WESTERN DISTRICT OF VIRGINIA BANKRUPTCY CONFERENCE
CHAPTER 13 CASE LAW UPDATE
JUNE 7, 2019

(Herbert L. Beskin, Chapter 13 Trustee)

SUPREME COURT OPINIONS

S59. **Lamar, Archer & Cofrin, LLP, v. Appling,** No. 16-1215, 584 U.S. _____ (6/4/18 opinion; Sotomayor). **Chapter 7 case. Non-dischargeability under 523(a)(2) of an oral statement concerning debtor's financial condition.** Law firm's client advised it that he would be receiving a sizeable tax refund from ich he would repay the fees he owed the firm. Relying on that statement, the firm continued working for the client. Client lied about not having received the refund. Firm obtained a $104K judgment against the client, and client then filed Chapter 7. Firm argued that the debt was non-dischargeable under 523(a)(2)(A). *Issue: Can a representation about a single asset, rather than overall financial condition, fall within 523(a)(2)(B?* Court said it could, but such statements must be made in writing. If statements fall within 523(a)(2)(A), the general fraud section, there is no requirement of a writing. To be non-dischargeable, a statement respecting the debtor's financial condition must meet all the requirements of 523(a)(2)(B); otherwise, even though the statement is false, the debt is dischargeable, notwithstanding 523(a)(2)(A) [NACTT Academy website.]

S60. **Obduskey v. McCarthy & Amp; Holthus LLP**, #17-1307, 3/20/19 opinion (Bryer) **Non-judicial foreclosure agent is not is not a "debt collector" under the FDCPA.** Facts: Law firm McCarthy & Holthus LLP was hired to carry out a nonjudicial foreclosure on a Colorado home owned by petitioner Dennis Obduskey. McCarthy sent Obduskey correspondence related to the foreclosure. Obduskey responded with a letter invoking a federal Fair Debt Collection Practices Act (FDCPA or Act) provision, 15 U. S. C. §1692g(b), which provides that if a consumer disputes the amount of a debt, a "debt collector" must "cease collection" until it "obtains verification of the debt" and mails a copy to the debtor. Instead, McCarthy initiated a nonjudicial foreclosure action. Obduskey sued, alleging that McCarthy failed to comply with the FDCPA's verification procedure. The District Court dismissed on the ground that McCarthy was not a "debt collector" within the meaning of the FDCPA, and the Tenth Circuit affirmed. Held: A business engaged in no more than nonjudicial foreclosure proceedings is not a "debt collector" under the FDCPA, except for the limited purpose of §1692f(6). Pp. 6-14.

FOURTH CIRCUIT OPINIONS

F66A. **Askri v. Gorman**, 580 B.R. 460 (E.D. Va. 2017) [Brinkema), affirmed 727 Fed. App'x 771, 6/25/18. **Trustee's obligation is to investigate the financial affairs of the debtor, not to remain neutral.** In this pro se case the Trustee filed a motion to dismiss, arguing that the four previous unsuccessful cases and the debtor's current income showed that he was not proceeding in good faith. Debtor argued that the Trustee had inappropriately advocated on behalf of

absent creditors and/or non-creditors, and that the Bankruptcy Court had erred by allowing the Trustee to do this, rather than forcing him to remain neutral. The District Court stated that (i) the debtor misunderstood the role of the Trustee; (ii) the Trustee had no obligation to remain neutral, but he did have an obligation to investigate the financial affairs of the debtor and, if he found it to be in the best interests of the creditors, to move to dismiss the case; (iii) the Bankruptcy Court did not err in its supervision of the Trustee; and (iv) there was no error in dismissing the case, and denying conversion to another chapter, given the debtor's lack of good faith. The Fourth Circuit, in an unpublished per curiam opinion, affirmed for the reasons stated by the District Court.

F66B. **US v. William Gilliam**, # 17-1642, 6/25/18 opinion (Per curiam, unpublished opinion. **Detailed discussion of the suspension of IRS limitation period for collection of taxes.** IRS assessed federal income tax liability against Gilliam for 1993 and 1995 tax years, and in 2015 sought to collect on the liability. Gilliam asserted the 10 year limitation on assessment of the taxes had expired, but the Court held that it was suspended from 12/07 to 9/10 and had not expired when the IRS moved to collect. The opinion contains a detailed explanation of the two-track process of appealing assessments, levys, and judicial proceedings in these situations. [Under IRC sec. 6502(a)(1), the IRS has ten years after making an assessment to collect through levy or judicial proceeding. Per sec. 6320(c), the period is suspended when the IRS is prohibited from making an assessment or collecting, or if the taxpayer requests a hearing to challenge a levy or a lien. If the taxpayer's request for a hearing is timely, the period is suspended; if it is not timely, it is not suspended.]

F67. **In re Rodney McCowan**, 2018 WL 4078613, ____ F.3d _____, 10/ /18 (Humrickhouse). **(Chap. 7 case from NC) OK to reopen case and amend exemption schedules six years after case was closed.** Six years after his Chapter 7 case was closed, the Debtor filed a motion to reopen his case to allow the Trustee to administer his residence when it was discovered that the mortgagee had filed a certificate of satisfaction on the property. The Court allowed the Debtor to reopen his case and amend his exemption schedules to claim a Homestead exemption. The Court applied a "middle approach" and stated that Rule 9006(b)(1) allows amendment of schedules if the failure to amend the schedules before the case was closed was the result of excusable neglect. The failure to claim the exemption did not preclude a finding of excusable neglect where there is no evidence of bad faith.

F68. **Labgold v. Regenhardt**, ***Virginia Supreme Court***, # 171640, 10/18/18 Opinion, 2018 BL 387385. **[Chapter 7 case.] Debtor will be allowed to pursue his claims for Chapter 7 post-petition attorney malpractice in state court, but not his pre-petition claims.** State Circuit Court dismissed Chapter 7 debtor's malpractice complaint against his bankruptcy attorney for lack of standing, and refused to allow him to amend his complaint. In the Bankruptcy Court, the US Trustee had brought an adversary complaint which resulted in the denial of discharge when the Court found that the debtor had fraudulently transferred his home within a year of filing from himself to himself and his wife as tenants by the entireties. The debtor's schedules had inaccurately listed the residence as exempt, and had failed to disclose the transfer. As a result of the adversary proceeding, the debtor was unable to obtain a Chapter 7 discharge of $600,000 of unsecured debt. The Virginia Supreme Court holds that the debtor *does* have standing to pursue his *post-petition* malpractice claims, and reverses and remands the case for further proceedings: (1) The state Circuit held that the debtor's claims for damages were pre-petition causes of action, which negated his standing. The Court agrees that the debtor did not have standing to assert damages for the alleged pre-petition breaches (improper preparation of schedules), because those claims are property of the bankruptcy estate and may only be brought by the Chapter 7 Trustee. (2) The Court disagrees with the state Circuit Court regarding the alleged *post-petition* breaches of the attorney's duties. (3) In addition, in his motion for leave to amend his complaint, the debtor proffered a number of additional allegations of post-petition breaches of duty.

F69. **Commonwealth of Virginia v. Barry Webb**, #17 2328, 11/19/18 opinion (Agee). **State child support agency cannot garnish funds in Trustee's possession at dismissal of an unconfirmed case; the Trustee must return the funds to the debtor.** Subsequent to the dismissal of the debtor's unconfirmed case, the Virginia Division of Child Support Enforcement sought by administrative garnishment to obtain $3,000 in post-petition plan payments held by the Trustee in order to apply them to the debtor's $75,000 of delinquent child support. The state Order to Withhold also purported to hold the Trustee personally liable for the debtor's entire debt if he failed to comply. The Trustee, concluding that he could not comply with both the mandate of the Bankruptcy Code [(1326(a)(2)] and the state garnishment order, filed a

motion with the Bankruptcy Court seeking direction as to whom he should pay the post-petition funds. The Bankruptcy Court ordered the Trustee to return the funds to the debtor, and the District Court affirmed. Held: *The judgment of the District Court is affirmed*. (1) The post-petition payments made by the debtor to the Trustee under 1326(a)(1) are property of the estate and are covered by the automatic stay while the case is pending. (2) The parties agree that the administrative expense exception under 1326(a)(2) does not apply, nor does paragraph 1326(a)(3). (3) "As the District Court observed, Congress was certainly free to determine which party received a Chapter 13 debtor's funds upon dismissal, and it had made that choice unequivocally in 1326(a)(2)." (4) Congress could have added other exceptions to this rule (e.g., child support), but it did not. (5) Congress' intention is "unmistakably clear in the language of the statue: when a case is not confirmed, the trustee must return the post-petition payments to the debtor." (6) This result follows Congress' direction in sec. 349(b)(3) that dismissal revest the property of the estate in the entity in which such property was vested immediately before the commencement of a case. (7) The Division's sec. 362 argument –that it should be able to purse its remedies available in state court against the debtor once the automatic stay has been lifted –is "simply unrelated to the clear requirement of 1326(a)(2)." (8) Sec. 362's description of a stay's conclusion is not a statement of *who* gets the funds; it only addresses *when* those funds are available. (9) The fact that the debtor's financial position may have been unfairly enhanced by this result does not change the choice that Congress has made to shield post-petition wages from creditors during the case and to return these funds to the debtor. (10) Va. Code sec. 63-2-1929 providing for this levy "directly contradicts with the federal mandate in sec. 1326(a)(2)..." and under the Supremacy Clause it is therefore preempted by sec. 1326(a)(2). (11) "Section 1326(a)(2) simply prevents the Division from levying upon the Trustee when he is in possession of the post-petition payments." [See B197 for Bankruptcy Court opinion and B204 for District Court opinion]

F. 70 **Summitbridge National Investments III, LLC v. Ollie Faison**, # 17-2441, 2/8/19 opinion (Harris) **The Bankruptcy Code does not preclude an unsecured creditor's post-petition attorney's fees where such fees are guaranteed by a pre-petition contract.** Issue: The question in this appeal is whether the Bankruptcy Code bars a creditor from asserting an unsecured claim for attorneys' fees, if those fees are incurred after the filing of a bankruptcy petition but guaranteed by a pre-petition contract. Held: We join other federal courts of appeals in holding that the Code does not preclude such claims. Accordingly, we reverse the contrary determination of the district court and remand for further proceedings. (1) "In 2007, the Supreme Court provided important guidance in *Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co.*, 549 U.S. 443 (2007). There, the Court rejected a Ninth Circuit rule disallowing claims for post-petition attorneys' fees under one set of circumstances – specifically, where those post-petition fees were incurred while litigating issues of federal bankruptcy law. The *Travelers* Court stopped short of deciding whether the Code might provide some different and independent basis for disallowing post-petition attorneys' fees altogether. But as other courts have recognized, the Supreme Court's "analysis and rationale" in *Travelers* is "equally applicable to post-petition costs arising out of pre-petition contracts more generally." " (2) We conclude that neither sec. 502(b) nor 506(b) "expressly disallows a creditor like SummitBridge from asserting an unsecured claim for post-petition attorneys' fees based on a valid pre-petition contract." (3) "Section 502(b) does not bar SummitBridge from recovering post-petition attorneys' fees, so long as two conditions are met: First, SummitBridge must have had a "claim" for those fees as of the petition date; and second, that claim must not fall within one or more of the nine enumerated exceptions. " (4) "The right to payment of attorneys' fees under Faison's promissory notes was contingent on a future, post-petition event – namely, the notes being placed with an attorney for collection. But the Code defines "claim" broadly, and expressly includes "right[s] to payment" that are "contingent." What matters is that the *right* to those fees arose pre-petition, when Faison signed the promissory notes in question. That is enough, as the Ninth Circuit has explained, to make the fees "pre[-]petition in nature, constituting a contingent pre[-]petition obligation that bec[omes] fixed post[-]petition when the fees [are] incurred." " (5) "Unlike § 502, § 506, titled "[d]etermination of secured status," does not speak directly to the allowance or disallowance of claims. But § 506(b) does refer to attorneys' fees, providing that creditors with over-secured claims – that is, creditors with collateral that exceeds the amount of their claims – may add to their secured claims both interest and reasonable attorneys' fees: 506(b) never mentions, let alone expressly disallows, unsecured claims for post-petition attorneys' fees. Section 506(b) has nothing to do with the allowance or disallowance of claims. That function, as described above, is performed by § 502, aptly titled "[a]llowance of claims or interests." (6) "Section 502, in other words, answers "the threshold question of whether a claim should be allowed or disallowed," while "§ 506 deals with the entirely different, more narrow question of whether certain types of claims should be

considered secured or unsecured. It is no surprise, then, that when Congress intends to disallow a claim for attorneys' fees, it does so in § 502, not § 506." (7) "The Court in *Timbers* was addressing the allowability of claims for post-petition *interest*, not attorneys' fees. .. because § 502(b) does "not contain a similar prohibition against [allowance of] attorneys' fees, the comparison between the current issue and that presented in *Timbers* is not persuasive." (7) "Again, we emphasize that under *Travelers*, the question before us is whether there is anything in § 506(b) that could be deemed an express disallowance of unsecured claims for post-petition attorneys' fees. Like the Second and Ninth Circuits, we think there is not. " (8) Congress has "generally left the determination of property rights in the assets of a bankrupt's estate to state law," Allowing creditors, like SummitBridge, who have bargained specifically for attorneys' fees under state law to enforce those rights in bankruptcy is fully consistent with that principle, even if it reduces the pool of assets otherwise available."

F71. **In re Larry Hurlburt (Black v. Bledsoe)**, No. 17-2449, 05/24/19 Opinion (Wynn). [23 page majority opinion; 20 page dissent by Wilkinson] **The Court reverses its prior decision in Witt and holds that sec. 1322(c)(2) allows a debtor to bifurcate and cram down an undersecured homestead mortgage if the last payment on the mortgage is due before the end of the Chapter 13 plan.** Issue: Can Chap. 13 debtors bifurcate a "narrow subset of undersecured home mortgage loans" into separate secured and unsecured claims and "cram down" the unsecured portion of such loans? Held: Yes; the Fourth Circuit overrules its decision in In re Witt, 113 F.3d 508 (1997), and aligns itself with "every other court that has considered this issue." It holds that sec. 1322(c)(2) "*is best read to authorize modification of "claim[s]," not just "payment[s]," and therefore that a Chapter 13 plan may bifurcate a claim based on an undersecured homestead mortgage, the last payment for which is due prior to a debtor's final payment under a repayment plan, into secured and unsecured components and cram down the unsecured component*."

Facts: Debtor valued the property at $40,000; creditor filed a claim stating $40,000 secured and $91,000 unsecured, then amended it to $180,972 without designating secured and unsecured portions. The debtor's plan later proposed to pay $41,132 as a secured claim based on a recent appraised value. The Bankruptcy Court held that the proposed plan violated Code sec. 1322. This decision was affirmed by the District Court and a Fourth Circuit panel. Now the matter is being heard en banc. Analysis: (1) In Nobelman, the Supreme Court held that sec. 1322(b)(2) prohibits a Chapter 13 debtor from relying on 506(a) to cram down an "undersecured homestead mortgage to the fair market value of the mortgaged residence." (2) The sole issue here is whether this debtor's claim falls into the narrow exception to 1322(b)(2) contained in 1322(c)(2) regarding a loan that matures prior to the final Chapter 13 plan payment; in other words, "*whether the phrase "payment of the claim as modified" authorizes modification of "claim[s]"—including modification of the loan principal through bifurcation and cram down—or only modification of "payment of... claim[s]"—by , for example, permitting debtors to repay the outstanding part of a debt over the life of a repayment plan, rather than in accordance with the payment schedule set forth in the mortgage instruments*." (3) Finding ambiguity, Witt looked to the legislative history of sec. 1322(c)(2) and determined that Congress intended "that only payment may be modified." Other courts and commentators have criticized that opinion. (4) Sec. 1322(c)(2) begins with "notwithstanding subsection (b)(2)," which indicates Congress intended it to be an exception to the limitation in 1322(b)(2)'s anti-modification provision. (5) Sec. 1322(c)(2) authorizes payment of the claim as modified pursuant to sec. 1325(a)(5), which authorizes cram down of a secured claim; sec. 506(a)(1) is not the authorizing provision, and this distinction is recognized by the Supreme Court in Till and Rash. (6) We do not believe that the statute's legislative history "carries much interpretative weight." Witt misplaced reliance on the absence of discussion of Nobelman in 1322(c)(2)'s legislative history; sec. 1322(c)(2) did NOT overrule Nobelman, which construed sec. 1322(b)(2). (7) The District Court's judgment is reversed and the matter is remanded for further proceedings.

[Dissent: Sec. 1322(c)(2) only allows debtors to repay their mortgages over the full duration of the plan... Nobelman protected mortgage creditors from bifurcation, strip down, changing the amount of the secured interest, and extending the repayment period. The enactment of 1322(c)(2) allows modification only as to the *timing* of those mortgage payments, not the amount... The majority is incorrect in stating that it is not overruling Nobelman... We should require more clarity from Congress before we "undermine a significant, on-point Supreme Court precedent"... The title of the section heading of this statutory amendment was "Period for Curing Default Relating to Principal Residence"... Rather than honoring the presumption of respecting a Supreme Court decision, the majority has chosen

"to go thrashing in the weeds"... This decision may impact the availability and cost of home mortgages for higher risk borrowers.]

BANKRUPTCY AND DISTRICT COURT OPINIONS

B222. **In re James Underwood**, Bankr. W.D. Va. # 18-70168, 5/30/18 opinion (Black). **Debtor could exempt garnished funds because the state court issued no remittance order to the garnishee before the bankruptcy case was filed.** *Issue:* Did a pre-petition garnishment extinguish the debtor's interest in the funds such that he could not exempt them under Code sec. 522(f)? *Facts:* A garnishment was filed against the debtor's bank account more than 3 months pre-petition. The funds were still in the debtor's bank account when the case was filed, at which time the Bankruptcy Court issued the standard quash order. The plan sought to avoid the creditor's lien, and the debtor exempted the funds on his Schedule C. *Held*: (1) The lien arose per state law when the writ was delivered to the sheriff. (2) The lien can be avoided if the debtor had an interest in the funds when the writ attached. (3) Since the garnishee only sent the state court a statement of funds on hand and not the actual funds, state law required the Court to issue an order to the garnishee to remit the funds. (4) The state court didn't do that before the bankruptcy case was filed, and the automatic stay prevented it from doing that after the case was filed. (5) So under state law the debtor still had an interest in the funds, and the funds could be exempted. (6) Creditor's objection to the quash order is overruled.

B22A. **In re Jeffrey Minick**, Bank. W.D. Va. # 18-50146, 5/31/18 opinion (Connelly). **[Chapter 7] Debtor's pre-petition bad faith conduct is insufficient grounds to have the case dismissed.** Creditor moved the Court to dismiss a case as a bad faith filing, because the debtor filed to stop a state court civil action and because the creditor did not believe the debt was dischargeable. The state court action arose from the debtor's prepetition action in engaging in criminal conversation with the creditor's then wife. The Court held that prepetition bad faith conduct by itself is insufficient to disqualify a debtor from proceeding in bankruptcy. If the creditor wishes to have this particular debt excepted from discharge, he can filed an adversary proceeding under sec. 523(a)(6). The Court also denied the alternative request of relief from stay to pursue the state court civil action. [Court website summary]

B22B. **In re Vanhoozier**, Bankr. W.D. Va., # 17 70673, A.P. # 17 07045, 6/19/18 opinion (Black). **[Chapter 7 case] Court reduces attorney fees sought in a suit for violation of the automatic stay.** The Debtor filed a Complaint against his employer seeking an award of costs ($775.00) and attorney's fees ($4,200.00) as a sanction for violation of the automatic stay of 11 U.S.C. § 362. Noting that the paralegal and the attorney charged the same hourly rate ($200/hour) and billed in quarter hour increments instead of tenth of an hour increments, the Court reduced the paralegal's rate to $100/hour and also reduced her time by one half. This reduction was also supported by the fact that both the paralegal and attorney performed the exact same task on the exact same date on several occasions. Counsel's fees were allowed in a limited amount as this was not a complicated matter and counsel could have filed a motion to show cause against the employer without the necessity of filing an adversary proceeding. No costs were allowed as the matter should have been filed before the case was closed and due to the fact that no filing fees are due from a debtor who files an adversary proceeding. The Court allowed only $700.00 in attorney's fees and granted judgment in the total amount of $1,075.00 as a reasonable attorney's fee as a sanction against the employer. Counsel was also prohibited from recovering from the Debtor the filing and reopening fees paid in connection with the case. [Court website case summary]

B223. **In re Timothy and Lisa Coleman**, Bankr. W.D. Va., # 17-51147, 6/22/18 Opinion (Connelly). **[Chap. 7 case] Virginia statutory exemption for life insurance policies and annuities applies only to policies issued in, or for delivery in, Virginia.** Issue: Does the exemption at VaC 38.2-3122(B) that protects insurance policies apply to policies issued in Connecticut at a time when the Debtors were domiciled in Maryland? The statute requires that such policies be "issued or issued for delivery in" Virginia. The Chapter 7 Trustee objected to the Debtors' claim of exemption on four insurance policies and two annuities. Held: The phrase "issued or issued for delivery in the Commonwealth" modifies both "a

policy of life insurance" and "annuity." The Court sustains the Trustee's objection to the Debtors' claim of exemption in the cash surrender value of the life insurance policies and the annuity contracts.

B223A. **In re Jackson,** Bankr. W.D. Va., #15 70100, 7/17/18 opinion (Black). [**Chapter 7 case] Court rejects debtor's attempt to reduce exemptions claimed in a prior Homestead Deed and apply them to a subsequent asset.** The Chapter 7 Trustee objected to the Debtors' attempt to reduce the amount of exemptions claimed on a prior recorded homestead deed and use the resulting excess exemption amount in an attempt to exempt funds held in a bank account resulting from the sale of a distribution contract. The contract was an asset of the estate at the time of the initial filing of the case, but the Debtors did not claim an exemption in the contract at that time. The Debtors argued that the proceeds received from the sale were not part of the Chapter 7 estate because the case was previously one under Chapter 13, and the provisions of 11 U.S.C. § 348(f) apply, which provide that the Chapter 7 estate does not include assets that have been obtained since the time of the filing of the original case. Relying on *In re Emerson*, 129 B.R. 82 (Bankr. W.D. Va. 1991), *aff'd*, 962 F.2d 6 (4th Cir. 1992), the Court held that the Debtors were precluded from timely perfecting any exemption in the funds held in the bank account pursuant to the Virginia homestead exemption. Had the Debtors wanted to claim a portion of the distribution contract or proceeds realized from its sale as exempt, they should have included it in the original homestead deed. The Court sustained the Trustee's objection. [Court website case summary]

B223B. **In re Roadcap**, Bankr. W.D. Va., #17 51132, 8/23/18 opinion (Connelly). **[Chapter 7 case] Tenancy by the entireties had been severed but is debtor still entitled to protect proceeds from sale of T by Es property.** The Chapter 7 debtor filed a motion to quash a creditor's garnishment of escrowed proceeds from a sale of a house originally held as tenants by the entireties. The creditor objected. The parties disagreed on whether the proceeds were held as tenants by the entireties as of the petition date because the tenancy may have severed prepetition. Looking to the terms of the escrow agreement and the property settlement agreement, the Court found that the tenancy had severed but that the debtor was entitled to his claimed VaC 34-4 homestead exemption. [Court website case summary]

B224 **In re Karen Thomas (16 50612) and In re Gary and Mary Brooks (16 50396), Adv. Proceed: Debtors v. Midland Funding and Midland Credit Management,** Bankr. W.D. Va., A.P. 17-05010, September, 2018 (Connelly). **Motions to dismiss alleged violations of sec. 1692f of the FDCPA and Rule 3001 are denied, as is the Defendant's motion to compel arbitration.** Defendants are moving to dismiss the amended complaint under FRCP 12(b)(6), or to compel arbitration. Plaintiffs have alleged that the Defendants' business practices involve filing proofs of claim that they reasonably know contain false statements, that fail to itemize fees, costs, and interest, and that do not comply with the document requirements of Rule 3001, and that such practices violate the FDCPA. *Held:* (1) Plaintiffs have consented to have this Court enter a final ruling; since the Defendants' responsive pleading did not mention consent, the Court will issue its ruling on the motions by consent. (2) The Court has already ruled that Count 1 of the original complaint stated a cause of action under the FDCPA, as it alleged a practice of consciously making false statements on the proofs of claim (e.g., reporting interest as principal) and ignoring the requirements of Rule 3001. (3) The amended proofs of claim state that the prior account holder may have included interest, fees, and other charges under the term "finance charges"; that is not a false statement or misrepresentation, nor is it misleading. Therefore the complaint does not state an actionable claim under sec. 1692(e), and the Defendants' motion to dismiss as to the amended proofs of claim is granted. (4) The amended complaint pleads a cause of action under sec. 1692f because it alleges a practice of filing claims with false statements, then withholding the credit card agreement after the Debtors have requested it, amending the claims only after an adversary proceeding has been filed, and then amending the claims in a way that does not comply with Rule 3001. (5) The amended complaint "pretty clearly alleges a violation of Rule 3001, so the motion to dismiss Count I and Count II as to the violation of the FDCPA sec. 1692F is denied. (6) Midland seeks arbitration of the FDCPA and Rule 3001 claims because the claims it bulk-purchased from Synchrony Bank contain arbitration clauses in the credit card agreement. It would be inappropriate to compel arbitration of the question of whether Midland complied with Rule 3001. The Fourth Circuit has previously stated that in the bankruptcy setting, congressional intent to enjoin arbitration is sufficiently clear to override even international arbitration agreements. *Phillips v. Congleton, LLC, 403 F.3d 164 (2005).* (7) The Rules allow the Court to impose sanctions and other penalties, but it does not allow for a private cause of action for damages for violating a rule of procedure like Rule 3001. So the question of whether Rule 3001 has been violated is

not a question of fact or law for arbitration. The motion to compel arbitration regarding possible violation of Rule 3001 and the FDCPA is denied. [**Note: Decision has been appealed, 10/12/18]**

B225. **In re Wanda Tolley**, Bankr. W.D. Va., 18-60203, 9/12/18 Order (Connelly). **Va. Code sec 34-18 completely exempts the current value of previously-fully-exempted property if the increase in equity is due solely to paydown of the mortgage.** Trustee objected to confirmation and to the Debtor's exemption claim of $63,600 in her residence pursuant to Va Code sec. 34-18. In 1996, the Debtor had filed a Chapter 7 case and exempted $5,000 in her residence; her schedules listed a value of $83,655 and a lien in the same amount. There was no objection to her exemption claim, the Trustee filed a no asset report, and the Debtor received a Chapter 7 discharge. In the current case the property is valued at $63,600, with no liens. The parties agree that the Debtor made no physical improvements to her residence since 1996, Held: (1) For sec. 34-18 to apply, a Debtor must first claim property as exempt under the homestead exemption ("property set apart"). (2) Sec. 34-18 means that "the exemption in the original property renders the appreciation and rents and profits likewise exempt, as long as the original property has not been changed by permanent improvements from non-exempt sources." (3) Both the Trustee and Debtor's counsel previously understood the statute to fully exempt the Debtor's residence, but after further review of In re Moore, 412 B.R. 830 (Bankr. W.D. Va. 2008) [Stone opinion], they are questioning their understanding of that ruling. (4) "...to the extent this [Court's] analysis conflicts with the ruling of *In re Moore,* this Court does not follow that ruling." (5) The net equity resulting from satisfaction of the mortgage is exempt under sec. 34-18 as long as the property had been exempted under 34-4 originally. It is immaterial that the overall value of the property has depreciated. (6) Since the profits are exempt, the Court need not opine on the meaning of the other language contained in the statute. (7) The parties further agree that the property "set apart" was the Debtor's residence, not a percentage of its value. (8) The Trustee's claim that the Debtor did not exempt her property in the prior Chapter 7 case because there was no equity overlooks the fact that no one objected to the exemption; absent such an objection, "the property was exempted and removed from her estate (9) "Until the issue is otherwise fully litigated... payments on a mortgage which render an increase in equity in the real property may constitute "profits" for purposes of sec. 34-18." (10) The Trustee's objection is overruled.

B226. **Thomas v. Midland Funding, LLC (In re Thomas),** Bankr. W.D. Va., #16 50612, A.P. 17 05010, 9/28/18 opinion (Connelly) **[See also B207 and B224] Midland's request to require arbitration, and its motion to dismiss, in this FDCPA action are denied.** In round two of dispositive motions in this adversary proceeding, Midland Funding, LLC ("Midland") filed a motion to dismiss the plaintiffs' amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) or in the alternative to compel arbitration and strike class allegations. The debtors claimed that Midland violated the Fair Debt Collection Practices Act and Federal Rule of Bankruptcy Procedure 3001 due to its business practice of knowingly filing proofs of claim that purposely contain inaccurate amounts owed, and only amending the proofs of claim after the debtors file an adversary proceeding. The Court denied Midland's motion to dismiss and further found that this alleged violation was not an appropriate question for arbitration and therefore denied the motion to compel arbitration. [Court website summary]

> B226A. **In re Daniels**, Bankr. E.D. Va., 2018 Bankr. LEXIS 3029, 10/1/18 opinion (Kenney). **Proceeds from the sale of exempt T by Es property need not be applied to plan where there are no joint creditors, and the proceeds are not disposable income.** Debtors sought to sell their T by Es property and keep the entire proceeds of $90K while paying 0% to their general unsecured creditors; they had no joint creditors. Trustee objected and sought to have enough of the proceeds applied to the plan to pay 100% to allowed general unsecured claims, and argued that the debtors should have to pay for their living expenses out of the sale proceeds. Held: (1) Deeming debtors' refusal to contribute exempt property a lack of good faith would be like surcharging exempt property for debtor's bad conduct, which was rejected in *Law v. Siegel.* (2) The exempt property is not property of the estate and therefore cannot be considered as disposable income. The Trustee's objections are overruled. [Summary from VSB Bankruptcy Law News, Winter, 2019]

B227. **Crosby v. ALG Trustee, LLC**, Virginia Supreme Court, #180062, ___ Va. ___, 12/20/18 opinion (Powell). **Foreclosing trustee has common law fiduciary duties to be impartial and to sell the property for the best possible price.** Property owner appealed the ruling of the Albemarle County Circuit Court that sustained the trustee's demurrer

to the owner's suit against the trustee for breach of fiduciary duties. [Owner had already repurchased the property and settled his claims with Fannie Mae and the purchasers.] The trustee had conducted a foreclosure sale of the owner's property where the property was tax assessed at $436,800 but was sold for $20,904. Held: (1) Owner's claim was not a common law negligence claim, but was actually a contract claim. An action for the breach of contractually implied duties is still contractual in nature, even though it may sound in tort. (2) "A trustee under a deed of trust is a fiduciary for both debtor and creditor." These fiduciary duties arise under the common law. There is a requirement of impartiality: he is considered the agent of both debtor and creditor, and must use "every reasonable effort to sell the estate to the best advantage." (3) "A trustee's failure to remain impartial by selling the property at a price that is so grossly inadequate as to shock the conscience will raise a presumption of fraud." (4) These common law obligations are not abrogated by the terms of the deed of trust instrument or by related statutes enacted by the General Assembly (e.g., Va. Code sec. 55-59.4. (5) Here, the complaint establishes that the foreclosure sale overwhelmingly benefited the creditor at the debtor's expense and there was a significant discrepancy between the sales price and the value of the property, so it should have survived a demurrer. (6) "The trial court's ruling that the trustee's duties were limited to the four corners of the contract, and that there is no duty by the trustee under the common law, was erroneous." (7) The judgment of the trial court is reversed and the case is remanded for further proceedings.

B228. **In re Akers,** Bankr. W.D. Va., # 17-70584, 1/3/19 opinion (Black). **In Chapter 12 case, confirmation denied and case dismissed on feasibility grounds.** The Court denied confirmation the Debtors' Fourth Amended Chapter 12 plan and dismissed this family farmer's case finding that the Debtor's plan was not feasible under 11 U.S.C. § 1225(a). The Court found it improbable that the Debtor would have sufficient income to make all his required payments under the plan, noting the Debtor's mistake-laden record keeping and financial projections. As the records and projected revenue and expenses were so inaccurate and unpersuasive, they did not demonstrate the Debtor's probable compliance with the plan terms. Therefore, the Court held that the Debtor failed to carry his burden on the feasibility prong of Section 1225. The Court also denied leave to amend the plan under 11 U.S.C. § 1221 as the Debtor failed to show any reasonable likelihood of reorganization. As the Debtor had multiple opportunities to present a confirmable plan and had been unable to do so, the Court dismissed the case. [Court website case summary]

B229. **Hanson v. Cassidy (In re Cassidy),** Bankr. Ct., W.D. Va., # 18 60196, A.P. 18-06010 (1/10/19 opinion) (Connelly). **The Court found that an assault claim was properly excepted from discharge because the Virginia elements for the tort of assault lined up with the elements for the exception to discharge under 11 U.S.C. § 523(a)(6).** This adversary proceeding arose from a state law claim in circuit court based on a longstanding dispute between two neighbors. The litigation lasted several years and ultimately, Ms. Hanson was granted partial summary judgment on two of her claims: assault and intentional infliction of emotional distress. The judgment was memorialized in a Circuit Court Consent Order that established liability on behalf of Mr. Cassidy for the two claims. The damage issue was tried before a jury in November of 2017. Because the jury's award of $500,000 exceeded the amount demanded in the complaint, the Circuit Court judge remitted the award to either $100,000 or $200,000. Before the Circuit Court could enter an award on damages, Mr. Cassidy filed for chapter 7. Ms. Hanson filed a complaint to determine the dischargeability of her debt through an adversary proceeding, and then filed a motion for summary judgment. **Holding:** The Court found that collateral estoppel indeed applied because the five elements were met. The parties to the proceedings were the same because the plaintiff from the state court action was the same in this action, Ms. Hanson, and likewise Mr. Cassidy was the same defendant. The prior proceeding resulted in a final judgment because liability was already finalized and Mr. Cassidy did not show how he could have disputed the Circuit Court Consent Order merely because the judge had not yet ruled on the amount of damages. For the third element, the factual issue to be precluded must actually have been litigated in the prior action. The Court found that because a long line of cases interpreted "willful and malicious" for the purposes of section 523(a)(6) to refer to actions that cause injury without just cause or excuse, then the Circuit Court Consent order that faulted Mr. Cassidy for the tort of assault indeed met this element because the Virginia law of assault merely requires an overt act committed with the intent to place the victim in fear or apprehension of harm (similar to the case law definition of willful and malicious). Further, just because the order is a consent order does not preclude the fact that it was actually litigated. Fourth, the factual issue to be precluded must have been essential to the prior judgment. In this case, the intent of placing a victim in fear or apprehension of bodily harm was essential to the state court judgment. Lastly, mutuality was present because the party invoking estoppel, Mr. Cassidy, would have been bound

had the prior litigation reached the opposite result. Accordingly, the Court granted Ms. Hanson's motion for summary judgment to except her debt from Mr. Cassidy's discharge because the elements of 523(a)(6) closely lined up with the Virginia law elements of assault. Moreover, collateral estoppel prevented Mr. Cassidy from challenging the dischargeability of the debt owed to Ms. Hanson. [Court website case summary]

B230. **In re Nicholas Totoro**, Bankr. W.D. Va., # 18 50633, 1/22/19 Opinion (Connelly). **Discussion of DSO obligations vs. martial debts.** Debtor's ex-wife filed a late POC for $61,825 in priority child support and an objection to confirmation. Per the parties' separation agreement, it appeared that the ex-wife was allowed to keep all three of her retirement accounts in exchange for not receiving spousal support. Held: (1) Martial debts, unlike DSO claims, are dischargeable in Chapter 13. Court must look not only at the labels in the agreement, but at the *intent of the parties at that time.* The labels are "persuasive" of the parties' intent, but not "dispositive." (2) Using the four factor test of *In re Ludwig, 502 B.R. 466* (language and substance of the agreement; relative financial positions of the parties then; function of the obligation within the agreement; and evidence of overbearing at that time), the Court finds that the debtor's obligations to repay a portion of the ex-wife's retirement account loan, her parents, and a portion of her student loan are not in the nature of support, partly because they appear in the sections of the agreement on division of debts and property. (3) As for the debtor's obligation to pay half of the ex-wife's divorce-related attorney's fees, the divorce Court did not classify the fees as part of the DSO award, and the Court is unable to determine that this even split of fees is a DSO, so it will be deemed a marital debt and not a DSO. (4) The plan must be amended to pay in full the $19,883 in delinquent child support payable to the Va. DCSE, which filed a timely claim; the objection to confirmation is otherwise overruled.

--The ex-wife's priority POC for delinquent child support was filed 13 days after the claims bar date. Despite the fact that the claim is non-dischargeable, it does not fall within any of the exceptions contained in Code sec. 502(b)(9) and must therefore be disallowed. The debtor's objection to the claim is sustained.

B231. **In re William and Hannah Dyer (CLMG Corp. v. Dyer)**, Bankr. W.D. Va., # 18 62156, 3/1/19 opinion (Connelly). (**Chapter 7.) Automatic stay annulled to keep in place state court judgment for possession obtained by creditor after case had been filed because creditor was not given any notice of the filing.** Before the debtor filed a chapter 7 petition, CLMG Corporation filed an unlawful detainer action against the debtor s to a property it had purchased at a foreclosure sale. Later, after the debtor had filed his chapter 7 petition, CLMG, which was not in any way noticed of the bankruptcy case, obtained a judgement for possession. Once CLMG discovered the pending case, it filed a motion to annul the automatic stay so that the judgment for possession would not be void. Based on the facts of the case, the Court granted the motion. *(1) Code sec. 362(d)(1) allows the Court to grant relief from the stay, including annulling it, for "cause," so the Court has the power to grant relief retroactively. (2) Here, the creditor acted in good faith and without notice of the automatic stay, despite the Debtor's "ample opportunity" to provide such notice. (3) In addition, it would be pointless to deny this request: the property had been foreclosed upon almost 90 days earlier, the Debtors no longer had any legal interest in the property , and they admitted they had no intention of paying the mortgage, so the Court would have granted relief from the stay in any event. (4) The judgement for possession is not void. [*: This part of the summary is from the Court's website.]

B232. **In re Robin Hoffman**, Bankr. W.D. Va., # 13 60831, 3/15/19 opinion (Connelly) **Post-discharge refund of plan payments by creditors must be re-disbursed by Trustee to other creditors, not refunded to the Debtor.** Following receipt of a discharge and closing of her chapter 13 case, the debtor obtained a disability discharge of her student loans. The unsecured, student loan creditors then refunded funds ($3,611) that had been disbursed to the student loan creditors by the chapter 13 trustee pursuant to the debtor's chapter 13 plan. The chapter 13 trustee moved to reopen the case to redistribute these funds to the other general unsecured creditors. The debtor objected to the proposed distribution and requested that the funds be returned to her. The debtor also moved to file an amended plan to decrease the base gross and to provide for the funds to be returned to her. The Court granted the motion to reopen. The Court ruled that the trustee had to disburse the funds to the other general unsecured creditors and that the debtor could not modify her plan pursuant to section 1329. [Court website summary]

Other notes: This was a 4% "pot plan." Once her plan was confirmed, the debtor was bound by the *res judicata* effects of confirmation, and therefore bound to pay a total of $16,500 A creditor refund "simply places the plan

payments back into the hands of the trustee to disburse according to the terms and provisions of the confirmed plan." The trustee is bound to disburse the plan payments to the creditors "until he has received the total gross payments, or the case is dismissed or converted to another chapter," or until "full satisfaction of all claims." Code sec. 1327. The debtor's obtaining of a hardship discharge of her student loan debts does not "change the math": she must still pay the full $16,500. Debtor cannot modify her plan at this point, because Code sec. 1329(a) only allows such modification before a debtor has completed her plan payments. Such a request is "simply too late." This Court has consistently ruled that "the simple fact the amount of claims filed with the Court total less than originally scheduled is not a substantial and unanticipated change in financial circumstances the compels modification of the chapter 13 plan." Likewise, a reduction in a claim due to the satisfaction of that claim by an outside source should not be deemed a change in, or a worsening of, the debtor's financial condition," sufficient to justify a reduction in the amount of her plan obligation. If a debtor proposed a plan that said an unforeseen reduction in claims to be paid would cause a reduction in plan payments, such a plan would not be proposed in good faith unless it was paying all claims in full.

B233. **In re Rose Woodford (Woodford v. Capital Bank),** Bankr. W.D. Va., # 18 71300 (AP #19-07003), 5/1/19 Opinion (Black). **Bank did not violate the ECOA by requiring Debtor's husband to execute a deed of trust as collateral for a loan to Debtor's company.** Debtor's plan was not confirmed, and then she initiated an Adv. Proceed. alleging that the Bank had violated the Equal Credit Opportunity Act (ECOA) by requiring her husband to execute a deed of trust on their principal residence, so that the Bank's lien was void. The Debtor had executed a note and commercial guaranty as president of a company allegedly controlled by her daughter and son-in-law. At the closing, the Bank also required the Debtor and her husband to sign a deed of trust on their residence, allegedly without inquiring into the Debtor's credit-worthiness. The Bank filed a motion to dismiss under Rule 12(b)(6). Held: (1) To show a violation of the ECOA and 12 CFR sec. 2027(d)(1), Debtor must show that she was an applicant, that the Bank did not determine she was uncreditworthy, and it nevertheless required her husband to sign a "credit instrument." (2) An exception, in sec. 202.7(d)(4), allows a creditor to obtain a spouse's signature where necessary to create a valid lien in property offered as collateral. (3) Execution of a deed of trust does not create a right to incur debt or defer payment, so it is not a "credit instrument." (4) The Bank's extension of credit was not "joint" based on the deed of trust; it created only an in rem obligation, not a personal obligation, for the husband. (5) Because the Bank never required the husband to sign a "credit instrument," the A.P. will be dismissed for failure to state a claim for which relief can be granted.

B234. **In re Blake and Erica Hudson (Beskin v. Mr. Cooper)**, Bankr. W.D. Va., #17 61214, A.P. # 18 06026, 5/13/19 Order (Connelly). **Court denies Trustee's efforts to avoid mis-recorded D/T under sec. 547 and 544.**Trustee sought in Count I under sec. 547(b) to avoid certain actions of the mortgagee, Mr. Cooper, as preferential transfers, and in Count II under his sec. 544 strong arm powers to defeat the creditor's D/T lien. The facts are not in dispute, and the Court hereby rules on the Rule 12(c) motion filed by Mr. Cooper. Facts: Debtor purchased property in Campbell County and obtained financing from VHDA, whereupon a D/T was filed there. Debtor on 1/18/13 refinanced with USAA (now Mr. Cooper) and executed a D/T with it, but it was erroneously filed in Bedford County. Mr. Cooper discovered the mistake, and on 5/24/17 recorded a lost D/T affidavit and a copy of the D/T in Campbell County; on 6/5/17 it filed in Campbell County a suit to quiet title and a lis pendens. On 6/23/17 the Debtors filed this Chapter 13 case, and on 8/25/17 this Court confirmed the Debtors' plan, which surrendered the property in question. On 9/7/18, the Trustee initiated this A.P. Held: (1) The first issue is whether the transactions at issue—the recording in Campbell County of the D/T, the lost D/T affidavit, and the lis pendens--were "transfers of an interest of the debtor in property" within the meaning of sec. 547(b). (2) The Court must look to sec. 101(54) for the definition of "transfer." (3) The recording of the lis pendens and the lost D/T affidavit just provided notice and are not such "transfers." (4) The Trustee argues that the re-recording of the D/T in Campbell County perfected a lien within the avoidable preference period. The lien was "created" in 2013. This re-recording was part of an effort to protect Mr. Cooper's equitable interest in the property, and it also was not a "transfer." (5) Debtor never disputed the creation of the security interest or the validity of the D/T, and Mr. Cooper had taken steps to correct this problem before the Debtors filed for bankruptcy. (6) Because none of Mr. Cooper's actions were "transfers" per sec. 101(54), they cannot be preferential transfers under sec. 547(b), so Mr. Cooper's motion for judgment on the pleadings is granted on the Trustee's Count I action. (7) The Trustee cannot succeed on Count II under sec. 544 if the 547(b) preference action cannot be successful. (8) The Trustee claimed no state law defenses to Mr. Cooper's equity interest in the property or its right to equitable subrogation, and because the lis pendens was recorded

before this case was filed the Trustee cannon assert lack of knowledge of the problem. (9) Because the rulings on the Rule 12(c) motions dispose of the A.P., there is no need to address the competing motions for summary judgment.