# WESTERN DISTRICT OF VIRGINIA BANKRUPTCY CONFERENCE
# CHAPTER 13 CASE LAW UPDATE
# JUNE 1, 2018

(Herbert L. Beskin, Chapter 13 Trustee)

## SUPREME COURT OPINIONS

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

## FOURTH CIRCUIT OPINIONS

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

**F64.** **Gorman v. Cantu**, 2017 WL 6422351, 12/19/17 opinion, # 17-1034. **There was no clear error in the Bankruptcy Court's disposable income analysis of the Debtor's voluntary contributions to his retirement account.** Finding that the trustee did not raise the statutory issue of whether and when a chapter 13 debtor may make voluntary contributions to his retirement account, the Fourth Circuit found no clear error in the Bankruptcy Court's factual finding of good faith.

Ricardo Cantu's chapter 13 plan proposed to pay $51,240 toward his $148,346 unsecured debt over five years. The plan payments were based on a disposable income calculation which contemplated $338 in monthly repayments to two retirement accounts which Mr. Cantu had taken out against his government-backed Thrift Savings Plan. The Trustee argued that one of the loans from the TSP would be paid off shortly after commencement of the plan, and applying the forward-looking approach, the anticipated reduction in retirement contributions should be considered in calculating Mr. Cantu's disposable income. The Trustee also objected to Mr. Cantu's inclusion of domestic support payments in the amount of $1,625 per month, when his divorce decree ordered monthly payments of $1,500. Mr. Cantu countered that once he paid off the loan from the TSP he intended to resume making contributions in the same amount to that Plan. He also maintained that the discrepancy between the divorce decree and his actual payments was a result of a scrivener's error in the divorce decree.

With respect to Mr. Cantu's voluntary contributions to his retirement account, the Bankruptcy Court adopted the majority view that such payments may be deducted from the disposable income calculation under section 1325(b), so long as they are made in good faith. The court rejected the two contrary approaches under which 1) voluntary retirement contributions may be made only if they were being made prior to bankruptcy and in the same amount, and 2) voluntary contributions are prohibited in all circumstances. The court then addressed the factual issues of whether the contributions were proposed in good faith and whether the domestic support payments were accurate. The Court resolved both issues in Mr. Cantu's favor. *In re Cantu*, 553 B.R. 565 (Bankr. E.D. Va. 2016). The District Court affirmed.

On appeal, the Fourth Circuit side-stepped the statutory issue of which approach to voluntary retirement plan contributions to adopt, concluding that the Trustee did not appeal the Bankruptcy Court's application of the majority view, but instead, limited his argument to whether the Bankruptcy Court correctly resolved the factual issue of good faith. The Circuit Court found that the Bankruptcy Court did not commit clear error. Mr. Cantu had been making regular contributions to his TSP until he was forced to stop when he took out hardship loans against the account. In addition, the amount of his contributions was far less than the allowable contribution amount. The Court also found that the Bankruptcy Court did not commit clear error in accepting Mr. Cantu's testimony, supported by a pre-divorce Separation Agreement, that the divorce decree did not accurately reflect the agreement between the ex-spouses. Finding that the Bankruptcy Court's factual conclusions were supported by the evidence, the Circuit Court affirmed. [Summary from the NACTT website].

F65. **Sheehan & U.S. Trustee v. Keith and Phyllis Ash**, 8__ F. 3d _____, #17-1867, 5/4/18 Opinion (King). **Recently-relocated W. Va. Debtors may use Louisiana exemptions to protect property located in W. Va. [Chapter 7]** Chapter 7 Trustee and the UST appealed the Bankruptcy Court and District Court rulings which authorized the Debtors to utilize the Louisiana's state law statutory scheme to exempt personal property in West Virginia from the Debtors' Chapter 7 bankruptcy estate. Facts: Debtors moved from Louisiana to West Virginia in 3/15 and filed this case in 7/15; they owned property in both states. In W. Va. they owned various items of personal property valued at $3,450. Louisiana has opted out of the federal exemption scheme, but it does not restrict the application of its exemption statutes to in-state residents or property; i.e., it allows the "extraterritorial application" of its exemptions. On their Schedule C, the Debtors applied Louisiana exemptions for property located in both states. Held: (1) The majority "state specific" approach to this issue has been that "a state's exemption laws may be used by out-of-state debtors for out-of-state property to the extent that each state's exemption law permits." (2) We agree with the District Court, which opted to follow the "state specific" approach, and not the "anti-extraterritoriality" or "preemption" approaches, because the other two approaches would nullify the intended effect of Code sec. 522(b)(3) (3) The "state specific" approach treats sec. 522(b)(3)(A) as a straightforward choice-of-law provision, comports with the established principle of liberally construing bankruptcy exemption statutes in favor of debtors, and is consistent with opinions from the 8th and 9th Circuits.

**Commonwealth of Virginia v. Beskin (In re Barry Webb)**, Record No. 17-2328; Appeal from Dist. Ct., W.D. Va., # 3:17-cv-00028, 10/19/17 opinion (Moon). **May the Chapter 13 Trustee be garnished by the state child support agency upon the pre-confirmation dismissal of the Debtor's case?** The Bankruptcy Court held that Sec. 1326(a)(2) requires that where a case has been dismissed pre-confirmation, Trustee's funds on hand must be returned to the Debtor rather than be sent to the Va. DCSE pursuant to a state garnishment order. As noted in the following section, this case is on appeal to the Fourth Circuit, with final briefs due in May, 2018. It is unknown at this time if the Court will hear oral argument.

F66. **No v. Gorman**, 8_____ F.3d _____, #17 -1679, 5/24/18 Opinion (Duncan). **A Local Rule cannot remove the requirement for a hearing prior to dismissal under Code section 1307.** Debtor failed to commence making payments under her plan within the 30 days required by Code sec. 1326(a)(1), and also failed to appear for her creditors' meeting. In the ED of Va., Local Rule 3070-1(C) provides that if a Debtor fails to commence payments within 30 days, the Trustee shall certify the same to the Clerk, and "the Clerk shall enter an order dismissing the case." The Trustee filed the certification required by the Rule, and also filed a separate motion to dismiss the case. The Court scheduled a hearing on the Trustee's motion, but then dismissed the case prior to the hearing based on his certification pursuant to the Local

Rule. The District Court affirmed the dismissal. Issue: does the Local Rule conflict with the notice and hearing requirement of Code sec. 1307. Held: Yes, it does. (1) Section 1307 requires the opportunity for a hearing. (2) The Debtor was noticed of a hearing on the motion to dismiss, and she had every reason to rely on that notice. (3) A Local Rule cannot be inconsistent with the Bankruptcy Code, so this Local Rule is invalid to the extent it is inconsistent with Code section 1307. (4) We reverse and remand for proceedings consistent with this opinion.

## BANKRUPTCY AND DISTRICT COURT OPINIONS

B198A **In re Michael and Crystal Crews**, Bankr. W.D. Va,, # 16 60898, 6/23/17 Order (Connelly). **Allowable creditor fees for filing Rule 3002.1 notices.** Debtors are maintaining their long term mortgage payments per Code sec. 1322(b)(5). [Plan showed pre-petition arrears of $1; POC was filed with $726 in pre-petition arrears.] Mortgagee filed two 3002.1 notices of post-petition fees and costs, and Debtors objected to both. At the initial hearing, the Court ruled that (i) Debtors can't be charged a fee for filing the notice: it is a "ministerial act and a cost of doing business for the creditor"; (ii) $550 is a "rebuttable maximum amount" for the entire case for review of the plan, attorney's fees, the filing of a POC and amended POC, notice of appearance, and notice of payment change; this amount can be raised or lowered in any particular case if evidence is presented to warrant such a change; and (iii) the parties were invited to present evidence at a subsequent hearing as to an appropriate guideline.

Court now holds that: (1) Rule 3002.1 applies in this case; (2) Because the parties failed to present adequate evidence regarding the Court's proposed guidelines, "*the Court now rejects its proposed $550 rebuttable maximum and declines to institute a standard";* (3) Rule 3002.1(e) provides a process by which the Debtor may object to such fees and costs; in this case the Debtors failed to file such a motion, but instead objected to the 3002.1 notice filed by the creditor. The Court will rule on the objection despite this procedural error. (4) The filing of a 3002.1 notice is like sending a monthly mortgage statement, so fees for sending it may not be charged to the Debtors. (5) The Court rejects the Debtors' argument that once they assert that the charges are unreasonable, the charges must be disallowed unless the creditor proves with specificity each and every charge. (6) Creditor charged the Debtors $300 for plan review and $600 for filing a POC, a total of $900; Debtors do not object to the former fee. The Court "cannot fathom" how the latter fee can be twice that of the former. Fannie Mae guidelines limit the total fee to $750. The creditor has presented no evidence to justify this higher fee. (7) The Debtors' objection to the 3002.1 notice is sustained. The fee for filing the POC is reduced to $300, and is recoverable against the Debtors or their property only to that extent; this amount is in addition to the $300 fee for plan review. The $100 fee for filing the 3002.1 notice shall not be an additional debt of the Debtors secured by the deed of trust.

B198B **In re Terry Properties, LLC**, Bankr. W.D. Va., # 16 71449, 7/6/17 opinion (Black). [**Chapter 12 case; see also B200 and B196] Detailed analysis of farm valuation, plan feasibility, and appropriate interest rate and duration of payments on secured claims. ]** After a two day trial between the Chapter 12 farmer debtor and two secured creditors, the Court holds that (i) the value of the dairy farm property at issue is $2,500,000, (ii) the proper *Till* interest rate to be paid to a secured creditor on the real estate is a variable rate equal to prime (4.25%) plus a 2.5% risk adjustment, (iii) the proper period for the balloon payment was 7 years, with payments calculated on a 15-year amortization, and (iv) it will not approve the third-party injunction language included in the plan. Confirmation of the debtor's proposed plan was denied. The debtor was given leave to file another plan, and the Court would re-evaluate feasibility based upon those plan payments and whether a related business could demonstrate sufficient financial wherewithal.

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

B199A. **Larman v. HUD, Samuel I. White, PC, American Advisors Group ("AAG"), Reverse Mortgage Solutions, Inc.("RMS"), Finance of America Reverse, LLC, and Christopher Micale (In re Margaret Larman)**, Bankr. W.D. Va., # 16 71624, A.P. # 17-07001. 8/17/17 Opinion (Black). **Suit against HUD and reverse mortgage lenders can proceed against the lenders but not against HUD.** Debtor sought (i) a declaratory judgment against HUD for failing to implement certain anti-displacement protections concerning a reverse mortgage on her home, (ii) an order requiring HUD to accept assignment of the deed of trust, (iii) an order quieting title and voiding the reverse mortgage, and (iv) an order enjoining the defendants from proceeding with a foreclosure sale. *Facts:* The Debtor and her husband obtained a reverse mortgage in 2011, but were required to transfer their T by Es property solely into husband's name in order to qualify for the loan; only the husband entered into the loan. The loan was part of the HECM program, which HUD administers and for which it has issued regulations that lenders must follow. One of those regulations states that the loan must provide that it does not become due until the death of both the homeowner and his/her spouse. The husband was seriously ill at the time of the loan, and the Debtor understood that she would be allowed to continue to live in the property if her husband predeceased her. After the husband died in 2015, the house became the sole property of the Debtor when his daughter transferred her 2/3 intestate interest in the property to the Debtor. The reverse mortgage was declared in default in 2015. For months the Debtor corresponded with RMS in an effort to avoid foreclosure. She finally filed this case on 12/12/16 to avoid a sale scheduled for 12/16/16. Because the deed of trust made the loan payable if the borrower died, the Debtor asserts that it did not comply with the HUD regulations and should not have been insured by HUD. *Held:* (1) The Debtor has not demonstrated redressability sufficient to maintain standing for her claims against HUD, and therefore she has no standing under Article III. HUD offered a loan assignment option (a "MOE") to the Debtor; the Debtor may have been eligible had she been given timely or proper opportunity by RMS to take advantage of it, and it is far from certain she was given that opportunity. HUD provided the Debtor all the relief it is authorized to provide, so the Debtor's claim against it is moot. (2) The Court lacks the power to order HUD to provide the relief the Debtor is requesting. HUD's motion to dismiss is granted. (3) Regarding AAG's motion to dismiss: the Debtor's husband's daughter is not a necessary party, and there are too many questions of fact to determine at this time that the two year statute of limitations of Va Code 8.01-249(1) expired before this action was brought. AAG's motion to dismiss is denied.

B199B. **Robbins v. Hall (In re Hall)**, 569 B.R. 58 (Bankr. W.D. Va. 2017) (Connelly). **[CHAPTER 7] 11-20% hypothetical dividend to unsecured creditors did not constitute "substantial abuse" under 707(b)(3) (B).** The US Trustee filed a motion to dismiss for abuse under Code sec. 707(b)(3)(B). The Court, employing the required totality of the circumstances test, held, *inter alia,* that if the Debtor hypothetically surrendered his second house and filed a Chapter 13 case, the fact that he could pay a dividend to general unsecured creditors of 11% to 20% did not constitute "substantial abuse" under that section.

B200 **In re Terry Properties, LLC**, Dist. Ct. WD VA, # 1:17CV0004 [16 71449, A.P. #16 07038], 8/30/17 Opinion (Jones). **[CHAPTER 12 CASE; see also B196 and B198B] The Debtor's attempt to avoid the granting of a security interest as an uncompensated transfer that rendered it insolvent is denied.** In the Bankruptcy Court, Debtor sought to avoid per Code sec. 548(a)(1)(B) a transfer by the Debtor to Farm Credit; the Court granted summary judgment as to Farm Credit. Debtor appealed. Facts: The Debtor, an LLC, three individual Terrys, and a testamentary trust for which they were the trustees were indebted to Farm Credit on five obligations secured by three credit line deeds of trust. In March, 2015, they sought to restructure these loans. Part of the agreement was that the trust would be dissolved and its assets transferred to the Debtor, subject to the deeds of trust, and the Debtor and the LLC would assume all of the obligations of the trust under the 2009 notes, deeds of trust, etc. On 10/19/15 a deed of assumption was executed conveying the property to the Debtor, and simultaneously three credit line deed of trust modifications were executed. The deed of assumption was recorded 30 minutes before the modified deeds of trust. Held: (1) Debtor seeks to avoid a transfer of a security interest in its assets (the modification of a $518,000 deed of trust) for the benefit of the LLC and certain guarantors because it did not receive reasonably equivalent value in exchange and became insolvent due to the transfer. (2) The modification did not transfer a security interest in the property and did not increase the credit limit of the former deed of trust; the 2015 loans were already included in the 2009 deed of trust. (3) The Debtor did receive reasonably equivalent value: it received ownership of the property in return for becoming liable for all of the Trust's debts. (4) A 30

minute gap between recording the deed of assumption and the modification does mean that the second recordation was a separate transaction: this was one consolidated transaction. (5) The Debtor did not become insolvent as a result of the alleged transfer, because there was never a time the Debtor owned the property free and clear of the lien of the deeds of trust. (6) Farm Credit is entitled to summary judgment: there was no fraudulent transfer as a matter of law. (7) Allowing amendment of the Debtor's complaint would be futile: the new claims are identical to the prior ones, so the Court's analysis would be the same. (7) The decision of the Bankruptcy Court is affirmed.

B202 **In re Charles and Deborah McCallam**, Bankw. W.D. Va., # 13 60770, 9/19/17 Order (Connelly). **Reopening a closed case in which the automatic stay had been lifted will not allow the Court to review a subsequent default or re-impose the stay.** Debtors moved to reopen a closed case to allow the Trustee to file a 3002.1(f) notice which he had neglected to file, to determine if the debtor was current on all post-petition mortgage payments, and to re-impose the automatic stay to stop a scheduled foreclosure sale. Pursuant to a consent order regarding the stay, the mortgagee had filed a notice asserting default by the debtors on post-petition payments; the debtors failed to respond to that notice. The case was subsequently closed after the debtors completed their payments to the Trustee. Now, four months later, the debtors seek to reopen the case. Held: (1) Debtors have failed to explain how reopening the case or issuing a 3002.1 notice will reinstate or impose an automatic stay. (2) This Court is no longer the appropriate forum to contest the pre-case-closing default or the post-case-closing default, so the case will not be reopened.

B203 **In re Charles King, Sr.**, Bankr. W.D. Va. # 17 60094, 10/2/17 Order (Connelly). **Debtor's request for loan modification is denied because the total consequences to the Debtor outweigh the benefits.** Debtor sought permission to enter into a proposed loan modification. His confirmed plan would cure a pre-petition mortgage default of $26,339. The proposed loan modification would have reduced the interest rate and monthly payment slightly for the first six years, but for the last 34 years would have kept the interest rate approximately the same and reduced the monthly payment by only about $33/mo.. Overall, it would have lengthened the Debtor's mortgage payments by 8.25 years and increased his total payments by $74,754. The Court "fails to find ... that the temporarily reduced monthly payments and interest rate outweigh the total consequences to Mr. King." The Debtor's motion was denied without prejudice.

B204 **Commonwealth of Virginia v. Beskin (In re Barry Webb)**, Dist. Ct., W.D. Va., # 3:17-cv-00028, 10/19/17 opinion (Moon). [Appeal of Judge Connelly's 3/30/17 decision] **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 Va. DCSE pursuant to a state garnishment order.** *Issue: whether Code sec. 1326(a)(2) requires a Chapter 13 bankruptcy trustee to return funds to a debtor after dismissal of the debtor's case if a creditor has attempted to levy on the trustee after dismissal.* Held: (1) Courts have split in roughly equal proportion on the answer. (2) DCSE's argument that the automatic stay no longer protects the debtor, and therefore it should be able to levy on the trustee directly, is generally correct, but Congress "changed the default situation in sec. 1326(a)(2) by directing the trustee to give the funds to the debtor." (3) Sec. 362 does not "contradict or muddle" sec. 1326(a)(2) about *who* gets the funds; it only addresses *when* those funds are available. (4) DCSE's argument that the plain meaning of 1326(a)(2) would lead to absurd results is "ultimately unconvincing." (5) 28 USC sec. 959(b) requires the trustee to manage the property according to the laws of the state, but that provision is best read as "allowing state law to fil in responsibilities left unaddressed by the Bankruptcy Code, not as overruling the Code's plan meaning *sub silentio."* Here state law contradicts the Code's mandate, so DCSE's argument fails. (6) The context of the Bankruptcy Code supports the plain meaning of 1326(a)(2), since Chapter 13 is a "wholly voluntary process" and this section refuses to penalize debtors for entering into the process. (7) The Supreme Court this year emphasized that dismissal of a bankruptcy cases aims to return to the prepetition status quo. Czyzewski v. Jevic Holding Corp, 137 S. Ct. 973 (2017). If DCSE could levy on these funds now, it would allow it to improve its prepetition position. The Court does not disagree with the Bankruptcy Court Judge's concern about creating a "race to the trustee." (8) Regarding the Barton doctrine [104 U.S. 126 (1881)], no other *court* has attempted to obtain subject-matter jurisdiction over the trustee, and that is what the Fourth Circuit requires to apply the doctrine [see McDaniel v. Blust, 668 F.3d 153 (2012)]. This Court is reluctant to expand this doctrine beyond that, and so will not apply it here. (9) Regarding the state laws at issue (Va. Code 63.2-1929(A) and (D), -1930), these statutes contradict the federal statute, so the Supremacy Clause mandates that "the federal statute must "preempt" the state statute," and Code sec. 1326(a)(2) must prevail. (10) Bankruptcy Court 's decision is affirmed, and the money must be returned to the debtor. *[The*

*following case is on appeal to the Fourth Circuit, with final briefs due in May, 2018. It is unknown at this time if the Court will hear oral argument.]*

B205 **In re Sherry Mohler**, Bankr. W.D. Va., # 16 51025, 10/06/17 Order (Connelly). **Debtor's objection to the mortgagee's proof of claim is sustained; applicable burdens of proof.** Debtor objected to the mortgagee's proof of claim for pre-petition arrears, alleging that it conflicted with the 10/19 billing statement sent to the Debtor immediately before the case was filed. In sustaining the Debtor's objection, the Court set forth guidelines for evaluating such matters: (1) Pursuant to Stancill v. Harford Sands, 272 F.3d 637 (4th Cir. 2004), a properly filed POC is prima facie evidence of the claim's validity and amount; once filed, the burden of rebutting that presumption falls on the objecting party, who must provide evidence that negates at least one fact necessary to the claim's legal sufficiency; once that occurs, the burden shifts back to the claimant to prove the existence and validity of the debt by a preponderance of the evidence. (2) The Debtor provided sufficient evidence to negate the creditor's claim's legal sufficiency. (3) FRBP 902(11) permits business records to be admitted without the presence of a custodian to authenticate them; it is not proof of the contents and does not bolster the record or bestow weight. (4) Prima facie evidence is not dispositive evidence. (5) The creditor failed to show some support to corroborate the amounts set forth in the business records to meet its requirement to prove the amounts by a preponderance of the evidence. (6) The Court assigns less weight to the attorney invoices than to the 10/19 billing statement.

B206 **In re Wanda and Cecil Kern**, Bankr. 576 B.R. 817, W.D. Va., #17,71159, 11/29/17 Opinion (Black). **Debtors' intention to move elsewhere does not negate their domicile being in Virginia when the case was filed.** Debtors claimed Virginia exemptions, but live close to the Virginia-Tennessee state line, and have taken steps toward changing their residence from Va. to Tenn, including buying a house in Tenn. But they have not been physically able to move. Trustee objected to their claim of Va. exemptions. Issue: Is buying a residence in another state with the intention to move there, but not yet moving because they haven't yet been able to sell their current residence, enough t change one's "domicile. Held: Under the facts of this case, No. (1) Husband was 66, retired, and had lived in Va. his entire life; worked as a pastor near his home, and would continue to do so after they moved to Tenn. 2015 and 2016 taxes had been filed with Tenn. Addresses, but they had voted in Va. elections; they had Virginia drivers' licenses, and their cars were registered in Va. (2) Husband was claiming an $850K exemption for a personal injury settlement under VaC 34-28.1; it would not have been fully exempt under Tenn. law. (3) Merely owning property in another state and moving some personal items into it with the intent to relocate there in the future does not satisfy the requirement that the debtors have a "physical presence" in the state. The overwhelming evidence in this case is that Va. is the debtors' domicile until they establish one elsewhere. (4) Trustee's objection to the debtors' claim of Va. exemptions is denied.

B207. **Thomas and Brooks v. Midland Funding, LLC, and Midland Credit Management, Inc. (In re Karen Thomas**, #16-50612, and **In re Gary and Mary Brooks**, # 16-50396)), A.P. # 17-05010 and 15-05009, Bankr. W.D. Va., 11/30/17 Opinion (Connelly). **Rulings on motions to dismiss complaint alleging violations of the FDCPA and FRBP 3001.**Debtors sought a class action, declaratory relief, damages, and injunctive relief for violations of the Fair Debt Collections Practices Act ("FDCPA") and FRBP 3001. *Facts:* Debtors claim that Midland filed claims, on debts which it had acquired from Synchrony Bank, which did not itemize interest, fees, or costs even though it knew the amounts asserted did include these components. *Held*: (1) The Debtors' allegations that Midland filed claims which were false in amount and character alleges sufficient "materiality" to satisfy 15 USC sec. 1692e(2) and (10) of the FDCPA. It is not dispositive that the Trustee failed to object to these claims, since without this information the Trustee would not have been able to evaluate whether he should assert a legal challenge to the claim. (2) Under the FDCPA, the plaintiff must plead a plausible risk of injury, not an actual injury—a connection between the statutory breach and a risk of harm. This requirement is captured by the materiality requirement. (3) At this stage, the complaint alleges a practice of knowingly violating the FRBP 3001 and hindering a debtor's ability to readily obtain information regarding the claim, and that these actions violate FDCPA sec. 1692f as unconscionable and an unfair means to collect a debt. Assuming these facts to be true, the complaint raises "a legal question unresolved to date." (5) Therefore Midland's motion to dismiss these alleged violations of the FDCPA is denied. (6) Plaintiffs have not alleged sufficient facts that demonstrate any amounts of expenses or attorney's fees resulting from Midland's failure to comply with FRBP 3001. They focus their request for relief on the second alternative—"other appropriate relief"—and seek an injunction against future conduct. They have

not met the standard for issuing such an injunction. This count is insufficiently drafted, and will be dismissed, but plaintiffs are granted leave to amend this part of their complaint.

B208. **Robbins v. Delafield, Upright Law, et al**., Bankr. W.D. Va., A.P. # 16-07024, 12/8/17 Opinion (Black) **Rulings on sealing of trial documents.** Prior to trial, the Court granted the Defendants' motion to file confidential exhibits under seal temporarily. Upon conclusion of the trial, the parties were directed to submit a brief to justify the continued sealing of exhibits and an explanation as to why alternatives to sealing would not provide sufficient protections. The Defendants' motion for continued sealing of exhibits is now before the Court. While the presumption is that all documents filed in a bankruptcy case are accessible to the public; under 11 U.S.C. § 107(b), the Court may protect an entity with respect to a trade secret or confidential research, development or commercial information and defamatory or scandalous material. The Court held that the seal would be maintained pending its decision on the merits of this case on scripts and training materials for employees, partner handbooks, tax returns and financial information, but not on partner newsletters that contain publicly available information. The Defendants also requested that they be allowed to withdraw from the public record any proposed trial exhibits previously filed under seal that were not admitted into evidence. The Court kept those documents under seal upon final resolution of the case, will not consider the documents in its ruling on the merits and will permit the Defendants to withdraw the documents upon final resolution of the case. [Court website summary]

B209 **In re Ronald and Karen Carter**, Bankr. W.D. Va., # 17 60505, 12/18/17 Order (Connelly). **A confirmed plan's failure to provide for a secured claim filed post-confirmation is not grounds under Code sec. 1307(c) to dismiss the case.** Debtors objected to a secured proof of claim ("POC") because the Trustee had filed a motion to dismiss the case due to the Debtors' failure to provide for the claim in their confirmed plan. The claim had originally been owned by Capital One, but had been acquired by Cavalry Spv I, LLC ("Cavalry"). (1) Cavalry filed the POC in its name, but the Debtors' objection, while sent to the correct address, was noticed in the name of Capital One, not Cavalry. The notice to Cavalry was "insufficient ... to sustain the objection by default," as it did not comply with Rule 3007(a)(2)(A). (2) The Debtors alleged in their objection that the collateral, a motorcycle, had been stolen six years earlier, and therefore the claim should be treated as unsecured. Sustaining the objection would not determine the validity of the lien, avoid the lien, or satisfy the lien, so it's unclear whether such an order is necessary. If the Debtors are seeking to determine the lien's validity or to avoid it, this objection is "an ineffective means to achieve that result. See ...Rule 4003(d), 7001(2)." (3) The Debtors' plan scheduled this debt as an unsecured claim. Paragraph 8 of the plan confirmed by the Court states that if a claim is scheduled as unsecured and the creditor files its claim as secured but fails to object to confirmation, the creditor may be treated as unsecured for purposes of the plan; this does not limit the creditor's right to enforce its lien. Failure to provide for a secured claim is not one of the enumerated grounds under Code sec. 1307(c) to dismiss a case post-confirmation. If Cavalry has a valid lien, it may enforce it after discharge; this right is not affected by plan confirmation, and any lien does not impair discharge. So it is not clear if grounds are present to dismiss the case at this time. This result would not change even if the language of paragraph 8 had not been included in the plan: the failure to provide for a secured claim "simply permits the lien to pass through the bankruptcy unaffected." Debtors would be wise to modify the plan to provide for an untreated lien, but "it is not clear whether a debtor can be compelled to do so over threat of dismissal when he has already achieved a confirmed plan." While the trustee may wish to move to modify the plan to request such a plan modification, such action is "not imperative for a debtor to achieve a discharge or fresh start." (4) This situation is different from that of an allowed priority claim filed after confirmation. Part 4.1 of the (new) official form Plan provides that all allowed priority claims will be paid in full, so "a priority claim filed after confirmation for amounts greater than the plan provided for may indeed establish grounds to dismiss a case if not addressed." (5) So while a Trustee or other party may *request* plan modification to provide for a post-confirmation claim to increase the amount of payments on claims of a particular class, the failure to do so "... is not by itself a basis to dismiss a case." (6) The Trustee's motion to dismissed is continued for further hearing.

B210 **In re Richard Witt**, Bankr. W.D. Va., # 17 61453, 12/18/17 Order (Connelly). **Claim held to be unsecured when neither the claim nor the amended claim showed any proof of security and the creditor failed to meet its burden under Harford Sands.** Debtor objected to the secured POC of Wells Fargo ("WF"), an open-ended revolving credit account. The debt had been scheduled by the Debtor as an unsecured claim. WF did not respond, but filed an amended

claim that contained a credit card application signed by the Debtor. (1) The Court reviewed the burden-shifting approach enunciated by the Fourth Circuit in *In re Harford Sands, Inc.*, 372 F.3d 637 (2005): a properly filed POC is prima facie evidence of its validity, and the Debtor must then offer rebuttal evidence that negates at least one fact necessary to the claim's legal sufficiency, demonstrates a true dispute, and has probative force equal to the contents of the claim. *In re Falwell,* 434 B.R. 779 (Bankr. W.D. Va., 2009). If that is done, the burden shifts back to the creditor to prove the validity and amount of the claim by a preponderance of the evidence. (2) Debtor's objection had the necessary probative force because no evidence was attached to the POC to show that it was secured, and WF failed to respond or meet its burden, so the Court sustains the objection. (3) The amended POC does not contain any additional documents that support the existence of a secured claim. Because the amended claim is identical to the initial claim, it appears that WF was aware of the initial objection, and the Court interprets the objection to apply to both claims. Therefore the Court sustains the Debtor's objection to both claims and finds it to be unsecured. (4) If the amended claim is considered to be a response to the objection, WF has failed to meet its burden of proof, because the amended POC contains no evidence of security, and the Court reaches the same result.

B211. **Hurt v. US Dep't of Housing & Urban Dev. (In re Hurt)**, Bankr. W.D. Va., A.P. # 17-07020, 12/27/17 Opinion (Black) **Court denies Debtor's recovery of a 90 day pre-petition federal tax refund set-off by HUD.** The Debtors filed an adversary proceeding pursuant to 11 U.S.C. §§ 542(a) and 547(b) seeking to recover a federal tax refund the United States Department of the Treasury setoff prepetition within 90 days of their petition date in partial satisfaction of a foreclosure deficiency that the Debtors owed to HUD. HUD contends that the setoff is not recoverable under either section, nor is it recoverable under 11 U.S.C. § 553, the provision of the Bankruptcy Code governing setoffs. The Court held that the validity of the setoff had not been called into question by any allegation of the Complaint and a cause of action to recover it is not available under Section 547(b). The Court also held that Section 553(b)(1) does not bar the creation of an insufficiency during the 90 day prepetition period, but permits the trustee to recover the setoff amount only if the insufficiency is less at the time of set off than when it arose. In the instant case, there was no reduction in the insufficiency, therefore section 553(b) does not allow recovery by the trustee. As HUD did not improve its position within 90 days preceding the filing of the petition, the Court granted HUD's motion for summary judgment and dismissed the adversary proceeding. [Court website summary]

B212. **Ayers v. U.S. Dep't of Defense (In re Ayers)**, Bankr. W.D. Va., # 17-70928, 1/8/18 Opinion (Black) **[CHAPTER 7] Rulings on Debtor's Motion for hardship discharge of military student loan.** The Debtor filed an adversary proceeding against the U.S. Department of Defense and the U.S. Department of the Treasury seeking a declaration that her debt to the Department of Defense under the ROTC/SOAR program is dischargeable under 11 U.S.C. § 727 or alternatively that any such debt excepted from discharge under 11 U.S.C. § 523(a)(8) constitutes an undue hardship on the Debtor and should be discharged. The Debtor also asserted that the Defendants' actions were arbitrary and capricious and that no reason exists for disparate treatment of the Debtor and sought declaratory judgment that the Defendants' decision to recoup certain expenses because of her disenrollment from the Air Force based solely on her sexual preference is in violation of 5 U.S.C. §706(2) and her right to due process and equal protection under the Fifth Amendment of the Constitution. In response, the Defendants filed a motion to dismiss pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The Court granted the Defendants' Motion to Dismiss in part and denied it in part, denied the Debtor's Motion to Amend the Complaint as futile, but allowed the Debtor to amend her complaint as to whether the debt can be discharged as an undue hardship under the *Brunner v. N.Y. State Higher Educ. Servcs. Corp.* test. [Court website summary]

B213. **In re Timothy & Andrian Williams and Jessica Scott (US Trustee v. Delafield, LSC, Upright Law, Allen, Law Solutions, Chern, Scanlan, Sperro, and Morgan)**, Bankr. W.D. Va., # 15 71767, A.P. # 16 07024, and 16-50158, A.P. # 16-05014, 2/12/18 Order & 62 page Opinion (Black). **Court imposed various sanctions against the defendants in cases involving Upright Law and related entities.** Order: (1) Delafield's contract with debtors is declared void; (2) Morgan shall disgorge his fees in these two cases to the Chapter 7 Trustee; (3) privileges of LSC, Upright Law, Chern, and Allen to file or conduct cases , directly or indirectly, in the WD of VA are revoked for 5 years, including any firm that they directly or indirectly have an ownership interest in or control over; (4) LSC, Upright Law, Chern, Allen, Scanlan and Sperro shall be fined collectively $250,000, payable to the UST within 30 days of this order becoming final and unappealable; (5)

Chern is personally fined $50,000 for his leadership of the Sperro scheme, payable to the UST within 30 days; (6) Delafield's privileges to practice in this Court are revoked for 1 year, and he is sanctioned $5,000 to be paid to Williams' within 30 days, deliverable to M. Garber; he may reapply for reinstatement after 1 year (Court lists the factors it will consider important in that decision); (7) Morgan's privileges to practice, directly or indirectly, including through his PLLC, in this Court are revoked for 18 months, and he is sanctioned $5,000 to be paid to Ms. Scott within 30 days, deliverable to M. Garber; he may reapply for reinstatement after 18 months (Court lists the factors it will consider important in that decision); (8) Sperrow to disgorge immediately all funds received from the sale/disposition of any property for which it sent funds to LSC/Upright in connection with cases and all funds received from a lender to recover a lender's collateral; all such funds to be paid to the Court Clerk and held pending further order of this Court; also, to provide the UST with a list of all clients referred to it from LSC/Upright nationally and all details regarding the recovery, disposition, etc., of any collateral involved in the New Car Custody Program; (9) UST to forward copies of the Order and Opinion to Ill. and Va. state bar disciplinary authorities; (10) (multiple rulings re lifting of the seal on, and withdrawal of, certain exhibits and the trail transcript).

B214. **Dulles Electric & Supply Corp. v. Shaffer (In re Shaffer)**, Bankr. W.D. Va., #13-51380 and 13-51381, A.P. # 17-05018 and 17-05019, **[Chapter 7]** 2/27/18 Opinion (Connelly). **Post-petition extensions of credit under a pre-petition guaranty are not discharged.** Plaintiff reopened the bankruptcy cases of defendants and filed separate complaints against each defendant seeking a declaratory judgment on the dischargeability of particular debts for postpetition extensions of credit based on a guaranty signed prepetition. The Court concluded that the chapter 7 discharge orders did not discharge liability under the guaranty for the postpetition extensions of credit. [Court website summary]

B215. **In re Townside Construction, Inc.**, Bankr. W.D. Va., #16-70629, 3/14/18 Opinion (Black) **[CHAPTER 7] Certain pre-petition causes of action are found to be included in the Debtor's estate under sec. 541.** The Chapter 7 Trustee, the Bank creditor and the foreclosure trustee under certain deeds of trust filed a motion to approve a compromise and settlement whereby the Bank would pay a certain sum to the Trustee, after which the Trustee would convey certain real property to the Bank and execute a general release of the Bank and foreclosure trustee releasing all claims against them, known and unknown, and accruing from the beginning of time through the date of the entry of the order approving the settlement. The Debtors objected to the motion asserting that certain causes of action were not property of the estates and that the Debtors were entitled to bring litigation against these parties without the Trustee's involvement. As the scope of the definition of estate property under 11 U.S.C. § 541 is both comprehensive and far-reaching, the Court found that the causes of action alleged by the Debtors in these pending separate lawsuits were "sufficiently rooted" in the Debtors' pre-bankruptcy pasts with the Bank to fall within the *Segal v. Rochelle* test, and that the alleged causes of action sufficiently flowed from the Debtors' prepetition assets such as to fall within the scope of Section 541. The Court did not decide whether the settlement should be approved, reserving the issue until after the Trustee fulfills his statutory duties. [Court website summary]

B216. **In re Ayse Hoole**, Bankr. W.D. Va., # 17 50262, 3/21/18 Opinion (Connelly) **Court determines the extent of the Trustee's rights to the Debtor's joint tenant WROS interest in real estate.** [**CHAPTER 7 CASE**]. Debtor scheduled her joint tenancy with right of survivorship interest (with her mother) in a duplex valued at $81,200 ($93,900 for taxes) as being worth $812. The Chapter 7 Trustee filed a motion to determine the nature and extent of the estate's interest in the property. Debtor argued that she did not have a one-half interest in the property because she did not provide half the consideration for the property: since her mother provided the purchase funds, she would be entitled to the sale proceeds in a state partition suit. Held: (1) Under Va Code 55-20.1, the debtor and her mother own the property as joint tenants with the right of survivorship as at common law. Case law says that means each joint tenant possesses the entire estate, rather than a fractional share, and the joint tenancy shares four "unities": time, title, interest, and possession. (2) That means that each share is "equal, and the duration, quality, legal or equitable, of their estates are the same." (3) So if in fact the Debtor's interest is not equal to her mother's, then she is not a joint tenant, but a tenant in common with her. But that is not what the deed says. (4) The Court concludes that the debtor and her mother are joint tenants and not tenants in common, which means that they each have an equal interest in the property. (5) Va Code 64.2-305(C)(3) only applies to married spouses and is thus inapplicable here. (6) The Court declines to allow the admission of extrinsic (parole) evidence to vary or alter the clear terms of the deed. (7) Va Code 58.1-3211.1 applies

only to tax relief and does not negate Va Code 55-20.1. (8) The Chapter 7 estate's interest in this real estate "is in the nature of a joint tenant with an undivided interest in the entire property with right of survivorship." (9) On the issue of whether the Trustee may conduct a sale of the real estate pursuant to 363(h), and how such proceeds would be divided: the Trustee's power is not limited to her state law rights to partition as a joint tenant. (10) Under Va Code 8.01-81, a lien creditor may compel partition, and under 544(a) the Trustee has all the rights powers of a hypothetical lien creditor, so the Trustee can compel partition under the Virginia Code. (11) Va Code 8.01-31 does not limit what the Trustee would be entitled to in a partition suit because that section "addresses potential rights of one joint tenant against another, as opposed to the rights of a holder of a judgment lien." (12) The Court reserves any ruling on any motion seeking to sell or partition the property until such time as an appropriate motion has been filed.

B217. **Farthing v. Fraley (In re Fraley)**, Bankr. W.D. Va., #17-70067, A.P. # 17-07027, 3/28/18 Opinion (Black) **[CHAPTER 7 CASE] Court denies the Trustee's attempted avoidance of a voluntary transfer of real estate from the Debtor to his daughter.** The Chapter 7 Trustee sought an order avoiding a voluntary transfer of land from one debtor to his daughter in which a life estate was reserved for the debtors (one of whom was a stranger to the title) under 11 U.S.C. § 544(b) and Virginia Code § 55-81. As the female debtor did not own an interest in the property prior to the reservation, the reservation of the life estate only survived as to the male debtor. The Court then valued his single life estate in the property and added that to the value of his other personal property and found that the total asset value after the transfer was greater than his total liabilities. Thus, the male debtor was not insolvent at the time of, or made insolvent by, the transfer, and the conveyance may not be avoided. [Court website summary]

B218. **In re Loretta Amos**, Bankr. W.D. Va., # 17-50572, 4/12/18 Order (Connelly). **There was good cause to extend the Debtor's lump-sum payment beyond 36 months; plan must pay interest on unsecured claims where Chapter 7 test requires 100% payout.** In a case that must pay 100% because of the Chapter 7 test, the below-median Debtor's proposed plan would pay 100% at 1.16%/yr. interest [federal judgment interest rate] through fifty-two $100/mo. payments and a one-time lump sum payment at some point in months 48-54 from the sale of her house or the liquidation of her retirement funds. Trustee objected, *inter alia*, that the plan did not meet the liquidation or good faith tests, and had not shown good cause to extend the plan beyond 36 months. Held: (1) The Debtor's decision not to liquidate her house or retirements funds in the first 36 months is not bad faith, especially when she will not retire until after 36 months, will liquidate her assets after she retires, and will pay interest and regular payments until that time. (2) Her scheduled retirement after 36 months is sufficient cause to justify a plan period beyond 36 months. (3) To comply with the liquidation test, the Debtor "must provide enough interest to the unsecured creditors to ensure they receive present value of their claims." (4) The Court took under advisement the question of the appropriate interest rate to be applied in this circumstance, and will allow the parties to brief the issue. [Note: The plan was subsequently confirmed as proposed when the Trustee withdrew his objection.]

B219. **In re Thomas and Alda Butler**, Bankr. W.D. Va., # 17 51010, 5/3/18 Order (Connelly). **Debtor's objection to a POC which incorrectly identified the Debtors as the creditor is overruled.** Debtors listed Merck Employees FCU on their Schedule F as an unsecured debt for a personal loan in the amount of $13,882; it was not marked as disputed. The creditor filed a POC, but incorrectly listed the Debtors as the creditor in two places; the POC contained a correct creditor address and identified a designated employee who filed the claim. Debtors objected to the POC because of the two incorrect creditor identifications. Held: (1) ) If a claimant files a prima facie valid POC, the burden shifts to the Debtors to introduce evidence to rebut the claim's presumptive validity; they must negate at least one fact necessary to the claim's legal sufficiency and demonstrate the existence of a true dispute. In re Harford Sands Inc., 372 F.3d 637 (4th Cir. 2004); In re Falwell, 434 B.R. 779 (Bankr. W.D. Va. 2009). (2) While the Debtors have correctly pointed out a clerical error, they have not sufficiently "called into question the amount or validity" of the claim or asserted "a true dispute" over the amount or validity of the claim. (3) Debtors have failed to carry their burden; their objection is overruled. (4) The Court determines that that the proper and true creditor is Merck Employees FCU.

B220. **In re Calvin and Deborah Napier**, Bankr. W.D. Va., #17-71557, 5/22/18 Opinion (Black). **[Chapter 7] Creditor is not required to produce unreasonable or burdensome documentation of its claim in response to Debtors' objection; compliance with Rule 3001 shifts the burden to Debtors to rebut the claim.** Debtors filed objections to four claims of

Portfolio Recovery Associates, LLC, filed by PRA Receivables Management, LLC ("PRA"). The claims were for four credit cards, and each claim contained the last four digits of an account number, the original creditor, the date the account was purchased, a last transaction date, a last payment date, and a charge off date. A copy of a bill of sale from Citibank was also attached, referencing a Master Agreement, an Addendum, and a "final electronic file." The Debtors objected that there was no evidence which showed that *these specific claims* had been purchased by PRA. Held: (1) FRBP 3001(c)(3) sets forth what must be included in such a claim to obtain a prima facie evidence of validity and amount. (2) These claims contained "all or substantially all" of the information required by this Rule, so under Harford Sands the claims are presumptively valid, and the burden shifted to the Debtors. (3) To require PRA to produce a master bill of sale, schedules, etc., "is an unreasonable and unnecessary burden on the creditor, especially when... all of the information the Debtors included in their schedules matches up readily with the proofs of claim actually filed." (4) The criminal penalties for filing fraudulent claims provide a sufficient safeguard against unauthorized claims. (5) Citing In re Hill (E.D. Ky. 2/28/14): The claims process is intended to be a simple, manageable process, not one full of pitfalls that prevent legitimate claims from being paid, and the Debtors have not alleged that the debts are owed to someone else or not owed at all. (5) Debtors' objections are denied.

B221. **In re Eric Thompson**, Bankr. W. D. Va., #18-60017, 5/23/18 Opinion (Connelly). **Perfection of a lien on a motor vehicle: effective when applied for with the DMV, not when paper certificate of title is issued.** Debtor objected to the creditor's secured claim, alleging that it had not perfected its electronic lien on the vehicle prior to the filing of the bankruptcy petition. With its claim, the creditor filed a disclosure statement, note and security agreement, and a "Lien and Title Information" document from Dealer Track Collateral Management Services, which contained an electronic perfection date of 9/28/16. The creditor produced a paper application, signed by the debtor, for a title lien that was stamped as received by the DMV on 9/2/16. The debtor's objection is based upon the fact that a certificate of title was issued by the DMV on 2/2/18 and marked as "Original," and the case was filed on 1/8/18. Held: (1) Since 2005, the DMV is not required to issue a paper certificate of title; it is deemed to have issued one when it has created an electronic record of such title in its title record system. Therefore court decisions prior to that date requiring a paper certificate of title "are of limited applicability." (2) An application for the recordation of a security interest is deemed perfected on the date when it has been filed with the DMV, not the date a certificate of title is issued by the DMV. VaC 46.2-638; Huennekens v. Abruzzese, 252 B.R. 341 (Bankr. E.D. Va. 1999). (4) The creditor's lien was perfected as of the filing of the application with the DMV prior to the filing of the bankruptcy case, and it is the holder of a secured claim. (5) Debtor's objection is overruled.