FOURTH ANNUAL WESTERN DISTRICT OF VIRGINIA BANKRUPTCY CONFERENCE
RECENT CASES OF INTEREST TO CHAPTER 13 PRACTITIONERS: 04/27/16 TO 03/31/17)
JUNE 2, 2017, ROANOKE

WESTERN DISTRICT OF VIRGINIA BANKRUPTCY COURT AND DISTRICT COURT

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.

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., # 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:** Debtor's counsel has indicated he may appeal this opinion.]

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.

B 179A. **Evans v. Stackhouse [Appeal of B179, above]**, **Dist. Ct. ED VA**, #4:16ev17, 1/13/17 (Doumar). **Bankruptcy Court decision is affirmed; case to be dismissed.** *Denial of discharge:* Does 1328(a) "all payments under the plan" encompass solely the Trustee payments or also include direct payments? (1) Two ED VA

Bankruptcy Court opinions say they are included, other districts have ruled similarly, and the 5th Cir. has ruled that such payments are under the plan where the mortgage is being cured in the plan. Foster, 670 F.2d 486 (1982). (2) It is apparent to the Court that the phrase "all payments under the plan" would encompass both direct and trustee payments; Congress could have easily included language limiting the payments that needed to be completed prior to receiving a discharge had it wanted to. The plain language of the legislation is conclusive. (3) The Court agrees with the reasoning of In re Kessler, Bankr. N.D. Tex., 2015, that both cure and maintenance payments on a mortgage concern the same claim and are therefore "under the plan." (4) Rule 3002.1(g) provides the lender the opportunity to rebut the claim that all payments under the plan have been made by including in its response the information that the debtor has not completed direct payments. (5) The Trustee's Notice of Final Cure Payment only covers cure payments made by her; she cannot certify if the debtor has made all post-petition payments. (6) The fact that this claim is not subject to discharge does not change the result. (6) It would be inappropriate for the Trustee to request a discharge for the debtor after having received notice of a very substantial default in post-petition mortgage payments under the plan. (7) Court disagrees that the application of 3002.1(f) has misinterpreted Sec. 1329(a). (8) The argument that this holding will increase the number of refilings contrary to the intent of BAP & CPA cannot override the requirements of the Code for discharge. (9) Debtor's failure to complete her direct payments render her ineligible to receive a discharge under 1328(a). (10) Debtor's case was properly dismissed because there was a material default and no conversion to Chapter 7 was being requested; it's not relevant that the lender did not desire to proceed with its contract remedies. Dismissal or conversion are the only remedies available to the debtor. (11) The Bankruptcy Court decision dismissing the case is affirmed.

B194. **In re Lillian Haskins**, Bankr. 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., # 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.

FOURTH CIRCUIT COURT OF APPEALS

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**, ____ F.3d _____, #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**, _____ F.3d _____, #16-1358 (4th Cir. 1/4/17). **[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)**, ____ F.3d ____, # 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.**, # 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)**, ____ F.3d ____, #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**, ____ F.3d ____, #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**, _____ F.3d _____, # 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."

UNITED STATES SUPREME COURT

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. **Midland Funding , LLC, v. Johnson**, _____ S. Ct. _____, #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.

Ongoing Mortgages – Escrow Calculations

Recap

Ongoing mortgages have now been in place in the Western District of Virginia for many years. Some divisions have had a quasi-compulsory requirement since October 1, 2015.

What have the Trustees seen?

What have the Trustees noticed?

- Debtors who insisted on paying direct defaulted and now are paying the ongoing mortgage through the Plan.
- Confirmation denied where debtor cannot afford the home.
- Reduced number of motions for relief.

Where do we go from here?

Accuracy in proofs of claim

Notices of Mortgage Payment Change

Is the claim accurate?

Your Debtor insists the claim is wrong and she made all of her payments? What do you do?

1) Gather proof of all of the payments.
2) Request proof of payment history.

Is the claim accurate?

3. Recreate your own record.

See Handout 1 demonstrating whether the monthly payment is current

See Handout 2 demonstrating the principal balance and accrued interest. This example shows a daily simple interest loan. The formula would need to change if calculated on a monthly basis

Calculating Escrow

- RESPA permits a lender to collect taxes, insurance premiums and other charges. 12 U.S.C. § 2609(a)(2)(A). However, verify the loan documents to ensure escrow can be collected.
- RESPA permits collection of an amount to maintain an additional balance and to cover anticipated deficiencies in the escrow account.

  12 U.S.C. § 2609(a)(2)(B).

Escrow Generally

- When calculating escrow, lenders must use the aggregate accounting method for accounts established after October 27, 1997. 12 C.F.R. § 1024.17(c)(4).
- Deficiency is a negative balance in the escrow account. Shortage is the amount an escrow account will fall short of the target balance. 12 C.F.R. § 1024.17(b).

Escrow Calculation

- Step One: Project the disbursements over the coming year. 12 C.F.R. § 1024.17(d)(2)(A).
- Step Two: Calculate the monthly amount to provide for these charges. 12 C.F.R. § 1024.17(d)(2)(A).
- Step Three: Determine monthly trial balance. 12 C.F.R. § 1024.17(d)(2)(B).
- Step Four: Add to the first monthly balance an amount sufficient to bring the lowest monthly trial balance to zero. 12 C.F.R. § 1024.17(d)(2)(B).
- Step Five: Add a cushion no greater than 1/6 of the monthly disbursements. 12 C.F.R. § 1024.17(d)(2)(C). This is your target balance.

Extreme Increases—Why bother?

- May result in Plan underfunding, a Trustee's Motion to Dismiss and in the worst case scenario, Plan failure
- If not corrected, may result in double payment of an item
- If truly an error and it violates RESPA, it may lead to collectible damages. If a violation of F.R.B.P. 3002.1 may allow collection of attorney's fees

Extreme Increases—Why bother?

- When the debtor with SSI of $2,000 per month insisted it was possible to pay a $1,500 monthly Plan payment to save the house is now facing a TMTD for funding because the ongoing mortgage is now $1,100 per month requiring a Plan payment of $1,750 per month, isn't it time to counsel the debtor that financial success may also include giving up the house?

Escrow Accounts

- (In a perfect world) When the escrow account is open, the final calculation results in the amount the lender would require as an up front deposit to maintain the account. (However, we don't live in a perfect world.)
- If there is a deficiency greater than one monthly escrow payment, then the lender may require the deficiency to be paid over the next 2-12 months. 12 C.F.R. § 1024.17(f)(4).
- Examples/See Appendix E to RESPA available athttps://www.law.cornell.edu/cfr/text/12/appendix-E_to_part_1024

Extreme Increases

A red flag in any case is when you see an escrow account starting with a negative balance.

See example

Date	Contractual payment amount	Funds Received	Contracutal Due Date	Payment Applied	Late Fee Incurred	Description	Past Due Balance
1/12/2014	**661.72**		**January 2014**		**33.09**	**Payment Due**	**661.72**
2/3/2014		700.00		January 2014		Payment	**-**
2/12/2014	**661.72**		**February 2014**		**33.09**	**Payment Due**	**661.72**
2/28/2014		700.00		February 2014		Payment	**-**
3/12/2014	**661.72**		**March 2014**		**33.09**	**Payment Due**	**661.72**
3/28/2014		700.00		March 2014		Payment	**-**
4/12/2014	**661.72**		**April 2014**		**33.09**	**Payment Due**	**661.72**
4/28/2014		675.00		April 2014		Payment	**-**
5/12/2014	**661.72**		**May 2014**		**33.09**	**Payment Due**	**661.72**
6/12/2014	**661.72**		**June 2014**		**33.09**	**Payment Due**	**1,323.44**
6/17/2014		675.00		May 2014		Payment	**648.44**
7/7/2014		700.00		June 2014		Payment	**-**
7/12/2014	**661.72**		**July 2014**		**33.09**	**Payment Due**	**661.72**
8/12/2014	**661.72**		**August 2014**		**33.09**	**Payment Due**	**1,323.44**
8/18/2014		675.00		July 2014		Payment	**648.44**
9/12/2014	**661.72**		**September 2014**		**33.09**	**Payment Due**	**1,310.16**
9/30/2014		675.00		August 2014		Payment	**635.16**
10/12/2014	**661.72**		**October 2014**		**33.09**	**Payment Due**	**1,296.88**
11/12/2014	**661.72**		**November 2014**		**33.09**	**Payment Due**	**1,958.60**
				September thru			**1,958.60**
12/3/2014		2,118.97		November 2014		Payment	**-**
12/12/2014	**661.72**		**December 2014**		**33.09**	**Payment Due**	**661.72**
12/29/2014		700.00		December 2014		Payment	**-**
1/12/2015	**661.72**		**January 2015**		**33.09**	**Payment Due**	**661.72**
2/6/2015		700.00		January 2015		Payment	**-**
2/12/2015	**661.72**		**February 2015**		**33.09**	**Payment Due**	**661.72**
3/12/2015	**661.72**		**March 2015**		**33.09**	**Payment Due**	**1,323.44**
3/20/2015		700.00		February 2015		Payment	**623.44**
4/12/2015	**661.72**		**April 2015**		**33.09**	**Payment Due**	**1,285.16**
5/7/2015		800.00		March 2015		Payment	**485.16**
5/12/2015	**786.64**		**May 2015**			**Payment Due**	**1,271.80**
5/29/2015		-				Payment	**1,271.80**
6/12/2015	**786.64**		**June 2015**		**33.09**	**Payment Due**	**2,058.44**
7/12/2015	**786.64**		**July 2015**		**33.09**	**Payment Due**	**2,845.08**
8/12/2015	**786.64**		**August 2015**		**33.09**	**Payment Due**	**3,631.72**
9/12/2015	**786.64**		**September 2015**		**33.09**	**Payment Due**	**4,418.36**
10/12/2015	**786.64**		**October 2015**		**33.09**	**Payment Due**	**5,205.00**

Loan Effective Date	**5/12/2008**	Interest Rate	8.00%
First Payment date	**6/9/2008**	Days	365
Beg Balance	$ 79,112.54		

Pmt #			Mo. Amount Paid	Beg Principal	Interest Application Principal Paid	Ending Principal	Total Int Paid in Mo	Integrity check
1	**Payment Date**	**6/9/2008**						
	Principal paid	**700.00**						
	Interest Paid		**700.00**	$79,112.54	$214.49	$78,898.05	$485.51	YES
2	**Payment Date**	**7/18/2008**						
	Principal paid	**650.00**						
	Interest Paid		**650.00**	$78,898.05	$0.00	$78,898.05	$650.00	YES
3	**Payment Date**	**8/25/2008**						
	Principal paid	**675.00**						
	Interest Paid		**675.00**	$78,898.05	$0.00	$78,898.05	$675.00	YES
4	**Payment Date**	**9/15/2008**						
	Principal paid	**660.00**						
	Interest Paid		**660.00**	$78,898.05	$290.31	$78,607.74	$369.69	YES
5	**Payment Date**	**10/22/2008**						
	Principal paid	**690.00**						
	Interest Paid		**690.00**	$78,607.74	$52.52	$78,555.22	$637.48	YES
6	**Payment Date**	**11/24/2008**						
	Principal paid	**700.00**						
	Interest Paid		**700.00**	$78,555.22	$131.82	$78,423.40	$568.18	YES
7	**Payment Date**	**12/30/2008**						
	Principal paid	**700.00**						
	Interest Paid		**700.00**	$78,423.40	$81.21	$78,342.19	$618.79	YES
8	**Payment Date**	**2/2/2009**						
	Principal paid	**675.00**						
	Interest Paid		**675.00**	$78,342.19	$91.19	$78,251.00	$583.81	YES
9	**Payment Date**	**2/26/2009**						
	Principal paid	**700.00**						
	Interest Paid		**700.00**	$78,251.00	$288.38	$77,962.62	$411.62	YES
10	**Payment Date**	**3/30/2009**						
	Principal paid	**675.00**						
	Interest Paid		**675.00**	$77,962.62	$128.19	$77,834.43	$546.81	YES
11	**Payment Date**	**4/20/2009**						
	Principal paid	**700.00**						
	Interest Paid		**700.00**	$77,834.43	$341.75	$77,492.68	$358.25	YES
12	**Payment Date**	**5/14/2009**						
	Principal paid	**650.00**						
	Interest Paid		**650.00**	$77,492.68	$242.37	$77,250.31	$407.63	YES
13	**Payment Date**	**6/25/2009**						
	Principal paid	**675.00**						

	Interest Paid		**675.00**	$77,250.31	$0.00	$77,250.31	$675.00	YES
14	**Payment Date**	**7/29/2009**						
	Principal paid	**675.00**						
	Interest Paid		**675.00**	$77,250.31	$63.20	$77,187.11	$611.80	YES
15	**Payment Date**	**8/24/2009**						
	Principal paid	**700.00**						
	Interest Paid		**700.00**	$77,187.11	$260.14	$76,926.97	$439.86	YES
16	**Payment Date**	**9/29/2009**						
	Principal paid	**700.00**						
	Interest Paid		**700.00**	$76,926.97	$93.01	$76,833.96	$606.99	YES
17	**Payment Date**	**11/4/2009**						
	Principal paid	**700.00**						
	Interest Paid		**700.00**	$76,833.96	$93.75	$76,740.21	$606.25	YES
18	**Payment Date**	**11/20/2009**						
	Principal paid	**675.00**						
	Interest Paid		**675.00**	$76,740.21	$405.88	$76,334.33	$269.12	YES
19	**Payment Date**	**1/18/2010**						
	Principal paid	**700.00**						
	Interest Paid		**700.00**	$76,334.33	$0.00	$76,334.33	$700.00	YES
20	**Payment Date**	**2/12/2010**						
	Principal paid	**700.00**						
	Interest Paid		**700.00**	$76,334.33	$0.00	$76,334.33	$700.00	YES
21	**Payment Date**	**3/15/2010**						
	Principal paid	**700.00**						
	Interest Paid		**700.00**	$76,334.33	$175.95	$76,158.38	$524.05	YES
22	**Payment Date**	**4/16/2010**						
	Principal paid	**700.00**						

	Interest Paid		**700.00**	$76,158.38	$165.85	$75,992.53	$534.15 YES
23	**Payment Date**	**5/10/2010**					
	Principal paid	**700.00**					
	Interest Paid		**700.00**	$75,992.53	$300.26	$75,692.27	$399.74 YES
24	**Payment Date**	**6/18/2010**					
	Principal paid	**700.00**					
	Interest Paid		**700.00**	$75,692.27	$52.99	$75,639.28	$647.01 YES
25	**Payment Date**	**7/20/2010**					
	Principal paid	**675.00**					
	Interest Paid		**675.00**	$75,639.28	$144.49	$75,494.79	$530.51 YES
26	**Payment Date**	**8/13/2010**					
	Principal paid	**675.00**					
	Interest Paid		**675.00**	$75,494.79	$277.88	$75,216.91	$397.12 YES
27	**Payment Date**	**9/24/2010**					
	Principal paid	**725.00**					
	Interest Paid		**725.00**	$75,216.91	$32.59	$75,184.32	$692.41 YES
28	**Payment Date**	**11/1/2010**					
	Principal paid	**725.00**					
	Interest Paid		**725.00**	$75,184.32	$98.81	$75,085.51	$626.19 YES
29	**Payment Date**	**12/3/2010**					
	Principal paid	**725.00**					
	Interest Paid		**725.00**	$75,085.51	$198.37	$74,887.14	$526.63 YES
30	**Payment Date**	**1/7/2011**					
	Principal paid	**725.00**					
	Interest Paid		**725.00**	$74,887.14	$150.52	$74,736.62	$574.48 YES
31	**Payment Date**	**2/4/2011**					
	Principal paid	**725.00**					
	Interest Paid		**725.00**	$74,736.62	$266.34	$74,470.28	$458.66 YES
32	**Payment Date**	**2/28/2011**					
	Principal paid	**661.72**					
	Interest Paid		**661.72**	$74,470.28	$269.99	$74,200.29	$391.73 YES
33	**Payment Date**	**3/11/2011**					
	Principal paid	**316.15**					
	Interest Paid		**316.15**	$74,200.29	$137.26	$74,063.03	$178.89 YES
34	**Payment Date**	**3/30/2011**					
	Principal paid	**694.80**					
	Interest Paid		**694.80**	$74,063.03	$386.37	$73,676.66	$308.43 YES
35	**Payment Date**	**4/14/2011**					
	Principal paid	**661.71**					
	Interest Paid		**661.71**	$73,676.66	$419.49	$73,257.17	$242.22 YES
36	**Payment Date**	**5/20/2011**					
	Principal paid	**694.80**					
	Interest Paid		**694.80**	$73,257.17	$116.77	$73,140.40	$578.03 YES

37	**Payment Date**	**6/17/2011**						
	Principal paid	**661.72**						
	Interest Paid		**661.72**	$73,140.40	$212.86	$72,927.54	$448.86	YES
38	**Payment Date**	**7/15/2011**						
	Principal paid	**628.64**						
	Interest Paid		**628.64**	$72,927.54	$181.08	$72,746.46	$447.56	YES
39	**Payment Date**	**8/12/2011**						
	Principal paid	**662.00**						
	Interest Paid		**662.00**	$72,746.46	$215.56	$72,530.90	$446.44	YES
40	**Payment Date**	**9/23/2011**						
	Principal paid	**700.00**						
	Interest Paid		**700.00**	$72,530.90	$32.32	$72,498.58	$667.68	YES
41	**Payment Date**	**10/21/2011**						
	Principal paid	**700.00**						
	Interest Paid		**700.00**	$72,498.58	$255.08	$72,243.50	$444.92	YES
42	**Payment Date**	**11/18/2011**						
	Principal paid	**700.00**						
	Interest Paid		**700.00**	$72,243.50	$256.64	$71,986.86	$443.36	YES
43	**Payment Date**	**12/16/2011**						
	Principal paid	**662.00**						
	Interest Paid		**662.00**	$71,986.86	$220.22	$71,766.64	$441.78	YES
44	**Payment Date**	**1/13/2012**						
	Principal paid	**662.00**						
	Interest Paid		**662.00**	$71,766.64	$221.57	$71,545.07	$440.43	YES
45	**Payment Date**	**2/24/2012**						
	Principal paid	**662.00**						
	Interest Paid		**662.00**	$71,545.07	$3.39	$71,541.68	$658.61	YES
46	**Payment Date**	**3/23/2012**						
	Principal paid	**662.00**						
	Interest Paid		**662.00**	$71,541.68	$222.95	$71,318.73	$439.05	YES
47	**Payment Date**	**4/20/2012**						
	Principal paid	**662.00**						
	Interest Paid		**662.00**	$71,318.73	$224.32	$71,094.41	$437.68	YES
48	**Payment Date**	**5/29/2012**						
	Principal paid	**700.00**						
	Interest Paid		**700.00**	$71,094.41	$92.29	$71,002.12	$607.71	YES
49	**Payment Date**	**6/18/2012**						
	Principal paid	**700.00**						
	Interest Paid		**700.00**	$71,002.12	$388.76	$70,613.36	$311.24	YES
50	**Payment Date**	**7/19/2012**						
	Principal paid	**700.00**						
	Interest Paid		**700.00**	$70,613.36	$220.22	$70,393.14	$479.78	YES
51	**Payment Date**	**8/15/2012**						
	Principal paid	**700.00**						
	Interest Paid		**700.00**	$70,393.14	$283.43	$70,109.71	$416.57	YES

52	**Payment Date**	**9/25/2012**						
	Principal paid	**700.00**						
	Interest Paid		**700.00**	$70,109.71	$69.97	$70,039.74	$630.03	YES
53	**Payment Date**	**10/22/2012**						
	Principal paid	**700.00**						
	Interest Paid		**700.00**	$70,039.74	$285.52	$69,754.22	$414.48	YES
54	**Payment Date**	**11/15/2012**						
	Principal paid	**700.00**						
	Interest Paid		**700.00**	$69,754.22	$333.07	$69,421.15	$366.93	YES
55	**Payment Date**	**12/27/2012**						
	Principal paid	**700.00**						
	Interest Paid		**700.00**	$69,421.15	$60.95	$69,360.20	$639.05	YES
56	**Payment Date**	**1/31/2013**						
	Principal paid	**355.00**						
	Interest Paid		**355.00**	$69,360.20	$0.00	$69,360.20	$355.00	YES
57	**Payment Date**	**3/4/2013**						
	Principal paid	**675.00**						
	Interest Paid		**675.00**	$69,360.20	$11.45	$69,348.75	$663.55	YES
58	**Payment Date**	**3/29/2013**						
	Principal paid	**675.00**						
	Interest Paid		**675.00**	$69,348.75	$295.01	$69,053.74	$379.99	YES
59	**Payment Date**	**4/29/2013**						
	Principal paid	**790.00**						
	Interest Paid		**790.00**	$69,053.74	$320.81	$68,732.93	$469.19	YES
60	**Payment Date**	**5/30/2013**						
	Principal paid	**700.00**						
	Interest Paid		**700.00**	$68,732.93	$232.99	$68,499.94	$467.01	YES
61	**Payment Date**	**7/3/2013**						
	Principal paid	**789.00**						
	Interest Paid		**789.00**	$68,499.94	$278.53	$68,221.41	$510.47	YES
62	**Payment Date**	**7/26/2013**						
	Principal paid	**789.00**						
	Interest Paid		**789.00**	$68,221.41	$445.09	$67,776.32	$343.91	YES
63	**Payment Date**	**8/30/2013**						
	Principal paid	**700.00**						
	Interest Paid		**700.00**	$67,776.32	$180.07	$67,596.25	$519.93	YES
64	**Payment Date**	**10/1/2013**						
	Principal paid	**700.00**						
	Interest Paid		**700.00**	$67,596.25	$225.90	$67,370.35	$474.10	YES
65	**Payment Date**	**10/31/2013**						
	Principal paid	**700.00**						
	Interest Paid		**700.00**	$67,370.35	$257.02	$67,113.33	$442.98	YES
66	**Payment Date**	**11/30/2013**						
	Principal paid	**700.00**						
	Interest Paid		**700.00**	$67,113.33	$258.71	$66,854.62	$441.29	YES

67	**Payment Date**	**1/2/2014**						
	Principal paid	**675.00**						
	Interest Paid		**675.00**	$66,854.62	$191.45	$66,663.17	$483.55	YES
68	**Payment Date**	**2/3/2014**						
	Principal paid	**700.00**						
	Interest Paid		**700.00**	$66,663.17	$232.44	$66,430.73	$467.56	YES
69	**Payment Date**	**2/28/2014**						
	Principal paid	**700.00**						
	Interest Paid		**700.00**	$66,430.73	$336.00	$66,094.73	$364.00	YES
70	**Payment Date**	**3/28/2014**						
	Principal paid	**700.00**						
	Interest Paid		**700.00**	$66,094.73	$294.38	$65,800.35	$405.62	YES
71	**Payment Date**	**4/28/2014**						
	Principal paid	**675.00**						
	Interest Paid		**675.00**	$65,800.35	$227.92	$65,572.43	$447.08	YES
72	**Payment Date**	**6/17/2014**						
	Principal paid	**675.00**						
	Interest Paid		**675.00**	$65,572.43	$0.00	$65,572.43	$675.00	YES
73	**Payment Date**	**7/7/2014**						
	Principal paid	**700.00**						
	Interest Paid		**700.00**	$65,572.43	$368.96	$65,203.47	$331.04	YES
74	**Payment Date**	**8/18/2014**						
	Principal paid	**675.00**						
	Interest Paid		**675.00**	$65,203.47	$74.77	$65,128.70	$600.23	YES
75	**Payment Date**	**9/30/2014**						
	Principal paid	**675.00**						
	Interest Paid		**675.00**	$65,128.70	$61.18	$65,067.52	$613.82	YES
76	**Payment Date**	**12/3/2014**						
	Principal paid	**2,118.97**						
	Interest Paid		**2,118.97**	$65,067.52	$1,206.24	$63,861.28	$912.73	YES
77	**Payment Date**	**12/28/2014**						
	Principal paid	**700.00**						
	Interest Paid		**700.00**	$63,861.28	$350.08	$63,511.20	$349.92	YES
78	**Payment Date**	**2/6/2015**						
	Principal paid	**700.00**						
	Interest Paid		**700.00**	$63,511.20	$143.19	$63,368.01	$556.81	YES
79	**Payment Date**	**3/18/2015**						
	Principal paid	**700.00**						
	Interest Paid		**700.00**	$63,368.01	$144.44	$63,223.57	$555.56	YES
80	**Payment Date**	**5/6/2015**						
	Principal paid	**800.00**						
	Interest Paid		**800.00**	$63,223.57	$121.00	$63,102.57	$679.00	YES
81	**Payment Date**	**5/29/2015**						
	Principal paid	**-**						
	Interest Paid		**-**	$63,102.57	$0.00	$63,102.57	$0.00	YES

Totals	56,233.51	$ 16,009.97	$ 40,223.54	56,233.51

Calculation of post-petition mortgage payment

Escrow Calculation

Step one:	**Real Estate Taxes:**	**958.24**
	Hazard Insurance:	**1540.00**
	Total:	**2498.24**
Step two:	**Monthly escrow:**	**208.19**

			Step Three Trial Balance	Step Four To $0	Step Five Add Cushion
Month	**Escrow Pay**	**Disbursements**			
				561.81	978.19
1	208.19		208.19	770.00	1186.38
2	208.19		416.37	978.18	1394.56
3	208.19		624.56	1186.37	1602.75
4	208.19		832.75	1394.56	1810.94
5	208.19	479.12	561.81	1123.62	1540.00
6	208.19		770.00	1331.81	1748.19
7	208.19	1540.00	-561.81	0.00	416.38
8	208.19		-353.63	208.18	624.56
9	208.19		-145.44	416.37	832.75
10	208.19		62.75	624.56	1040.94
11	208.19	479.12	-208.19	353.62	770.00
12	208.19		.00	561.81	978.19

Calculation of Mortgage Payment:

Principal & Interest	**655.80**
Escrow	**208.19**
Cushion	**34.70 (1/6 annual disb. /12)**
Shortage	**12.11 (1/12 shortage)**
(Difference between -$561.81 and $416.38)	
Total Mortgage Payment	**910.80**

Calculation of post-petition mortgage payment

Escrow Calculation

Step one:	**Real Estate Taxes:**	**625.20**
	Hazard Insurance:	**1348.00**
	PMI:	**73.68**
	Total:	**2,046.88**
Step two:	**Monthly escrow:**	**170.57**

			Step Three Trial Balance	Step Four To $0	Step Five Add Cushion
Month	**Escrow Pay**	**Disbursements**			
				1183.57	1524.71
1	170.57	1354.14	-1183.57	0.00	341.14
2	170.57	6.14	-1019.13	164.44	505.58
3	170.57	6.14	-854.70	328.87	670.01
4	170.57	6.14	-690.27	493.30	834.44
5	170.57	318.74	-838.43	345.14	686.28
6	170.57	6.14	-674.00	509.57	850.71
7	170.57	6.14	-509.57	674.00	1015.14
8	170.57	6.14	-345.13	838.44	1179.58
9	170.57	6.14	-180.70	1002.87	1344.01
10	170.57	6.14	-16.27	1167.30	1508.28
11	170.57	318.74	-164.43	1019.14	1360.28
12	170.57	6.14	0.00	1183.57	1524.71

Calculation of Mortgage Payment:

Principal & Interest	**235.99**
Escrow	**170.57**
Cushion	**28.43 (1/6 annual disb. /12)**
Shortage	**70.20 (1/12 shortage)**
(Difference between -$1,183.57 and $341.14)	
Total Mortgage Payment	**533.62**

Calculation of post-petition mortgage payment

Escrow Calculation

Step one:	**Real Estate Taxes:**	**958.24**
	Hazard Insurance:	**1540.00**
	Total:	**2498.24**
Step two:	**Monthly escrow:**	**208.19**

			Step Three Trial Balance	Step Four To $0	Step Five Add Cushion
Month	**Escrow Pay**	**Disbursements**			
			-1,458.23	2,020.02	2,020.02
1	208.19		-1,250.04	2,228.21	2,262.91
2	208.19		-1,041.85	2,436.40	2,505.80
3	208.19		-833.66	2,644.59	2,748.69
4	208.19		-625.47	2,852.78	2,991.58
5	208.19	479.12	-896.40	2,581.85	2,755.35
6	208.19		-688.21	2,790.04	2,998.24
7	208.19	1,540.00	-2,020.02	1,458.23	1,701.13
8	208.19		-1,811.83	1,666.42	1,944.02
9	208.19		-1,603.64	1,874.61	2,186.91
10	208.19		-1,395.45	2,082.80	2,429.80
11	208.19	479.12	-1,666.38	1,811.87	2,193.57
12	208.19		-1,458.19	2,020.06	2,436.46

Calculation of Mortgage Payment:

Principal & Interest	**655.80**
Escrow	**208.19**
Cushion	**34.70 (1/6 annual disb. /12)**
Shortage	**310.10 (1/12 shortage)**

(Possibly the difference between -$2,020.02 and $1,701.13)

Total Mortgage Payment $1,208.79