal debtor should the bankruptcy administrator's interpretation of the statute be accepted. [Summary from NACTT Academy website]

F58. **Ivey v. First Citizens Bank & Trust Co. (In re Whitley)**, 848 F.3d 205, # 15 2209, 1/3/17 opinion (Gregory). **Deposits and wire transfers to a bank account were not "transfers" within the meaning of sec. 548(a)(1)(A), and therefore not avoidable by the Trustee. [Chap. 7 case]** The Debtor defrauded friends, family, and acquaintances out of millions of dollars through a Ponzi scheme. Eight creditors filed an involuntary petition against the debtor. The Trustee filed a complaint on behalf of the estate against First Citizens Bank, where the debtor had a personal checking account in his name that he used to deposit funds, receive wire transfers, and write checks in the two years preceding his bankruptcy petition. The Trustee argued that certain deposits and wire transfers to Debtor's account, including personal and cashier's checks and wire transfers from Debtor's "investors," constituted transfers from Debtor to the Bank that were made with the actual intent to hinder, delay, or defraud creditors, and that they were therefore avoidable as fraudulent transfers under 11 U.S.C. § 548(a)(1)(A). The Bankruptcy Court granted summary judgment for First Citizens. The District Court affirmed the Bankruptcy Court. The Fourth Circuit concluded that the transactions did not even constitute "transfers" within the meaning of section 101(54), and thus the Court need not even consider whether they were avoidable. When the Debtor made deposits and accepted wire transfers, he continued to possess, control, and have custody over those funds, which were freely withdrawable at his will. [case summary by Caleb Chaplain.]

F59. **In re Gregory Birmingham (Birmingham v. PNC Bank, N.A.**, 846 F.3d 88, # 15 1800, 1/18/17 opinion (Lee). **Reference in a deed of trust on a primary residence to escrow funds, insurance proceeds and miscellaneous proceeds does not defeat the anti-modification provision of 1322(b)(2).** The debtor tried to cram down the deed of trust lien on his residence because its value was much less than the debt owed. The issue on appeal is whether reference in a deed of trust to escrow funds, insurance proceeds, or miscellaneous proceeds constitute additional collateral or incidental property for purposes of Code sec, 1322(b)(2). Held: These items constitute "incidental property," which entitles the mortgagee to anti-modification under that Code section; they do not constitute separate security interests. The District Court's determination is affirmed. (1) The "debtor's principal residence" under sec. 101(13A)(A) includes "incidental property," which term is further defined in sec. 101(27B). (2) The "auxiliary protections" in the deed of trust are not additional collateral because they are "inextricably bound to the real property itself as part of the possessory bundle of rights." (3) The North Carolina line of cases cited by appellant is rejected because those documents expressly created an additional security interest in escrow funds. Those courts agree that the anti-modification clause applies to the Fannie Mae/Freddie Mac deed of trust before the Court in this case. (4) It is not necessary to examine Maryland law to see if the deed of trust created additional security interests in escrow funds because the term is defined in the Bankruptcy Code.

F60. **Worley v. Magers (In re Worley)**, 849 F.3d 577, #15 2346, 2/28/17 Opinion (Wilkinson). **[Chapter 7 case] Debtor's "lowballing" the value of his primary asset was grounds for denial of discharge.** The Debtor estimated the value of his interest in a real estate investment company at just 4% of his initial capital contribution. The Bankruptcy Court found after a bench trial that the Debtor had "lowballed his valuation" and accordingly denied his discharge under the false

oath provision of Code sec. 727(a)(4). The Fourth Circuit affirms the Bankruptcy Court decision. (1) "A Debtor's sworn representation to the value of an asset on Schedule B counts as an "oath" for the purposes of the statute." (2) Reckless indifference to the truth constitutes the functional equivalent of fraud. Here, the Debtor "handpicked a valuation methodology that would return a piddling estimate for his stake" in his company; his background suggested that "he knew better." (3) While reliance on the advice of counsel "...generally absolves a Debtor of fraudulent intent... the Bankruptcy Court must still consider whether the Debtor acted in good faith." The Debtor must demonstrate that he provided the attorney with "all the necessary facts and documentation." And such advice is no defense "...when it should have been obvious to the Debtor that the attorney was mistaken." In this case the Bankruptcy Court "could have determined that any purported reliance on legal counsel was a ruse."

F61. **Blue Cross Blue Shield of NC v. Jemsek Clinic, et al**, 850 F.3d 150, #16-1030, 3/3/17 opinion (Motz). **Reasonableness of sanctions imposed by the Court.** Bankruptcy Court imposed "staggering sanctions" ($1.29 million in attorneys' fees and costs) on creditor Blue Cross for filing claims that the creditor valued at $10 million in a Chapter 11 case, and dismissed its claims with prejudice. Although the Bankruptcy Court "did not clearly err" in finding that the creditor acted in bad faith, the sanctions were "excessive." District Court's judgment adopting the Bankruptcy Court's sanctions is vacated, and the case is remanded for further proceedings. (Court discusses the standards for finding bad faith and for determining appropriate sanctions in such situations.)

F62. **LVNV Funding v. Harling, Rhodes, et al**, 852 F.3d 367, # 16 1346, 3/30/17 opinion (Agee). **Post-confirmation objections to general unsecured claims are not barred by Covert or by confirmation res judicata.** LVNV appealed from the Bankruptcy Court decisions disallowing its unsecured claims in two cases, claiming that the confirmation orders barred post-confirmation objections to claims. Held: the Bankruptcy Court judgments are affirmed. (1) The South Carolina form plan provides for pro rata payments to general unsecured creditors, and contains a provision reserving the right to object to claims after confirmation: "confirmation of this plan does not bar a party in interest from objecting to a claim." (2) The claims bar date in each case was later than the confirmation date, which is a common occurrence in Chapter 13 cases. (3) LVNV concedes that these claims would ordinarily be barred by the statute of limitations, but states that the objections were invalid because of *res judicata*. The Bankruptcy Court, relying upon the reservation of rights clause in the plan, disagreed. (4) LVNV's position does not satisfy the requirements for the application of res judicata and contradicts the plain language of the Code. (5) A confirmation order has preclusive effect on those issues "litigated by or determined at confirmation." (6) If a judgment satisfies the three factor test set forth in Covert for determining when *res judicata* applies, it is both "claim" and "issue" preclusive. (7) The Bankruptcy Court lacks the authority to impose additional requirements for confirmation beyond those set forth in Code sections 1322 and 1325. (8) Debtors are allowed to treat unsecured creditors as a single class, and when, as here, that occurs, the Court examines only the "pool" of funds available to the class as a whole during plan confirmation to ensure that those funds meet the Chapter 7 test. (9) No Code provision provides for the determination of the merits of an individual unsecured claim as part of plan confirmation. That function is reserved by statute for the claims allowance procedure, Code sections 501-502. (10) The treatment of each individual secured creditor's claim is bound up in plan confirmation, while an individual unsecured creditor's claim is not. (11) Nothing in sec. 502 or 1325, or elsewhere in the Code, ties the adjudication of the allowance of an unsecured creditor's claim to the confirmation process. The claim has been "deemed allowed" when filed without any action by the Court. There is nothing for the Court to adjudicate at plan confirmation regarding an individual unsecured creditor's claim; that process can only be commenced by the filing of an objection under sec. 502. (12) *Res judicata* does not apply because the objections to LVNV's unsecured claims do not raise the same cause of action as that before the Court in plan confirmation: there is no "prior judgment...on the merits." (13) There is no deadline under the Code for initiating the objection to claims process. (14) The Chapter 13 plan confirmation process and the claims allowance process are "separate and distinct actions within a debtor's bankruptcy proceeding." (15) Regarding our holding in Covert: that case "...reflects only that debtors who do not object to proofs of claim during their bankruptcy proceeding are precluded from later litigating the subject matter of those claims for personal gain outside their Chapter 13 proceeding as a way to avoid including the claim as an asset in their bankruptcy case."

F63. **Rusnack v. Cardinal Bank, N.A.,** 2017 U.S. App. LEXIS 13409, # 16 1676 (Harris), 7/25/17 opinion. **Debtor not responsible for HELOC distributions to his wife made without his authorization.** Husband advised bank to freeze its home equity line of credit (HELOC). Bank failed to honor his request and allowed the wife to subsequently withdraw an additional $20K. Husband and wife divorced. When the bank initiated a foreclosure for failure to pay this debt, Husband filed a Chapter 13 case. Bankruptcy Court sustained the Husband's objection to the bank's POC; the District Court reversed. Held: The freeze request was a stop payment order regardless of whether the request contained the word "freeze." The debtor did not benefit from the distributions to the Wife. Even if the bank were correct about its statute of limitations argument regarding the debtor's objection, his objection would be covered by the equitable doctrine of recoupment. *Reversed.*

IMPORTANT CASES: U.S. SUPREME COURT

S1. **Barton v. Barbour**, 104 U.S. 126 (1881). **Cannot sue a bankruptcy Trustee in state court without prior permission of the Bankruptcy Court.** A receiver for a railroad could not be sued without leave of the appointing court. Modern case law has extended this "Barton Doctrine" to all trustees; several circuits, most recently the 4th Circuit, have extended it to bankruptcy trustees where plaintiffs are attempting to sue the trustee in state court.
[E.g., In re Lowenbraun, 453 F.3d 314, 321 (6th Cir. 2006); McDaniel v. Blust, 10-1776, February 9, 2012 (4th Cir. 2012)]

S2. **Long v. Bullard**, 117 U.S. 617, 619-621 (1886). **A pre-petition mortgage lien on the property of the debtor survives, and is not affected by, the issuance of discharge**. The debtors tried to have a mortgage declared void based upon usury and the alleged discharge of the debt in the husband's bankruptcy. The Supreme Court noted that, "the discharge releases the bankrupt only from debts which were or might have been proved, and … debts secured by mortgage or pledge can only be proved for the balance remaining due after deducting the value of the security, unless all claim upon the security is released. Here the creditor neither proved his debt in bankruptcy nor released his lien. Consequently his security was preserved notwithstanding the bankruptcy of his debtor."

S3. **White v. Stump**, 266 U.S. 310 (1924). **Exemptions are determined as of the filing date.** The federal bankruptcy laws said that the debtor is entitled to the exemptions "prescribed by the state laws in force at the time of the filing of the petition," and must claim his exemptions in a schedule filed with the petition. So the debtor was not allowed to set aside an Idaho homestead exemption two months after he filed his case.

S4. **Mullane v. Central Hanover Bank & Trust Co.**, 339 U.S. 306, 314 (1950). **Due Process in bankruptcy cases.** Everything in bankruptcy is premised on due process, which itself is based upon "notice and the opportunity for a hearing." Mullane is the case to know by name on the constitutional requirements for notice: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

S5. **Butner v. United States**, 440 U.S. 48, 55, 99 S. Ct. 914, 918 59 L. Ed. 2d 136, 141-142 (1979). **Property interests in bankruptcy are defined by state law.** "Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding."

S6. **Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.**, 458 U.S. 50, 73 L. Ed. 2d 598, 102 S. Ct. 2858 (1982). **Boundaries of Bankruptcy Court authority.** In addition to the important statutory changes made in response to Marathon, this decision set the boundaries of Bankruptcy Court authority. Without the consent of the parties, Bankruptcy Courts can issue final judgments only on "core proceedings". For non-core related proceedings, a

Bankruptcy Judge can only issue proposed findings of fact and conclusions of law, which are submitted to the District Court, which reviews them *de novo*.

S7. **United States v. Whiting Pools, Inc.**, 462 U.S. 198, 203, 103 S. Ct. 2309, 76 L. Ed. 2d 515 (1983). **IRS just another creditor in bankruptcy.** Stands for the proposition that the IRS is no better than any other creditor and has to follow the bankruptcy laws like everyone else. One of the IRS's arguments was that it was exempt from the Bankruptcy Code's provision that related to other secured creditors. It also says stuff about property of the estate….

S8. **Blum v. Stenson**, 465 U.S. 886 (1984). **Court clarifies computation of fees using lodestar analysis.** Court overrules that aspect of the lodestar analysis of fee applications [such as that used by the 4th Circuit in Anderson v. Morris] that requires the court to adjust the lodestar fee on the basis of other factors once the initial amount of the fee (customary hourly rate x reasonable number of hours expended) is determined.

S8A. **Kelly v. Robinson**, 479 U.S. 36 (1986) (Section 523(a)(7) preserves from discharge in Chapter 7 any condition a state criminal court imposes as part of a criminal sentence. Thus, restitution obligations, imposed as conditions of probation in state criminal proceedings, are not dischargeable).

S9. **United Savings Association of Texas v. Timbers of Inwood Forest Associates**, 484 U.S. 365, 370-371, 98 L. Ed. 2d 740, 108 S. Ct. 626 (1988). **Burden of proof in motions to lift stay.** When a motion for relief from stay is filed, once the movant shows that the debtor has no equity in the property, the burden shifts to the debtor to establish that the property is "necessary to an effective reorganization" and that there is "a reasonable possibility of a successful reorganization within a reasonable time." And, Timbers also held that when secured collateral is declining in value, the secured creditor is entitled to cash payments or additional security in the amount of the decline.

S10. **Norwest Bank Worthington v. Ahlers,** 485 U.S. 197, 203-209 (1988). **The absolute priority rule did not preclude debtor's principals from retaining their ownership stake in the reorganized debtor where they contributed "money or money's worth" under the reorganization plan.** The Court held that, "the interest respondents would retain under any reorganization must be considered "property" under § 1129(b)(2)(B)(ii), and therefore can only be retained pursuant to a plan accepted by their creditors or formulated in compliance with the absolute priority rule." The Court rejected the proposal that "labor, experience, and expertise" or "future services" could satisfy the "property" requirement of the absolute priority rule.

S11. **United States v. Ron Pair Enterprises, Inc.**, 489 U.S. 235, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989). **All oversecured creditors get interest on their claim.** The law specifically allowed postpetition interest on a nonconsensual oversecured lien as well as on a consensual claim in light of the clear language of 11 U.S.C.S. § 506(b). Congress intended that all oversecured claims be treated the same way for purposes of postpetition interest.

S12. **United States v. Energy Resources Co.,** 495 U.S. 545, 549-550 (1990). **IRS may be required to apply chapter 11 plan payments to trust fund liability first.** The Bankruptcy Court "has the authority to order the IRS to apply the [chapter 11 plan] payments to trust fund liabilities if the bankruptcy court determines that this designation is necessary to the success of a reorganization plan." The court reached this conclusion despite the provisions of Internal Revenue Code Section 6672 which allows them to pursue the individual for such liability because bankruptcy order does not "prevent the Government from collecting trust fund revenue…"

S12A. **Pennsylvania Dept. of Public Welfare v. Davenport,** 495 U.S. 552 (1990) (The Code's language and structure demonstrate that restitution obligations constitute "debts" within the meaning of Section 101(11) and are therefore dischargeable under Chapter 13).

S13. **Grogan v. Garner**, 498 U.S. 279, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991). **Evidentiary standards in bankruptcy cases.** the Supreme Court stated: "Because the preponderance-of-the-evidence standard results in a roughly equal allocation of the risk of error between litigants, we presume that this standard is applicable in civil actions between private litigants unless 'particularly important individual interests or rights are at stake.'"

S14. **Farrey v. Sanderfoot**, 500 U.S. 111 (1991). **522(f)(1) can't avoid a judicial lien where the lien fixed on the property before the debtor obtained an interest in that property.** In order to use 522(f)(1) to avoid a lien, the debtor must possess "an interest to which a lien attached, before it attached, to avoid the fixing of a lien on that interest." 522 doesn't permit "avoidance of any lien on property, but instead expressly permits avoidance of 'the fixing of a lien on an interest of the debtor.' A fixing that takes place before the debtor acquires an interest, by definition, is not on the debtor's interest." The debtor cannot avoid the judicial divorce-related lien given to the non-debtor wife because the divorce decree extinguished the couple's joint tenancy and created new interests in place of the old. So the wife's lien fixed not on the debtor's pre-existing interest, but on the fee simple interest he was awarded in the divorce decree.

S15. **Owen v.Owen**, 500 U.S. 305 (1991). **Interpreting 522(f) lien avoidance as it applies to pre-existing state judicial liens.** The Florida Constitution provides a homestead exemption, which the state courts have held inapplicable to liens that attach before the property in question acquires its homestead status. Petitioner purchased his Florida condominium in 1984 subject to respondent's pre-existing judgment lien, and the property first qualified as a homestead under a 1985 amendment to the State's homestead law. After petitioner filed a chapter 7 petition for bankruptcy in 1986, the Bankruptcy Court, *inter alia,* sustained his claimed homestead exemption in the condominium, but subsequently denied his postdischarge motion to avoid respondent's lien pursuant to Code § 522(f). The District Court and the Court of Appeals affirmed, finding that since the lien had attached before the condominium qualified for the homestead exemption, the property was not exempt under state law. *Held:* 1. Judicial liens can be eliminated under § 522(f) even though the State has defined the exempt property in such a way as specifically to exclude property encumbered by such liens. The section provides, *inter alia,* that "the debtor may avoid the fixing of a [judicial] lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under," in effect, § 522(d), which lists federal exemptions, or under state law. At first blush, respondent's argument seems entirely reasonable that her lien does not "impair" petitioner's Florida homestead exemption within the meaning of § 522(f) because the exemption is not assertable against pre-existing judicial liens, and that permitting avoidance of the lien would not *preserve* the exemption but *expand* it. However, this result has been widely and uniformly rejected by federal bankruptcy courts with respect to *federal* exemptions under § 522(d). To determine the application of § 522(f), those courts ask not whether the lien impairs an exemption to which the debtor is in fact entitled, but whether it impairs an exemption to which he *would have been entitled* but for the lien itself. This approach, which gives meaning to the phrase "would have been entitled" in the applicable text, is correct. A different approach cannot be adopted for state exemptions, in light of the equivalency of treatment accorded to federal and state exemptions by § 522(f). 2. This Court expresses no opinion on, and leaves for the Court of Appeals to resolve in the first instance, the questions whether respondent's lien can be said to have "impair[ed] an exemption to which [petitioner] would have been entitled" at the time the lien was fixed, in light of the fact that petitioner did not yet have a homestead interest; whether the lien in fact fixed "on an interest of the debtor" if, under state law, it attached simultaneously with petitioner's acquisition of his property interest; and whether the Florida statute extending the homestead exemption was retroactive.

S16. **Johnson v. Home State Bank**, 501 U.S. 78 (1991). **Using a "Chapter 20" to avoid liens left over from Chap. 7 case.** This case led the way for the concept of a "Chapter 20" where a debtor could file a Chapter 7 bankruptcy petition, discharge general unsecured debts and then propose a Chapter 13 plan to deal with the secured claims that remain. Held that a mortgage lien securing debt discharged in a prior Chapter 7 case was a "claim" that could be treated in a subsequent Chapter 13 case. [Amendments made by BAPCPA to 11 U.S.C. § 1325(a)(5)(B) eliminated this gambit. Because the lien must be retained until the entire debt has been paid or until the debtor receives a discharge, if the Chapter 13 case is filed on the heels of the Chapter 7 discharge within the time frames of 1328(f), the debtor cannot receive a discharge and the Chapter 20 mechanism to get around Dewsnup appears to have been eliminated.]

S17. **Dewsnup v. Timm**, 502 U.S. 410; 112 S. Ct. 773; 116 L. Ed. 2d 903 (1992). **Strip down disallowed.** A debtor's suit to "strip down" creditors' lien on the debtor's real property to equal the property's fair market value and declare the remainder void was dismissed because the creditors' claim had been "allowed" and was "secured." [Under Dewsnup "… the term 'allowed secured claim' means a claim 'allowed' under 502 and 'secured' by a lien enforceable under state law…. Value in the collateral has no bearing on the lien-avoiding language of 506(d): any lien secured under state law must be respected and protected from removal." In re Kenneth and Stephanie Woolsey, 10th Cir., # 11-4014, 9/4/12 opinion]

S18. **Taylor v. Freeland & Kronz**, 503 U.S. 638 (1992). **Exemptions allowed if Trustee doesn't object, even if debtors not entitled to them.** If Trustee fails to object to exemptions claimed by the debtor within the statutorily prescribed time limits, the debtor may claim the exemptions even if the exemption's value exceeds what the Code permits.

S19. **Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership**, 507 U.S. 380, 389 (1993). **No excusable neglect for untimely filed Proof of Claim in Chapter 7 [and 13] case.** Within footnote 4, the Supreme Court states that there is no excusable neglect for an untimely proof of claim in a Chapter 7 cases. The Court observed, "the time-computation and -extension provisions of Rule 9006, like those of Federal Rule of Civil Procedure 6, are generally applicable to any time requirement found elsewhere in the rules unless expressly excepted. Subsections (b)(2) and (b)(3) of Rule 9006 enumerate those time requirements excluded from the operation of the "excusable neglect" standard. One of the time requirements listed as excepted in Rule 9006(b)(3) is that governing the filing of proofs of claim in Chapter 7 cases. Such filings are governed exclusively by Rule 3002(c). Chapter 13 claims are governed by the same Rules.

S20. **Nobleman v. American Savings Bank**, 508 U.S. 324, 113 S. Ct. 2106, 124 L. Ed. 2d 228 (1993). **Can't strip down mortgage lien secured solely by primary residence ($0 equity??).** The protection of Section 1322(b)(2) prevents the use of 11 U.S.C. § 506(a) to "strip down" the lien of a mortgage to the value of the mortgaged real estate when the creditor's claim is secured only by a lien on the debtor's principal residence.

S21. **Rake v. Wade**, 508 U.S. 464 (1993). **Interest on mortgage arrears.** Court held that a debtor was required to pay interest on mortgage arrears. [In 1994, Congress responded by amending Code 1322(e), which now provides that the amount necessary to cure a mortgage arrearage shall be determined in accordance with the underlying agreement and applicable non-bankruptcy law.]

S22. **BFP v. Resolution Trust Corp.**, 511 U.S. 531 (1994). **Foreclosure sale cannot be challenged as a fraudulent conveyance.** A non-collusive and regularly conducted non-judicial foreclosure sale could not be challenged as a fraudulent conveyance because the consideration received in such a sale established reasonably equivalent value as a matter of law. This case set in stone the rule from In re Madrid, 21 B.R. 424 (B.A.P. 9th Cir. 1982), *aff'd on other grounds*, 725 F.2d 1197 (9th Cir. 1984).

S23. **Field v. Mans,** 516 U.S. 59 (1995). **Measure of reliance required for fraud**. Fraud under § 523(a)(2)(A) requires proof only of "justifiable" reliance. The Supreme Court traced the history of fraud at common law, cited to numerous cases, and referred to some authoritative treatises, when it followed its "established practice of finding Congress's meaning in the generally shared common law when common-law terms are used without further specification, we hold that § 523(a)(2)(A) requires justifiable, but not reasonable, reliance."

S24. **Citizens Bank of Maryland v. Strumpf**, 516 U.S. 16, 166 S.Ct. 286, 133 L.Ed.2d 258 (1995). **Creditor can freeze bank account to preserve right to set off.** The Supreme Court held that bank accounts may be frozen, by the bank, to preserve their right to set off debts owed to them against the debtor's accounts. However, if the accounts are frozen, the creditor has move quickly to seek relief from stay to effectuate a setoff.

S25. **Associates Commercial Corp. v. Rash**, 520 U.S. 953 (1997). **Valuation of collateral in cramdown situation.** The Supreme Court held that when Chapter 13 plan proposes to retain collateral for use in debtor's trade or business over creditor's objection under "cram down" provisions, value of collateral (and thus amount of the secured claim) is price willing buyer in debtor's trade, business, or situation would pay to obtain like property from willing seller. Applying a foreclosure-value standard when the cram down option is invoked attributes no significance to the different consequences of the debtor's choice to surrender the property or retain it. A replacement-value standard, on the other hand, distinguishes retention from surrender and renders meaningful the key words "disposition or use.

S26. **Fidelity Financial Serv. V. Fink**, 522 U.S. 211 (1998). **State law cannot extend 547(c)(3)(B) 20 day period in which to perfect a security interest to prevent avoidance by the Trustee.** Diane Beasley purchased a new car and gave petitioner, Fidelity Financial Services, Inc., a promissory note for the purchase price, secured by the car. Twenty-one days later, Fidelity mailed the application necessary to perfect its security interest under Missouri law. Beasley later filed for bankruptcy, and the trustee of her bankruptcy estate, respondent Fink, moved to set aside Fidelity's security interest on the ground that the lien was a voidable preference under 11 U.S.C. §547(b). Section 547(c)(3)(B) prohibits the avoidance of a security interest for a loan used to acquire property if, among other things, the security interest is "perfected on or before 20 days after the debtor receives possession of such property.'' Fink argued that this "enabling loan'' exception was inapposite because Fidelity had not perfected its interest within the 20-day period. Fidelity responded that Missouri law treats a motor vehicle lien as having been "perfected'' on the date of its creation (in this case, within the 20-day period), if the creditor files the necessary documents within 30 days after the debtor takes possession. The Bankruptcy Court set aside the lien as a voidable preference, holding that Missouri's relation-back provision could not extend §547(c)(3)(B)'s 20-day perfection period. The District Court affirmed on substantially the same grounds, as did the Eighth Circuit. *Held:* A transfer of a security interest is "perfected'' under §547(c)(3)(B) on the date that the secured party has completed the steps necessary to perfect its interest, so that a creditor may invoke the enabling loan exception only by satisfying state law perfection requirements within the 20-day period provided by the federal statute. Section 547(e)(1)(B) provides that "a transfer of . . . property . . . is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.'' This definition implies that a transfer is "perfected'' only when the secured party has done all the acts required to perfect its interest, not at the moment as of which state law may retroactively deem that perfection effective. …Congress intended §547(c)(3)(B) to establish a uniform federal perfection period immune to alteration by state laws permitting relation back. Thus, the statutory text, structure, and history lead to the understanding that a creditor may invoke the enabling loan exception only by acting to perfect its security interest within 20 days after the debtor takes possession of its property.

S27. **Kawaauhau v. Geiger,** 523 U.S. 57 (1998). **The "willful and malicious" standard for nondischargeability under § 523(a)(6) requires proof that the injury was intentional.** The Court reviewed a malpractice claim against the debtor/doctor and held the claim would discharge, holding that "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of §523(a)(6)." The Court observed that, "The word "willful'' in (a)(6) modifies the word "injury,'' indicating that nondischargeability takes a deliberate or intentional *injury,* not merely a deliberate or intentional *act* that leads to injury."

S27A. **United States v. Craft, 534 U.S. 274 (2002. A federal tax lien can attach to one spouse's interest in T by Es property even though the other spouse does not owe the debt.** (The Court did not reach the issue of what that interest would be; case remanded to the 6th Circuit for that determination.)

S28. **Archer v. Warner,** 538 U.S. 314 (2003). **Nondischargeable debt under § 523(a)(2)(A) may include debt based upon Note which "settled and released" a fraud claim.** Debt reflected in a settlement agreement, which included a release of all claims, can be nondischargeable as one being obtained by fraud, depending on the nature of the underlying debt that was settled. The Supreme Court, " conclude[s] that the Archers' settlement agreement and releases may have worked a kind of novation, but that fact does not bar the Archers from showing that the settlement debt arose out of "false pretenses, a false representation, or actual fraud," and consequently is nondischargeable, 11 U. S. C. § 523(a)(2)(A)."

S29. **Lamie v. United States Trustee**, 540 U.S. 526 (2004). **Attorney for chapter 7 debtor may not be paid by the estate.** Chapter 7 debtor's attorney cannot be paid from Chapter 7 estate funds for work done as a Chapter 7 debtor's counsel. The Supreme Court affirmed the 4th Circuit ruling that, "in a Chapter 7 proceeding § 330(a)(1) does not authorize payment of attorney's fees unless the attorney has been appointed under § 327 of the Code." Its ruling was based, in part, upon the quirky changes to § 330(a) by the 1994 amendments which removed the language "or to the debtor's attorney."

S30. **Kontrick v. Ryan,** 540 U.S. 443, 447 (2004). **The deadline for filing a discharge complaint is not jurisdictional.** The debtor did not raise the lateness of the dischargeability complaint until after he lost and filed a motion to reconsider. The Supreme Court held that, "a debtor forfeits the right to rely on Rule 4004 if the debtor does not raise the Rule's time limitation before the bankruptcy court reaches the merits of the creditor's objection to discharge."

S31. **Till v. SCS Credit Corp.**, 541 U.S. 465 (2004). **Required interest rate on cramdowns and pay-in-fulls is prime+.** The Court observed that, "debtor's interest payments will adequately compensate all such creditors for the time value of their money and the risk of default.." The court then adopted the "formula approach" noting that "the resulting 'prime-plus' rate of interest depends only on the state of financial markets, the circumstances of the bankruptcy estate, and the characteristics of the loan, not on the creditor's circumstances or its prior interactions with the debtor." For these reasons, the Court observed, "the prime-plus or formula rate best comports with the purposes of the Bankruptcy Code." The Court did not decide the proper scale for the risk adjustment, but noted other courts had "generally approved adjustments of 1% to 3%..."

S32. **Exxon Mobil Corp. v. Saudi Basic Industries Corp.**, 544 U. S. 280 (2005). **Applying the *Rooker-Feldman* doctrine** . The Supreme Court in the cases of *Rooker* v. *Fidelity Trust Co.,* 263 U. S. 413 (1923), and in *District of Columbia Court of Appeals v.* Feldman, 460 U. S. 462 (1983) articulated the jurisprudence for federal district court original (and not appellate) jurisdiction pursuant to 28 U.S.C. §1257 and the application of preclusion law pursuant to 28 U.S.C. §1738. In this case the Supreme Court confined the doctrine to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments. *Rooker-Feldman* does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines that allow federal courts to stay or dismiss proceedings in deference to state-court actions."

S33. **Howard Delivery Service, Inc. v. Zurich American Ins. Co.**, 547 U.S. 651 (2006). **Liability for worker's compensation benefits are not entitled to priority under §507(a)(5)**. The Supreme Court reversed the Fourth Circuit and held "that carriers' claims for unpaid workers' compensation premiums remain outside the priority allowed by § 507(a)(5)" because it is not an "employee benefit plan." Rather, "[t]hey modify, or substitute for, the common-law tort liability to which employers were exposed for work-related accidents."

S34. **Marrama v. Citizens Bank of Massachusetts**, 549 U.S. 365, 367, 127 S. Ct. 1105 (2007). **Conversion from Chapter 7 to 13: Court can deny if fraudulent.** There is no 'absolute right' to convert a Chapter 7 case to a Chapter 13. Where there is fraud, §706(d) provides adequate authority for the denial of conversion, where there has been fraud. Further, nothing in the text of either §706 or §1307(c) (or the legislative history of either provision) limited the authority of a court to take appropriate action in response to fraudulent conduct by the atypical litigant who had demonstrated that the litigant was not entitled to the relief available to the typical debtor. The broad authority granted to bankruptcy judges in §105(a) was adequate to authorize an immediate denial of a §706(a) motion to convert. The impact of this decision on the debtor's 'absolute right to dismiss' a Chapter 13 case is still a hot issue before the courts.

[in Jacobsen v. Moser (*In re Jacobsen*), 609 F.3d 647 (5th Cir. 2010), the Fifth Circuit joined an increasing number of courts in holding *Marrama v. Citizens Bank*, 549 U.S. 365, 127 S. Ct. 1105, 116 L.Ed.2d 956 (2007) compels the conclusion that a chapter 13 debtor does not have an absolute right to dismiss a case where the debtor has acted in bad faith or abused the bankruptcy process and

requested dismissal under §1307(b) in response to a request for conversion.]

S35. **Milavetz, Gallop, et al, v. U.S.**, 559 U.S. ____, No. 08-1119, 3/8/10 Opinion. **Code 101(12A), 526, and 528 re debt relief agencies and attorneys.** Attorneys are covered by this section; attorneys prohibited from advising debtors to incur more debt b/c they're filing for bankruptcy (OK if for a valid purpose); sec. 528 required disclosures are constitutional.

S36. **United Student Aid Funds, v. Espinosa**, 559 U.S. ____, 130 S. Ct. 1367, 3/23/10 Opinion. **Notice required; due process; FRCP 60(b)(4); finality of confirmation order; Court's obligation to address plan defects.** DR's plan proposed paying all principal on student loan, but discharging accrued interest. No Adversary Proceeding was filed. Creditor failed to object. Court discharged the interest owed on the loan upon completion of the plan. Years later, the debtor asked the Bankruptcy Court to enforce its 1997 discharge order by directing the creditor to cease its collection efforts on the balance of the debt; the creditor then filed a motion under Federal Rule of Civil Procedure 60(b)(4) asking the Bankruptcy Court to rule that its order confirming the plan was void because the order was issued in violation of the Code and Rules. The Bankruptcy Court granted the debtor's motion and ordered the creditor to cease its collection efforts. The Sup. Ct. holds that the Bankruptcy Court's order was not void under FRCP 60(b)(4). DR's failure to serve the CR w/ notice of the AP deprived it of a "right granted by a procedural rule," but that did not amount to a violation of due process; that was satisfied by the CR's receipt of the plan. The confirmation order is not void b/c Bank. Ct. lacked statutory authority to confirm the plan absent an undue hardship finding under 523(a)(8). This was a legal error, but confirmation order is still "enforceable and binding" b/c CR had actual notice of the plan and failed to object. Ninth Circuit wrong in saying a Bank. Ct. must confirm a plan proposing a discharge of a student loan w/o a hardship determin. in an AP unless the CR objects. Such a plan violates 1328(a)(2) and 523(a)(8), and failure to comply should prevent confirmation even if no response from CR. "In other contexts, we have held that courts have the discretion, but not the obligation, to raise on their own initiative certain nonjurisdictional barriers to suit….Section 1325(a) does more than codify this principle; it requires bankruptcy courts to address and correct a defect in a debtor's proposed plan even if no creditor raises the issue."

S37. **Ogle v. Fidelity & Deposit Co. of Maryland**, 559 U.S. _____ (4/30/10 denial of certiorari). **Attorney Fees - Unsecured creditor's recovery of postpetition attorneys fees authorized by valid prepetition contract.** Denying certiorari, the United States Supreme Court has let stand a decision by the Second Circuit Court of Appeals that an unsecured claim for postpetition attorneys fees, authorized by a valid prepetition contract, is allowable under 502(b) of the Bankruptcy Code and is deemed to have arisen prepetition. The court noted that it allowed such claims in a case that was decided under the former Bankruptcy Act, In re United Merchants and Mfrs., Inc., 674 F.2d 134 (C.A.2-N.Y. 1982), and it concluded that United Merchants survived statutory revisions and the Supreme Court's decision in Travelers Cas. and Sur. Co. of America v. Pacific Gas and Elec. Co., 549 U.S. 443, 127 S.Ct. 1199, 167 L.Ed.2d 178 (2007). In addition, the Court of Appeals held that 506(b) does not implicate unsecured claims for postpetition attorneys fees and therefore interposes no bar to recovery. A split of authority on the issue was noted. In his petition for a writ of certiorari, the liquidating trustee asserted that, by adopting such an expansive meaning of "contingent claim" to allow postpetition attorneys fees under 502, the Second Circuit, as well as all other courts that come to the same conclusion, have effectively rendered numerous sections of the Code superfluous, includeing 502(e)(2), (g), (h) and (i), and 506(b) . (Case below: Ogle v. Fidelity & Deposit Co. of Maryland, 586 F.3d 143 (C.A.2-N.Y. 2009).)

S38. **Hamilton v. Lanning**, 560 U.S. ____, 177, 130 S. Ct. 2464, # 08-998, decided 6/7/10 (8-1 decision; opinion by Alito). **Calculation of disposable income.** Debtor received a one-time buyout during the 6 mos. before she filed her Chap. 13 case that caused her to be above-median and her B22C "disposable income" to be $1,114/mo. Her I & J disposable income was $149/mo. She filed a 36 month, $144/mo. plan. There was no dispute that her actual income was insufficient to make the payments required by B22C.

Regarding the phrase "projected disposable income," the Trustee argues that the "mechanical approach" should apply: a judge should just multiply the past average monthly disposable income times the number of months in the plan. Debtor argues that while the Trustee's method should be determinative in most cases, "…in exceptional cases, where

significant changes in the debtor's financial circumstances are known or virtually certain, a bankruptcy court has discretion to make an appropriate adjustment." Debtor has the stronger argument because:

(1) The ordinary meaning of the word "projected": Its ordinary usage does not assume that the past will necessarily repeat itself. A projection takes into account both past events and "other factors that may affect the final outcome."

(2) The word "projected" appears in many federal statutes, but rarely means simple multiplication. When Congress intends simple multiplication, it does so unambiguously, usually using the term "multiplied."

(3) Pre-BAPCPA case law points in favor of the "forward looking approach," because courts had "discretion to account for known or virtually certain changes in the debtor's income." "We will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure," and Congress did not amend the term "projected disposable income" in 2005, leaving intact a well-documented view that courts could take into account "known or virtually certain changes to the debtor's income or expenses when projecting disposable income." If Congress wanted "projected" to carry a specialized meaning in Chapter 13, we would expect it to say so expressly.

The mechanical approach clashes repeatedly with sec. 1325:

(1) The section refers to disposable income "to be received in the applicable commitment period," which favors the forward looking approach; it effectively reads this phrase out of the statute when the debtor's current disposable income is substantially higher than that which will be received during the plan;

(2) Courts must determine projected disposable income "as of the effective date of the plan," which is the confirmation date; Congress would have said as of filing date if it had intended only a mechanical multiplication; this wording shows Congress wanted courts to "consider post-filing information about the debtor's financial circumstances";

(3) If disposable income is to be "applied to make payments," if the debtor lacks the ability to do that the language is rendered "a hollow command."

Mechanical approach arguments are "unpersuasive":

(1) Not true that our decision leaves the definition of disposable income "with no apparent purpose." A court taking the forward looking approach "should begin by calculating disposable income, and in most cases, nothing more is required. It is only in unusual cases that a court may go further and take into account other known or virtually certain information about the debtor's future income or expenses."

(2) Tenth Circuit's rebuttable presumption approach simply heeds the ordinary meaning of "projected."

(3) The special circumstances exception of sec. 707 only applies to expenses, but that's not enough to remove the court's traditional discretion in this area.

Where debtor's disposable income in the 6 mo. look-back period is substantially lower or higher than that during the plan period, "the mechanical approach would produce senseless results that we do not think Congress intended."

None of the Trustee's suggested approaches to mitigate the harsh results of the mechanical approach are "satisfactory."

(1) Delaying filing the case: delay is not always a "viable option," and it could give the appearance of bad faith.

(2) Delay filing Sch. I, ask Court to set new 6 mo. period: it would improperly undermine what the Code demands, and wouldn't help all debtors.

(3) Dismiss case and refile: plainly circumvents statutory limits on courts' ability to shift the look-back period.

(4) Filing Chapter 7 case instead: presumption of abuse would kick in; special circumstances exception is limited.

Held: "…when a bankruptcy court calculates a debtor's projected disposable income, the court may account for changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation."

(Lengthy dissent by Justice Scalia)

S39. **Schwab v. Reilly**, 560 U.S. _____, 130 S. Ct. 2652, #08-538, decided 6/17/10 [6-3; Thomas opinion]. **Exemption claim does not cover excess of asset value over value disclosed.** Chap. 7 debtor exempted all of her estimated value of her business assets/tools of the trade on her Sch. C. The Trustee did not timely object to the exemption. Trustee moved to sell the property, which turned out to be worth more than expected. Debtor argued that by attempting to exempt the full value of the assets, she had put the Trustee on notice of her intention, and the Trustee had forfeited its claim to any excess value by not filing a timely objection. Held: Because the debtor's exemption claim was within the range allowed

by the Code, the Trustee was not required to object to the exemptions in order to preserve his right to retain any value beyond the value of the exempt interest. Under Code 522(l), the value of the property claimed exempt should be judged on the dollar value the debtor assigns to her interest in the property, not the value the debtor assigns the asset. Taylor v. Freeland & Kronz only means that Trustee must object if the amount the debtor claims exempt is not within the statutory limits; value "unknown" was a warning flag to the Trustee in that case that did not exist in this case. This ruling encourages a debtor to declare an exemption in a way that makes the asset's full market value clear.

The Court encouraged the debtor to "declare the value of her exemption in a manner that makes the scope of her exemption clear, for example, by listing the exempt value as 'full fair market value' or '100% of FMV.' Such an exemption will encourage the trustee to object promptly to the exemption if he wishes to challenge it and preserve for the estate any value in the asset beyond relevant statutory limits….If the trustee fails to object…the debtor will be entitled to exclude the full value of the asset…"

S40. **Florida Dept. of Revenue v. Rodriguez**, 560 U.S. ____, decided 10/07/10. **Child support agency violated confirmation order when it sent collection letters to debtor.** The State of Florida was in contempt of the bankruptcy court's confirmation order when it sent collection letters to the Chapter 13 debtor during the pendency of his bankruptcy, the Eleventh Circuit Court of Appeals previously ruled in a case in which the United States Supreme Court has now denied certiorari. Because the Bankruptcy Code's automatic stay provisions contain an exemption for the collection of child support from property that is not property of the estate, the State's actions in attempting to collect child support from property that had revested in the debtor did not violate the stay. The terms of the debtor's confirmed plan, however, were binding on the State, as creditor, and the State violated the confirmation order by asserting an interest other than those provided for in the plan. Accordingly, the bankruptcy court's finding of contempt and award of attorneys fees was appropriate, the Court of Appeals held. In its petition for certiorari, the State asked, inter alia, whether 1327(a) of the Bankruptcy Code, which "binds" debtors and creditors to the provisions of a Chapter 13 plan upon confirmation, negates the specific language of 362(a) and 362(b)(2)(B) of the Code, which allow for the collection of child support payments from property that is not property of the estate. (Case below: In re Rodriguez, 367 Fed.Appx. 25 (C.A.11-Fla. 2010).)

S41. **Ransom v. FIA Card Services**, #09-907, 562 U.S. _____, 131 S. Ct. 716 (2011) [Decided 1/11/11; 8-1 opinion, Scalia dissenting]. **Over-median debtor cannot claim the car ownership expense of Line 28 & 29 unless he has a loan or lease payment on a vehicle as of filing.** Over-median debtor claimed a car ownership expense even though he owned his car free and clear of any debt. Creditor objected to this claimed expense. Held: "a debtor who does not make loan or lease payments may not take the car-ownership deduction." [Court affirms the 9th Circuit decision, 577 F.3d 1026.]

"Congress passed the BAP & CPA …to help ensure that debtors who *can* pay creditors *do* pay them ... and that debtors will repay creditors the maximum they can afford."

(1) Debtor may claim only "applicable" expense amounts listed in the IRS Standards. What makes an expense applicable is "its correspondence to an individual debtor's financial circumstances. Congress established a filter, permitting a debtor to claim a deduction from a National or Local Standard table only if that deduction is appropriate for him. And a deduction is so appropriate only if the debtor has costs corresponding to the category covered by the table—that is, only if the debtor will incur that kind of expense during the life of the plan." Had Congress intended otherwise, it could have omitted the term "applicable" altogether.

(2) Since Congress intended "the means test to approximate the debtor's reasonable expenditures on essential terms, a debtor should be required to qualify for a deduction by actually incurring an expense in the relevant category." Also, to rule otherwise would give preferential treatment to over-median debtors, since under-median debtors "cannot take a deduction for a non-existent expense."

(3) Further, the statute's purpose—to ensure that debtors pay creditors the maximum they can afford—is best achieved by interpreting the means test, consistent with the statutory text, to reflect a debtor's ability to afford repayment.

(4) The vehicle-ownership expense category covers "… the costs of a car loan or lease and nothing more… it is not intended to estimate other conceivable expenses associated with maintaining a car." Maintenance expenses are the province of the separate 'Operating Costs' deduction… The IRS' Collection Financial Standards reinforce this conclusion

by making clear that individuals who have a car but make no loan or lease payments may take only the operating-costs deduction. Fn. 7: "the statute does not incorporate or otherwise import the IRS' guidance…but since the IRS creates the National and Local standards..revises them..and uses them every day… The agency might...have something insightful and persuasive (albeit not controlling to say about them."

(5) Debtor's interpretation of "applicable" is rejected: it just directs the debtor to which box on the table to check (1 car, 2 cars, etc.)., and makes the term superfluous. But the term "…is necessary only for the different purpose of dividing debtors eligible to make use of the tables from those who are not." That interpretation "would sever the connection between the means test and the statutory provision it is meant to implement—the authorization of an allowance for (but only for) 'reasonable and necessary' expenses. Expenses that are wholly fictional and not easily thought of as reasonably necessary." And it would "run counter to the statute's overall purpose of ensuring that debtors repay creditors to the extent they can—here, by shielding $28,000 that he does not in fact need for loan or lease payments."

(6) Debtor argues that "applicable" must be different from "actual." We decline to resolve the issue of whether the debtor is entitled to the full amount of the allowance regardless of his out-of-pocket costs, or whether the amount of actual expenses controls.

(7) Regarding the "notwithstanding… the monthly expenses of the debtor shall not include any payments for debts" language of 707(b)(2)(A)(ii)(I): it "functions only to exclude, and not to authorize, deductions."

(8) Regarding debtor's arguments about "senseless results": The debtor with the single car payment left as of filing is "…the inevitable result of a standardized formula like the means test… Congress chose to tolerate the occasional peculiarity that a bright-line test produces." If car payments end during the life of the plan, an unsecured creditor may move to modify the plan under 1329(a)(1).

(9) Regarding the need for a replacement car during the plan: the debtor has the right to modify the plan under 1329(a)(1).

[*In re Willems, (Bkrtcy E.D. Wis), 2/4/11: Ransom should be applied retroactively in any Ch. 13 case in which a plan had not been confirmed when the decision was announced.]*

S42. **Stern v. Marshall**,564 U.S. _____, 131 S. Ct. 2594, 6/23/11. **A counterclaim against a creditor asserting a claim is a core proceeding under § 157(b)(2)(C), but Congress' delegation of jurisdiction over such claims to a bankruptcy court (which is not an Article III court) is unconstitutional.**

Vicki Lynn Marshall, also known as Anna Nicole Smith, married Howard Marshall shortly before his death. When Mr. Marshall, reputed to be one of the wealthiest men in Texas, passed away, his will left nothing to Vicki, and Vicki asserted that Marshall's son, Pierce, had prevented her from receiving an *inter vivos* gift before Marshall passed away. Vicki filed an action in Texas against Pierce because of the interference. When Vicki filed bankruptcy in California, Pierce filed a claim for defamation and asserted that his claim was nondischargeable. Vicki challenged the claim and pursued a counterclaim against Pierce for his interference in her receiving the gift from Marshall. The probate court in Texas determined that there was no tortuous interference and that Vicki had no claim against Pierce. The bankruptcy court, however, concluded that Vicki had a valid claim and awarded her in excess of $44 million on her counterclaim.

The claim which Vicki raised against Pierce was a counterclaim and, under a strict reading of 28 U.S.C. § 157(b)(2)(C), the counterclaim was a "core proceeding," giving the bankruptcy court full jurisdiction to consider it. The statute confers upon bankruptcy judges the authority to hear and enter final judgments in all core proceedings arising under Title 11 or arising in a case under Title 11, specifically "counterclaims by the estate against persons filing claims against the estate."

The Supreme Court held, however, that in crafting the jurisdiction of the bankruptcy court, Congress went too far.

Bankruptcy judges are not appointed by the president, not confirmed by the Senate, do not hold lifetime tenure and do not have a protection against reduction in compensation during their tenure. Thus, they are not "judges" under Article III. The counterclaim raised by Vicki was a state law action that had origins independent of federal bankruptcy law and could not necessarily be resolved by a ruling on Pierce's proof of claim. Congress cannot constitutionally withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, equity, or admiralty. The action raised by Vicki was, at its very heart, a tort action and was a state common law action between two private parties. *Northern Pipeline* established that "Congress may not vest in a non-Article III court the power to

adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants." Similarly, Congress cannot vest in a non-Article III court the power to render a final judgment in a tort action. "What is plain here is that this case involves the most prototypical exercise of judicial power: the entry of a final, binding judgment by a court with broad substantive jurisdiction, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory regime. If such an exercise of judicial power may nonetheless be taken from the Article III judiciary simply by deeming it part of some amorphous 'public right,' then Article III would be transformed from the guardian of individual liberty and separation of powers we have long recognized in mere wishful thinking."

In ruling on the counterclaim, the bankruptcy court was required to and did make factual and legal determinations that were not part of passing on or considering objections to Pierce's proof of claim. There was, however, no reason to believe that the process of adjudicating Pierce's proof of claim would necessarily resolve Vicki's counterclaim. "The only overlap between the two claims in this case was the question whether Pierce had, in fact, tortuously taken control of his father's estate in the manner alleged by Vicki in her counterclaim and described in the allegedly defamatory statements."

It should be noted that, in ending its opinion, the majority stated that "[t]he Bankruptcy Court below lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim." Thus, the majority seemed explicitly to limit its holding to cases in which the claim and counterclaim would not be resolved by the same judicial inquiry necessary to the proof of claims process.

The unrestricted conferring of jurisdiction on counterclaims which a debtor may have against a claimant is clearly unconstitutional.

S43. **AmeriCredit Financial Services, Inc. v. Penrod**, ___ U.S. ____, 132 S. Ct. 108, 181 L. Ed. 2d 34 (October 3, 2011). **Negative equity in a car loan is not purchase money for purposes of the hanging paragraph in § 1325.** The Supreme Court denied the petition for certiorari arising from the Court of Appeals for the Ninth Circuit's decision (611 F.3d 1158 (2010)). The creditor had financed the debtor's prepetition purchase of a new vehicle by accepting as a trade-in the debtor's prior vehicle, paying off the remainder of the loan on that prior vehicle, and providing debtor with sufficient financing to purchase the new vehicle. The creditor asserted that due to the language of the hanging sentence at the end of § 1325(a), it had a purchase money security interest both to the extent of the funds used to purchase the new vehicle as well as the funds used to satisfy the loan on the prior vehicle (the "negative equity"). The Ninth Circuit disagreed and held that "negative equity" in a car loan for the financing of preexisting debt is not purchase money. *See AmeriCredit Fin. Servs., Inc. v. Penrod (In re Penrod)*, 611 F.3d 1158 (9th Cir. July 16, 2010).

S44. **Baud v. Carroll**, 132 S. Ct. 997, # 11-27, 1/10/12. **ACP for above median debtors w/ no disp. inc. is still 60 mos.** The Supreme Court of the United States denied the Petition for Writ of Certiorari in the case of Baud v. Carroll, No. 11-27 (U.S.). The issue that was presented for review and denied by the Court was whether section 1325(b)(1)(B) requires an above-median-income debtor with negative or zero disposable income to remain in bankruptcy for a minimum duration equal to the applicable commitment period of five years where the debtor's unsecured creditors will not be paid in full and the debtor's actual monthly net income as listed on Schedules I and J demonstrate that the debtor can make payments to unsecured creditors under a Chapter 13 plan.

The United States Court of Appeals for the Sixth Circuit decision in this case stands, Baud v. Carroll, 634 F.3d 327 (6th Cir. 2011). When an above-median-income debtor has positive disposable income, as calculated under section 1325(b)(2) of the Bankruptcy Code and Form B22C, the debtor's Chapter 13 plan must run for five years equivalent to the applicable commitment period. Further, section 1325(b)(1)(B) of the Bankruptcy Code requires the Chapter 13 plan of an above-median-income debtor to last the full five-year period where the debtor has negative or zero disposable income. There is no exception to the temporal requirement for a debtor with negative or zero disposable income.

S44A. **Hall et ux v. United States**, # 10 -875, 5/14/12 **[chapter 12 case] Capital gains taxes from selling the farm after filing the case are neither collectible nor dischargeable in Chapter 12.** Debtors sold their farm after filing their Chapter 12 case. The IRS objected to the plan because it would not pay in full the capital gains taxes resulting from the

sale of the farm. Code 1222(a)(2)(A) strips certain governmental claims arising from such sales of their priority status and makes them dischargeable general unsecured claims. Held: These taxes were not " incurred by the estate" under 503(b), so they are neither collectible nor dischargeable in the Chapter 12 case, because there is no separate taxable estate in a Chapter 12.

S45. **Bulloch v. Bankchampaign**, #11-1518, 5/13/13, 133 S. Ct.1310. **"Defalcation" under Code sec. 523(a)(4) is defined.** Petitioner's father established a trust for him and his siblings. He borrowed funds from the trust, but paid it all back with interest. Siblings sued and obtained a state court judgment for breach of fiduciary duty; court found no malicious motive. Petitioner filed bankruptcy, and siblings opposed discharge of this debt under 523(a)(4). Bankruptcy Court and appellate courts held that the debt was non-dischargeable. Held: (1) "Defalcation" includes "a culpable state of mind requirement involving knowledge of, or gross recklessness in respect to, the improper nature of fiduciary behavior." (2) It should be treated similarly to "fraud," in that "where the conduct at issue does not involve bad faith, moral turpitude, or other immoral conduct, defalcation requires an intentional wrong." (3) "Where actual knowledge of wrongdoing is lacking, conduct is considered as equivalent if, as set forth in the Model Penal Code, the fiduciary "consciously disregards," or is willfully blind to, "a substantial and unjustifiable risk" that his conduct will violate a fiduciary duty." Judgment of the Court of Appeals is vacated and the matter is remanded for further proceedings.

S46. **Law v. Siegel,** 134 S. Ct. 1188, 3/4/14 opinion. **SUPREME COURT REJECTS NINTH CIRCUIT'S CREATIVE PUNISHMENT OF DECEPTIVE CHAPTER 7 DEBTOR.** The Supreme Court ruled that a home remains exempt property even if the individual's flagrantly deceptive conduct results in hundreds of thousands of dollars of litigation. The case involves a debtor (Law) who tried to keep money from his creditors by claiming that his home was subject to a fictional lien. Law's activity in support of this fiction was remarkable; as the Court's opinion notes, it extended (according to the courts below) to the filing of fictitious pleadings that he forged in the name of the fictitious lienholder. The trustee in the bankruptcy proceeding (Siegel) spent several hundred thousand dollars proving that Law's claim was wholly fabricated. Outraged by the conduct, the bankruptcy court (following established Ninth Circuit precedent) held that the trustee could collect the expenses of that litigation out of the funds Law received from the sale of his homestead. However, on review, the Supreme Court (in a unanimous opinion written by Justice Scalia) pointed to the provision in §522(k) of the Code, which states that exempt assets are "not liable for the payment of any administrative expense." The trustee's litigation costs have to be administrative expenses for bankruptcy purposes, because they were incurred by the trustee litigating on behalf the estate; if they weren't administrative expenses, they wouldn't be reimbursable at all. The suggestion that administrative expenses should have a narrower meaning in §522(k) than in the framework that makes those expenses an obligation of the estate was dismissed out of hand. The Court concluded: "… in crafting the provisions of [the relevant section of the Bankruptcy Code], 'Congress balanced the difficult choices that exemption limits impose on debtors with the economic harm that exemptions visit on creditors.' The same can be said of the limits imposed on recovery of administrative expenses by trustees. For the reasons we have explained, it is not for courts to alter the balance struck by the statute."

S47. **Executive Benefits Insurance Agency v. Arkison (In re Bellingham)** 134 S. Ct. 2165 (S.Ct. June 9, 2014) (Thomas). **When a bankruptcy court is called upon to adjudicate a "core" matter, as defined by the statute, as to which the bankruptcy court is not given Constitutional authority to decide per *Stern v. Marshall*, 131 S.Ct. 2594 (2011), the statute will be construed to treat such matters as "non-core" subject to de novo review by an Article III court.** Nicholas Paleveda and his wife owned and operated several businesses, including Bellingham Insurance Agency. Shortly after Bellingham ceased operations, Paleveda utilized Bellingham funds to incorporate Executive Benefits Insurance Agency. When Bellingham filed a voluntary Chapter 7 petition, the trustee initiated an action to recover the funds transferred to Executive Benefits. The bankruptcy court initially granted summary judgment for the trustee on all claims including the fraudulent conveyance claims against Executive Benefits. This was appealed to the district court which conducted a *de novo* review and affirmed the bankruptcy court's decision and entered a judgment for the trustee.

The issue before the Supreme Court was whether the bankruptcy court had any jurisdiction to consider the fraudulent conveyance action brought against an entity, Executive Benefits, which was not a claimholder in the

bankruptcy case. Executive Benefits argued, on appeal, following *Stern v. Marshall*, that Article III of the Constitution did not permit Congress to authorize bankruptcy courts to adjudicate such claims and that there was no mechanism in the statute that would permit the bankruptcy court to refer initial findings to an Article III court.

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

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

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

In the instant case, the district court did conduct a *de novo* review of the summary judgment award and independently found that the trustee's actions were appropriate and endorsed the judgment. Accordingly, there had been de novo Article III court review and this review satisfied the requirements of *Stern v. Marshall* and Article III. [*This summary is from Hank Hildebrand on the NACTT Academy website*.]

S48. Clark v. Rameker, #13-299, 134 S. Ct. 2242 (6/12/14 opinion). **Funds held in an inherited IRA are not "retirement funds" and may not be exempted under 522(b)(3)(C).** Chapter 7 debtors sought to exclude about $300K in an inherited IRA from their bankruptcy estate under the sec. 522(b)(3)(C) "retirement funds" exemption. Bankruptcy Court: no exemption allowed; District Court: exemption allowed; 7th Circuit: no exemption allowed. *Held:* Funds held in an inherited IRA are not "retirement funds" with the meaning of 522(b)(3)(C). (1) Such inheriting holders may withdraw the entire balance at any time; must withdraw money from the account no matter how far they are from retirement; and may never invest additional money. (2) Since such holders can use the entire balance immediately, there are no retirement policy objectives achieved by exempting such funds. (3) Petitioners' other arguments regarding the wording of the code section are unpersuasive: absence of the phrase "debtor's funds," effect of "to the extent that," etc.

S49. **Bullard v. Blue Hills Bank**, 135 S. Ct. 1686, # 14-116, 5/5/15 opinion. **A Bankruptcy Court order denying confirmation is not a final order which can be immediately appealed.** Bankruptcy Court sustained creditor banks' objection to confirmation and declined to confirm the plan. First Circuit BAP and First Circuit both concluded that the order denying confirmation was not a final order as long as the debtor remained free to propose another plan, and the First Circuit therefore dismissed the appeal for lack of jurisdiction. Held: A Bankruptcy Court's order denying confirmation of a proposed plan is a not a final order that the debtor can immediately appeal. (1) Only plan confirmation or case dismissal alters the status quo and fixes the parties' rights and obligations; here the relevant proceeding is the entire process culminating in confirmation or dismissal. (2) The fact that the debtor may have to choose between two untenable options (proposing an unwanted plan and appealing its confirmation, or accepting dismissal) does not change the result.

S50. **Harris v. Viegelahn**, 135 S. Ct. 1829, #14 400, 5/15/15 opinion (Ginsburg, 9-0). **Debtor payments received, and still held, by the Trustee prior to conversion to Chapter 7 must be returned to the debtor, not disbursed by the Trustee pursuant to the confirmed plan.** In a case with a confirmed plan that had the Trustee curing the debtor's mortgage arrearage, the debtor fell behind on the mortgage and Chase foreclosed on his home. Funds earmarked for the mortgage arrearage continued to accumulate in the Trustee's account. A year after the foreclosure the debtor converted his case to Chapter 7; ten days later the Trustee distributed $5,519 of his withheld wages mainly to his creditors. Debtor sought an order directing the Trustee to refund to the debtor the accumulated wages that she had distributed to his creditors. The Bankruptcy Court granted the debtor's motion; the District Court affirmed; and the Fifth Circuit reversed, holding that the Trustee must distribute such accumulated post-petition wages to the debtor's creditors pursuant to the confirmed plan. Held: (1) A debtor who converts to Chapter 7 is entitled to the return of any post-petition wages not yet distributed by the Chapter 13 Trustee. (2) Absent a bad faith conversion, Code sec. 348(f) limits a converted Chapter 7 estate to property belonging to the debtor as of the original filing date; post-petition wages collected by the Chapter 13 Trustee do not become part of that estate. (3) This exclusion removes those earnings from the pool of assets that may be liquidated and distributed to creditors; allowing a terminated Chapter 13 Trustee to disburse those earnings would be incompatible with the statutory design. (4) Sec. 348(e) terminates the services of the Chapter 13 Trustee upon conversion, so the moment a case is converted the Chapter 13 Trustee is stripped of authority to provide the "service" of disbursing payments to creditors. (5) Sec. 1327(a) and 1326(a)(2) ceased to apply once the case was converted, and continuing to distribute funds to creditors is not one of the Trustee's post-conversion responsibilities specified in the FRBP. (6) The refund of these monies to the debtor is not a windfall because if he had filed a Chapter 7 case he would have kept these wages in the first place, and Chapter 13 is a voluntary alternative to Chapter 7. Creditors can gain protection against the risk of excess accumulation of funds with the Trustee by seeking to have the plan include a schedule for regular disbursements of collected funds.

--In re Brandon et al, Bankr. N.D. Md, #14-23735-DER, 11/14/16 opinion (Judge ?). "Harris does not preclude the Court from directing Chapter 13 trustees to pay funds remaining in their possession to debtor's counsel up to the amount of the attorney's fee allowed in cases that are dismissed or converted prior to confirmation of a Chapter 13 plan."

S51. **Wellness International Network v. Sharif**, 135 S. Ct. 1932, # 13 935, 5/26/15 opinion (Sotomayor, 6-3). **Bankruptcy judges can adjudicate *Stern* claims with the parties' knowing and voluntary consent.** Sharif tried to discharge a debt owed to Wellness in his Chapter 7 case. Wellness sought a declaratory judgment that a trust he was administrator of was in fact his alter ego, so that its assets were property of his bankruptcy estate. The Bankruptcy Court ruled against Sharif, but while his appeal was pending the Stern v. Marshall decision [Article III forbids a Bankruptcy Court from entering a final judgment on claims that seek only to augment the bankruptcy estate and would otherwise exist without regard to any bankruptcy proceeding] was handed down. The District Court denied Sharif's request to file a supplemental brief raising Stern issues. The 7th Cir. ruled that his Stern claims could not be waived, and that the Bankruptcy Court lacked constitutional authority to enter final judgment on that claim. Held: Article III permits bankruptcy judges to adjudicate *Stern* claims with the parties' knowing and voluntary consent. *Stern* turned on the fact that the litigant did not truly consent to resolution of the claim against it in a non-Article III forum, so it doesn't govern the issue here. Sec. 157(c)(2) requires that consent to adjudication "need not be express, but it must be knowing and voluntary." The entitlement to an Article III adjudication is a personal right and thus ordinarily subject to waiver; "allowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process." The consent can be either express or implied—it can be based on "actions rather than words"—and the implied consent standard set forth in Roell v. Withrow, 538 U.S. 580, 589 [interpreting Sec. 63(c)] "supplies the appropriate rule for bankruptcy court adjudications." On remand, the 7th Circuit should decide if Sharif's actions evinced the requisite knowing and voluntary consent and whether he forfeited his *Stern* argument below. *["The principal dissent warns darkly of the consequences of today's decision. To hear the principal dissent tell it, the world will end not in fire, or ice but in a bankruptcy court."]*

S52. **Bank of America v. Caulkett**, 135 S. Ct. 1995, # 13 1421, 6/1/15 Opinion (Thomas, 9-0); consolidated Chapter 7 cases**. In a Chap. 7 case, debtor cannot void ("strip off") a junior mortgage lien where the senior lien is greater than**

the property's value if the creditor's claim is both secured by a lien and is allowed under sec. 502. Chapter 7 debtor owned a house encumbered with a senior and junior lien held by BOA. The senior mortgage amount was greater than the value of the house, so the junior lien was "wholly underwater." Debtor sought to avoid ("strip off") the junior lien under sec. 506(d). Bankruptcy Court granted the motion; Dist. Ct. and 11th Cir. affirmed. Held: (1) In a Chap. 7 case, can't void a junior mortgage lien where the senior lien is greater than the property's value if the creditor's claim is both secured by a lien and is allowed under sec. 502. (2) Debtors argued under 506(a)(1) that the claim was not "secured, " but Dewsnup v. Timm [a "strip down" case in which declined to use the definition of "secured claim" in 506(a) for purposes of 506(d)] forecloses that argument: a "secured claim is a claim supported by a security interest in property, regardless of whether the value of the property would be sufficient to cover the claim." (3) The Court declines to limit Dewsnup to partially underwater liens. The definition there did not depend on such a distinction. (The Court noted that the debtors were not asking the Court to overrule Dewsnup.) (4) Nobelman also does not support that distinction; it was applying 506(a) as it interacts with sec. 1322(b)(2). (The Court is reluctant to give the term "secured claim" in 506(d) a different definition depending on the value of the collateral; it is worried about allowing the difference of $1 in always shifting property value to be the difference between the lien being paid in full or being fully avoided: that kind of lien-drawing should to be done by Congress.)

S53. **Baker Botts v. ASARCO, LLC**, 135 S. Ct. 2158, # 14-103, 6/15/15 opinion **No attorney fees for litigation over attorney fees.** Justice Thomas (6-3): "Our basic point of reference when considering the award of attorney's fees is the bedrock principle known as the American Rule: Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise."

The dispute in this case involves fees for defending a fee application in bankruptcy. Law firms that work for the estate are appointed by the court and get paid only after the court approves fee applications, in a process that contemplates notice and a hearing to all involved in the case. The attorneys in this case (petitioners Baker Botts and Jordan, Hyden, Womble, Culbreth & Holzer) did extraordinary work for respondent ASARCO in its bankruptcy; among other things, they recovered a judgment against ASARCO's parent for more than $7 billion. The attorneys sought fees of $120 million, which the court awarded after an extended dispute. The court also awarded $5 million in fees for the time that the firms spent defending their fee applications, challenged by the ungrateful ASARCO (now under control of the company that the firms successfully sued). The Fifth Circuit did not doubt that the $5 million was a reasonable fee for the time spent, but it held that the Bankruptcy Code does not authorize the award of those fees.

The statute in question (Bankruptcy Code § 330) authorizes "reasonable compensation for actual, necessary services rendered." Obviously the phrase contemplates compensation of law firms for the services they render. But it is easy for the Court to say that the statute "neither specifically nor explicitly authorizes courts to shift the costs of adversarial litigation from one side to the other." End of story.

Citing 1930s dictionaries – because the phrase was added to the bankruptcy statute in 1934 – the Court reasons that "services" are labor performed for another, that defending a fee application is labor performed for the firm, and thus that defending a fee application is not a service. The Court notes other places in the Bankruptcy Code that displace the American Rule more explicitly. [from Scotusblog]

S54. **Husky International Electronics, Inc. v. Ritz**, 135 S. Ct. _____, #15 145, 5/16/16 opinion (Sotomayor). **[Chapter 7 case] Code sec., 523(a)(2)(A) "actual fraud" encompasses fraudulent conveyance schemes.** Defendant appellee Ritz was a director and then-part-owner of Chrysalis, which had incurred a debt of $164,000 to the appellant Husky. Ritz then drained Chrysalis of assets available to pay the debt by transferring large sums to other entities which he controlled. When Husky sued Ritz, he filed for Chapter 7 relief. Husky sought to have Ritz held personally liable and the debt deemed non-dischargeable under Code sec. 523 (a)(2) (A), asserting that it was actual fraud. The District Court and the Fifth Circuit held the debt to be dischargeable because it was not "actual fraud." The Supreme Court reversed and remanded the case, and held that "...we interpret "actual fraud" to encompass fraudulent conveyance schemes, even when those schemes do not involve a false representation." While the transferor does not obtain assets or debts through the fraudulent conveyance, the transferee—who, with the requisite intent, also commits fraud—does. (Thomas dissented)

S55. **Lightfoot v. Cendant Mortgage**, _____ S. Ct. _____, #14 1055, 1/18/17 opinion (Sotomayor). **Fannie Mae can be sued for financing and foreclosure problems in state court as well as in federal court.** By statute the Federal National Mortgage Association ("Fannie Mae") has the power "to sue and to be sued, and to complain and defend, in any court of competent jurisdiction, State or Federal." Plaintiffs filed a state court action against Fannie Mae alleging deficiencies in the refinancing, foreclosure, and sale of their home. The District Court denied a motion by the Plaintiffs to remand the case to state court and later entered judgment against the Plaintiffs. Held: (1) Fannie Mae's sue-and-be-sued clause does not grant federal courts jurisdiction over all cases involving Fannie Mae. (2) The outcome here turns on the meaning of "court of competent jurisdiction," which is a court with a grant of subject-matter jurisdiction covering the case before it. (3) The clause permits suit in any state or federal court "*already endowed with subject-matter jurisdiction.*" (4) "The doors to federal court remain open to Fannie Mae through diversity and federal question jurisdiction." The decision of the Ninth Circuit is reversed.

S56 **Czyzewski v. Jevic Holding Corp.,** 137 S. Ct. 973 (2017) (Breyer). **Bankruptcy Courts may not approve a structured dismissal of a Chapter 11 case that provides for distributions that do not follow ordinary priority rules without the consent of affected creditors** A settlement included the dismissal of the Chapter 11 case and a structuring of payments to certain administrative expenses, taxes, and unsecured claims, with nothing being distributed to the priority claim of the WARN Act creditors. The Bankruptcy Court, the District Court, and the Third Circuit all affirmed the settlement. The WARN Act creditors appealed. Held: Reversed and remanded. A distribution scheme ordered as part of a structured dismissal of a Chapter 11 case may not deviate from the priority rules for distribution of estate value that apply under the Code unless the affected parties consent.

S56. **Midland Funding , LLC, v. Johnson**, 137 S. Ct. 1407, #16-348, 5/15/17 opinion (Breyer). **Filing an obviously time-barred claim in a bankruptcy case is not a violation of the Fair Debt Collection Practices Act.** [Excerpts from the Court's syllabus:] Petitioner Midland Funding filed a proof of claim in respondent Johnson's Chapter 13 bankruptcy case, asserting that Johnson owed Midland credit-card debt and noting that the last time any charge appeared on Johnson's account was more than 10 years ago. The relevant statute of limitations under Alabama law is six years. Johnson objected to the claim, and the Bankruptcy Court disallowed it. Johnson then sued Midland, claiming that its filing a proof of claim on an obviously time-barred debt was "false," "deceptive," "misleading," "unconscionable," and "unfair" within the meaning of the Fair Debt Collection Practices Act, 15 U. S. C. §§1692e, 1692f. The District Court held that the Act did not apply and dismissed the suit. The Eleventh Circuit reversed. *Held*: (a) The filing of a proof of claim that is obviously time barred is not a false, deceptive, misleading, unfair, or unconscionable debt collection practice within the meaning of the Fair Debt Collection Practices Act. The relevant Alabama law provides that a creditor has the right to payment of a debt even after the limitations period has expired. Johnson argues that the word "claim" means "enforceable claim." But the word "enforceable" does not appear in the Code's definition, and Johnson's interpretation is difficult to square with Congress's intent "to adopt the broadest available definition of 'claim." Other provisions make clear that the running of a limitations period constitutes an affirmative defense that a debtor is to assert after the creditor makes a "claim." §§502, 558. The law has long treated unenforceability of a claim (due to the expiration of the limitations period) as an affirmative defense, and there is nothing misleading or deceptive in the filing of a proof of claim that follows the Code's similar system. (b) Several lower courts have found or indicated that, in the context of an ordinary civil action to collect a debt, a debt collector's assertion of a claim known to be time barred is "unfair." But those courts rested their conclusions upon their concern that a consumer might unwittingly repay a time-barred debt. Such considerations have significantly diminished force in a Chapter 13 bankruptcy, where the consumer initiates the proceeding, see §§301, 303(a); where a knowledgeable trustee is available, see §1302(a); where procedural rules more directly guide the evaluation of claims, see Fed. Rule Bkrtcy. Proc. 3001(c)(3)(A); and where the claims resolution process is "generally a more streamlined and less unnerving prospect for a debtor than facing a collection lawsuit." ...The bankruptcy system treats untimeliness as an affirmative defense and normally gives the trustee the burden of investigating claims to see if one is stale. And, at least on occasion, the assertion of even a stale claim can benefit the debtor. More importantly, a change in the simple affirmative-defense approach, carving out an exception, would require defining the exception's boundaries. Neither the Fair Debt Collection Practices Act nor the Bankruptcy Code indicates that Congress intended an ordinary civil court applying the Act to determine answers to such bankruptcy-related questions. Contrary to the

argument of the United States, the promulgation of Bankruptcy Rule 9011 did not resolve this issue. 823 F. 3d 1334, reversed.