Judge Anderson will forever be frozen in my memory much the way he appears in his courtroom portrait with his white hair, warm smile, quiet demeanor and gentle expression. To be fair, I am not sure he ever aged past the day I first met him in 1996 when I was sworn in as a member of the bankruptcy bar. I remember marveling at the call of the docket in his court that day. The cases moved quickly, but all participants had their opportunity to be heard. Judge Anderson presided over it all with abundant patience.

Not much changed over the last 17 years. Judge Anderson’s courtroom always operated like a well-directed orchestra, with all of the participants, from his staff to the attorneys, understanding their important roles. Judge Anderson served as the conductor, providing clear and consistent rulings and ultimately bringing order out of chaos. He was gifted in so many ways, of course, but in my mind his greatest talent in the courtroom was his ability to ensure all parties felt that they had been fully heard.

Judge Anderson’s untimely passing on June 20, 2013, caught many of us by surprise as his decline in health came on rapidly. In fact, he was last on the bench just 7 days earlier for hearings on June 13, 2013. Judge Anderson was a fixture on the bench in the Western District of Virginia, always welcoming, respectful and fair to the public and the members of the bar. His presence in the courtroom will be sorely missed, of course, but his impact on our bankruptcy practice and court system will endure. Although his list of accomplish-
ments is remarkable, Judge Anderson remained quiet about his endeavors during his life. His 33 years on the bench impacted not only those in our district but also the entire national judiciary.

Judge Anderson made his home in Danville, Virginia, surrounded by long-time friends and family in the slower-paced city that he loved. Born and raised there, Judge Anderson played football at George Washington High School before graduating in 1950. From there he attended Virginia Polytechnic Institute for his undergraduate studies and ultimately received his law degree in 1959 from the T.C. Williams School of Law at the University of Richmond.

After law school, Judge Anderson served his community in Danville as Assistant Commonwealth’s Attorney from 1960 to 1962. He then focused on the private practice of law in Danville for over 20 years until the U.S. District Court appointed him on December 5, 1980, to be a Bankruptcy Judge for the Western District of Virginia, with chambers in Lynchburg. The Court of Appeals for the Fourth Circuit reappointed Judge Anderson to the bench in 1986 and 2000 to two consecutive 14-year terms.

Although he admittedly joined the bench with limited bankruptcy experience, Judge Anderson was a quick study and soon became actively involved in the National Conference of Bankruptcy Judges (NCBJ) along with many of his colleagues at the time, such as Judges David S. Kennedy of the Western District of Tennessee, David W. Houston, retired, of the Northern District of Mississippi, A. Thomas Small, retired, of the Eastern District of North Carolina, and Arthur B. Briskman of the Middle District of Florida. These men would not only become some of his closest friends, but also highly regarded in their own right in the bankruptcy judiciary over the subsequent years.

Judge Anderson was a natural leader. He began his service to the NCBJ as a Director in 1983 and ultimately led the organization as its President from 1987 to 1988. During this period, Judge Anderson’s efforts to negotiate and secure passage of the Retirement and Survivors’ Annuities for Bankruptcy Judges and Magistrates Act of 1988 brought him the admiration and gratitude of his peers on the bench. The entire bankruptcy bar and public have benefited from his work. Judge Houston summarized the impact of Judge Anderson’s efforts most recently at the NCBJ 2013 Annual Conference in Atlanta, Georgia:

“This legislation was so important, not only because it gave those sitting Article I judges a meaningful retirement program which encouraged them to stay on as judges; it also created an incentive for the most qualified individuals in private practice to seek these positions. I can say without reservation that the passage of this legislation did more to ensure the sustained quality of the bankruptcy bench than any other event in our history. Bill Anderson’s contribution to this could conservatively be described as “heroic.”

In my recent conversation with Judge Briskman, he explained that prior to the enact-
ment of the retirement program, qualified jurists were leaving the bench because of the attraction of better compensation in private practice. When I asked him what it was about Judge Anderson that enabled him to be successful in the role of negotiator for the entire bankruptcy judiciary, Judge Briskman described Judge Anderson’s “nice political touch” and how he was “such a settling force” for the other judges, always knowing how to proceed politically with Congress and how to negotiate the minefields they faced.

After his successful tenure leading the NCBJ, Judge Anderson was inducted as a fellow of the inaugural class of the American College of Bankruptcy in 1990. That same year the members of the NCBJ presented Judge Anderson with the rarely given Herbert M. Bierce Distinguished Judicial Service Award. The award was created by the NCBJ to recognize exceptional individual service to improvements in the quality of justice in the Courts of Bankruptcy of the United States and has only been awarded a handful of times since its inception.

The list of Judge Anderson’s professional accomplishments does not end there, though. He also served on the Board of Governors of the American Bankruptcy Institute, on the Committee on the Administration of the Bankruptcy System of the United States Judicial Conference, and as Chair of the Bankruptcy Advisory Committee for the Administrative Office of the United States Courts. Of course his 33 years of faithful service on the bench also stand as a high-water mark in an admirable judicial career that few other judges will be able to match.

In his recent remarks to the NCBJ, Judge Thomas Small remembered his friend, Judge Anderson, as “a man of perfect balance.” He was as accomplished off the bench as he was in the courtroom. He simply loved the outdoors. Judge Anderson enjoyed playing tennis, riding and caring for his horses, and, of course, raising his prized English Setters. Judge Small also described Judge Anderson as an “unfailingly kind and polite” man who treated everyone with equal respect. Through it all he exuded warmth to those around him and maintained a wonderful sense of humor born of a lifetime of experiences dating back to his earliest days growing up in Danville.

It was in those early days that Judge Anderson forged many of the friendships he would enjoy throughout his life, but they also produced a special nickname not known far beyond Danville’s borders. George Washington High School had a particularly talented football team one year and the members of the squad vowed not to shave until they lost a game. The team had a long winning streak, but as the other boys grew more hirsute, Judge Anderson managed only a bright red goatee that curled outward at the bottom. The name “Goatee” was born, and it stuck – at least with the locals. To this day, at least one of the Danville court security officers remembers Goatee as the fastest one on the field. Judge Anderson happily answered to that nickname throughout his life, often hearing it on the streets from friends as he walked around downtown Danville for lunch after the morning hearings.

Hired to teach tennis and play matches with guests traveling without tennis partners, Judge Anderson spent his summers in high school working at the Cavalier Hotel in Virginia Beach. Little did he know during those summers playing against the likes of Mel Torme and Xavier Cugat that he would be honing his skills for matches later in life with the Chief Justice of the Supreme Court. Judge Anderson and Justice Rehnquist were known as much for their actual play on the court as they were for the good natured needling they gave one another during their matches. Tennis remained a lifelong passion of Judge Anderson. He once told me he only started slowing down his tennis as he grew older and
began running out of players to join him.

Unlike many of his counterparts, Judge Anderson had to support himself during law school. He quickly found a job working full time at Sears in Richmond doing everything from working the sales floor to stocking shelves. Apparently he excelled there too and was soon offered a management position. He had his sights set on a career in the law, though, and politely refused so he could finish his education instead.

Although Judge Anderson loved all of his animals – dogs, horses, cats or whatever made a home at his farm – raising his champion English Setters was his passion. All of his dogs had special meaning to Judge Anderson, whether they were accomplished in the field trial competitions like Timmy or simply a faithful hunting companion like Sam. Obtaining a puppy from one of Judge Anderson’s dogs was a particularly significant prize bestowed only upon a few lucky individuals. One special dog, BJ, came from one of Judge Anderson’s favorite dogs, Sue. The owner of BJ aptly named him in honor of Judge Anderson, as BJ was short for “Bankruptcy Judge.”

The field trial competitions took Judge Anderson and his wife of 28 years, Carolyn, all over the country, typically traveling together in the close quarters of their pickup truck. They cherished this time together and developed lifelong friendships with others in the world of field trial competitions along the way. To me it is difficult to remember Judge Anderson without picturing him with Carolyn. They remain inseparable in my memory. Their hard work and love of their dogs paid off with many accomplishments, including their beloved Timmy's second place finish in the 2009 National AKC Field Trial Championship.

Judge Anderson only occasionally traveled by plane for his field trial competitions but was always very concerned about the well-being of his dogs. Typically, he would watch carefully the loading of the plane with his dogs, before he would board the plane himself. On one such flight out of Charlotte, he was rushed on board before he was certain of the safe loading of his dog. Once on board, he asked the flight attendant to confirm that his dog, Red, was on the plane. When she was unable to do so, Judge Anderson insisted on deplaning. The flight attendant reminded him that he was not able to simply leave the plane once he had boarded, but the Judge politely but firmly reminded her that he most certainly could leave the plane. All he had to do was walk off of it, he explained. Recognizing his persistence, the flight attendant decided to make additional efforts to locate the dog. Judge Anderson’s intuition proved accurate; in fact, Red was in the process of being loaded onto the wrong plane. Nonetheless, despite causing their delay, Judge Anderson managed to win over the other passengers. Upon Red’s arrival onto the correct plane, the passengers broke into spontaneous applause.

Judge Anderson was a quiet leader, soft-spoken at times, but always heard. He was a mix of charm, wit, humility, warmth and grace. Recently Judge Kennedy summed up his good friend by describing him as a very special human being. He explained in an email to me that, “[t]he entire non-Article III judiciary and spouses owe Judge Anderson a great nondischargeable debt of gratitude.” I could not agree more with Judge Kennedy, but would humbly and respectfully expand such a poignant sentiment to include, as beneficiaries of the work and service of Judge Anderson, the entire bankruptcy bar, all court personnel and the public as a whole.

He will be missed.
Message from the Editor  Sarah Beckett Boehm

As 2013 ends, I am reminded of all the changes this year brought to our Bankruptcy Bar, including the retirement of Judge Tice, the recent appointments of Judges Phillips and Black, and the death of Judge Anderson. For those of you operating on a calendar year, I hope you hit your billable hour requirement and collected your receivables to make budget. With bankruptcy filings on the decline and budget cuts looming, 2014 promises to be an interesting year for us all. Fortunately, you have the Bankruptcy Laws News to keep your spirits bright!

This edition is dedicated to the memory of Judge Anderson and includes a wonderful tribute authored by David Cox, who clerked for Judge Anderson. I also would like to thank Judge Stone, Herb Beskin, and Rich Maxwell for sharing their memories of Judge Anderson. As you will learn (if you did not know already), Judge Anderson’s legacy exceeds far beyond the boundaries of the Western District and the Commonwealth of Virginia. He will be missed by all.

In addition to the Judge Anderson tributes, Bob Weed and Katie Vaillancourt examine Virginia garnishments. This edition’s Clerk’s Corner includes updates from John W. L. Craig, II, Bankruptcy Clerk for the Western District. Be sure to review the new Bankruptcy Rules that took effect on December 1. The Judges were busy writing opinions this quarter, which Kelly Barnhart has compiled for your reading pleasure in the Case Summaries. If you attended the portrait unveiling for Judge Tice, I probably took your picture – some of which are included. Enjoy!

Sarah
The Bankruptcy Section would like to put some romance into your life, with two upcoming getaways. When I think of a romantic getaway, I think of Hawaii or Paris, but that’s only because I already get to experience northern Virginia every day. Especially for section members outside of northern Virginia, Fairfax ought to be your romantic destination of choice next March.

For the first time in several years, we—in conjunction with VA CLE—will be presenting a seminar on business bankruptcies at the Waterford at Fair Oaks in Fairfax, Virginia on March 21, 2014. The featured business bankruptcy topics will include (a) when a Chapter 11 case goes bad (trustee/examiner appointments, creditor plans, conversions to Chapter 7, and dismissal); (b) how to sell assets in bankruptcy (sales free & clear, auctions, plan sales, and selling jointly owned assets); (c) ethical concerns for businesses/business owners in bankruptcy (including addressing government contractors in bankruptcy, and providing 1 hour of ethics credit); and (d) issues and strategies in health care/retirement home bankruptcy cases. Bankruptcy judges Robert G. Mayer and Brian F. Kenney of the Alexandria Division have confirmed their participation in this day long legal seminar.

Please consider bringing your spouse and children, or a date, and making a long three day weekend of this event. Northern Virginia and Washington, DC have much to offer. Aside from the usual museums and monuments, consider some lesser known sights, such as Theodore Roosevelt Memorial on Theodore Roosevelt Island. The Udvar-Hazy Center in Chantilly, Virginia has incredible displays of private and military aircraft and space vehicles and memorabilia. The National Zoo has a brand new baby panda, Bao Bao. The solemn grounds of Arlington National Cemetery are breathtaking, beautiful, and humbling. A crisp spring day is among the best times to visit. Look for your flyer from VA CLE as the program date approaches.

Besides our Spring CLE, the Virginia State Bar’s annual meeting in Virginia Beach will be held between Thursday July 12 and Sunday July 15, 2014. This year, the Bar has revised the format for CLE programs. Rather than focusing on smaller, specialized programs put on by each of the respective sections, the Bar will present a handful of larger “Showcase” CLEs on Friday and Saturday, focused on high-profile topics with broad appeal to lawyers generally, without regard to specific practice area. Additionally, between the morning and afternoon Showcase CLEs on Friday, there will be a luncheon for sections on Friday in the ballroom at the Hilton Hotel Oceanfront. The Bankruptcy Section will have a table designated for its members, and our business meeting—at which the section, among other things, elects the following year’s incoming members of the Board of Governors—will be held there immediately following the lunch. The VSB is excited about the new format for the annual meeting and has asked each section to inform its members about the weekend of activities in Virginia Beach, the CLE programs, section luncheon, and business meeting, and to encourage them to attend.

As the weather during the annual meeting in Virginia Beach has been chilly, windy, and overcast the last two years, it promises to be warm and sunny in 2014. Whether you routinely attend the annual meeting in Virginia Beach, attend only sporadically, or have never attended, consider attending this year. Even if you, as a member of the Bankruptcy Section, attend nothing but our free lunch on Friday, the weekend offers enough activities (and freedom to abstain from activities) to make it worthwhile for you and your loved ones, and the weekend culminates in Father’s Day.

We are offering a city getaway in March 2014 and a beach getaway in June 2014; all the makings you need for romance.

If you would like to participate in an upcoming CLE program, write an article for the Law News, or learn about ways of contributing to the Bankruptcy Section, please do not hesitate to give me a call or send me an e-mail. ~ Steve
JUDGE ANDERSON TRIBUTES

Memories of Judge William E. Anderson

By Herbert L. Beskin, Chapter 13 Trustee for the Western District

I appeared before Judge Anderson for over thirty years: twenty as a debtors’ attorney, and the last ten as one of his Chapter 13 Trustees. When he passed away, the end came suddenly and without much warning. We all knew how much he enjoyed his job, and how much he wanted to finish out his term. My hunch is that his biggest disappointment was not being able to walk away from the Courthouse for the last time under his own power, knowing that he’d fulfilled all his responsibilities, and satisfied that he’d passed along to his successor some advice that would ease the transition into his or her new role.

I don’t think I have ever known a judge quite like Judge Anderson. He seemed to be completely, absolutely comfortable in his own skin. His ego rested quietly deep inside his psyche, content not to make an appearance unless truly required by the occasion. He had no need to remind people of his position or his authority. The Judge never got lost in the weeds of legal theory, never took his watchful eye off how his judgments would play out in the real world. He was courteous to a fault to everyone who came before him. I think I saw him really angry on the bench only one time—and the attorney who was the subject of his wrath that day heartily deserved what he got.

The Judge never tried to be other than what he was: a wise ole country lawyer who liked and understood people. He had an innate sense of what was really important in a case, what was fair, who deserved a second (or third) chance, and who was probably telling the truth. He also had a knack for keeping things simple, no small feat in our profession. It has been my experience that it is very difficult to teach those traits to someone; you either have them, or you don’t. Judge Anderson had them. He made his bankruptcy courtroom a place where the poor and the disadvantaged could be heard with respect and given one last opportunity to keep from falling off the financial cliff. His gentle sense of humor was always lurking just beneath the surface, and he always seemed to enjoy the opportunity to shake his head at life’s craziness. Despite his position and his accomplishments, he was, to quote a phrase I’ve always liked, a really easy person to be around.

While he thoroughly enjoyed being a judge, there was much more to him than just his black robe. He was a man of the outdoors: hunting (on horseback into his seventies), playing tennis (Chief Justice Rehnquist was his frequent doubles partner), and running his beloved dogs across his farm and watching them compete in (non-legal) trials. He also was a popular and respected leader among his Bankruptcy Judge peers, selected as president of their association and one of their chief negotiators when their status under the new Code was being hammered out in the ‘80s.

Judge Anderson reinforced for me many of life’s most important lessons, mostly quietly, and mostly by example. Keep things simple; appreciate what you have; treat people the way you’d want to be treated; carry your power lightly; learn to listen to others; treasure your friends; never miss the opportunity to tell—or hear—a good story; never miss a chance to compliment or thank someone; do things that you love; and be wary of anyone who doesn’t like dogs, especially huntin’ dogs. He instinctively knew how to balance patience and firmness, seriousness and the hearty laugh, people and principles. The Judge was the epitome of an important person who never let his importance go to his head, and instead never missed an opportunity to greet people with warmth and modesty.

At the dedication of his portrait to celebrate twenty-five years on the bench, he remarked that long after he was gone, people would look at his picture and say: “I don’t know what kind of Judge he was, but he sure had a great head of hair!” But those of us who watched him for years will remember more his generosity of spirit, and his smile. It is that smile, and the way he kept moving through life with gratitude, dignity, and purpose well into his eighties, that I will remember most.
JUDGE ANDERSON TRIBUTES

By The Honorable William F. Stone, Jr.

When Judge Anderson was initially appointed as a Bankruptcy Court Judge by the District Court, many were likely surprised because his bankruptcy experience was limited, and even saying that might be generous. Furthermore, he never made any pretension of being a legal scholar. So it seems safe to surmise that few, if any, probably not even Judge Anderson himself, had any sense of how consequential a mark he would make in that career. Indeed, he almost certainly had the greatest impact on the Bankruptcy Court system of any Bankruptcy Judge that the Commonwealth of Virginia has so far produced and it is hard to see how that credential will ever be matched, much less surpassed. Although his accomplishments are many and his national reputation secure, the achievement that seems to be on a plateau all its own is the critical one he played in persuading Congress to enact a retirement program for Bankruptcy Court Judges where none had existed before. To say that he personally played the critical role is not puffery or just a generous compliment, it is a historical fact that Bankruptcy Judges across the country universally recognize. That change in the system, probably more than any other factor, has attracted many highly capable men and women to the Bankruptcy Court bench, maintaining and strengthening its quality and accordingly the level of legal practice in the Bankruptcy Courts. Ironically, Judge Anderson never retired himself, saying that there was nothing he enjoyed more than being a Bankruptcy Judge even though he had a wide variety of other interests and pleasures. Dying in the saddle, so to speak, may have suited him best as I'm not sure how much he would have liked being a former judge.

By Richard C. Maxwell, Esquire

In the dog world, there are two types of herding dogs. An example of the first type is an Australian shepherd, which runs circles around the herd and creates general unease and agitation in order to get the herd to do what the dog wants. The second type of herding dog is exemplified by a bouvier des flandres. A bouvier sits in the middle of the herd and the herd takes comfort from the bouvier’s quiet strength. Such was the temperament of Bill Anderson. He was the type of person you felt better for knowing. He never needed to raise himself above others. Rather, he made others feel comfortable around him. Throughout my years of practice in big cases and small cases, he treated everyone with courtesy and respect. In return, he gained the admiration of all those who came before him.
The Fair Debt Collection and Practices Act ("FDCPA") provides that "any debt collector who brings any legal action on a debt against any consumer" shall bring such action in either the judicial district where the consumer resides or in the judicial district where the consumer signed the contract. When the consumer has moved to a different county after the judgment but before the garnishment, is there a problem bringing the garnishment in the court in the district where the consumer no longer resides?

A garnishment issued in the judgment debtor/consumer’s former judicial district would violate the FDCPA, if the garnishment is a legal action on a debt against the consumer.

Nationally, some courts have held that a garnishment is obviously an action against the consumer. Such garnishment would therefore be a clear violation of the FDCPA, if the garnishment is filed in any judicial district other than where the judgment debtor now resides (or where the contract was entered into).

On the other hand, other federal courts have been reluctant to override underlying state law, where the state had its own garnishment venue based on the garnishee’s location. Those cases say the garnishment is an action against the employer/bank/garnishee - not against the consumer.

Until 2012, judgment creditors had no clear alternative under Virginia law but to file the garnishment in the court where the judgment was entered. Perhaps in response to FDCPA challenges, a provision was added to Va. Code Ann. § 8.01-511(A)(iii) in March 2012, effective July 2012, to allow the garnishment to be filed in the city or county where the judgment debtor now resides.

But, was that provision necessary? A 1978 Virginia Supreme Court case said, "In Virginia, garnishment is regarded, not as a process of execution to enforce a judgment, but as an independent suit by the judgment-debtor in the name of the judgment-
ment summons has been issued, up to, and until the return date of the garnishment summons. The exemption must be considered by the garnishing court.9 “Thus, [ ] there is a window of opportunity ‘to protect garnished wages’ by ‘a claim of homestead exemption.’”10 The Code also requires that a notice of exemptions and claim for exemption form be attached to every garnishment summons.11


To summarize, although usually found on the same form, there is a difference between the garnishment summons and a writ of fieri facias. The garnishment summons gives the judgment creditor a means of enforcing their lien against property held by third parties, and the Virginia Supreme Court has called that an action against that third party.

The prior writ of fieri facias creates that lien on the judgment debtor’s property. The fieri facias is a legal action, certainly, on a debt, certainly, and against the consumer. Virginia’s special homestead exemption provides additional policy support for holding that the writ of fieri facias, present on the face of garnishment summons, is an action against the consumer which should be subject to the FDCPA venue provision.

Judgment creditors who proceed with a fieri facias and garnishment in the judgment court when the consumer/debtor has moved residence to a new judicial district, do so at their peril.

(Endnotes)

1. A collection attorney is a debt collector, within the meaning of the FDCPA, so actions brought by an attorney, not a pro se original creditor, are covered here.
2. 15 U.S.C. § 1692i(a)(2). Except, perhaps, for medical bills. Consumer debtors are most often sued where they reside, and this article focuses on actions of that type. Additionally, the FDCPA, and therefore this article, does not apply to business debts.
4. See Smith v. Solomon & Solomon, P.C. (1st Cir. 2013) (holding the Massachusetts “trustee process” is not an action against the consumer but, rather, the third-party garnishee); Pickens v. Collection Servs. of Athens, Inc., 165 F. Supp. 2d 1376, 1377 (M.D. Ga. 2001), aff’d, 273 F.3d 1121 (11th Cir. 2001) (Georgia statute specifically defined a garnishment proceeding as an action between the judgment-creditor and the garnishee and required venue to be based on the garnishee’s place of business).
5. “If the judgment debtor does not reside in the city or county where the judgment was entered, the judgment creditor may have the case filed or docketed in the court of the city or county where the judgment debtor resides and such court may issue an execution on the judgment, provided that the judgment creditor (a) files with the court an abstract of the judgment rendered, (b) pays fees to the court in accordance with § 16.1-69.48:2 or subdivision 17 of § 17.1-275, and (c) files in both courts any release or satisfaction of judgment.” Va. Code Ann. § 8.01-511(A)(iii). This is narrower than the FDCPA venue provisions. Taking as an example, a consumer judgment debtor was sued in Prince William when he resided there. He now lives in Stafford. Stafford and Spotsylvania are in the same Virginia judicial district, so the FDCPA venue provision would allow a garnishment to issue from Spotsylvania. But 8.01-511 only permits judgment to be docketed for purposes of the garnishment in the city or county where the judgment debtor now resides, which would be Stafford. A Spotsylvania garnishment would violate the FDCPA as an action that cannot legally be taken.
7. Butler v. Butler, 219 Va. 164 (1978). The authors would like to thank Darrell Drinkwater, Esq., of M. Richard Epps, PC, for bringing this case to our attention.
11. Va. Code Ann. § 8.01-512.4. This is presumably why the Code requires that “service” of the garnishment be had on both the garnishee and the judgment debtor. See Va. Code Ann. § 8.01-511, et seq.
Clerk’s Corner

John W. L. Craig, II, Clerk of Court • Western District of Virginia

FILING TRENDS

Filings in the Western District of Virginia continue to fall for the fourth straight year. There were 9,595 total bankruptcy cases filed in the Western District in 2009 and this year we project approximately 6,500 filings. This is a reduction of approximately 32.3% for the period. Over the last year, filings have fallen from 6900 to the projected 6500 this year for a projected reduction of 5.9%. These reductions mirror national trends over the same period of time.

There are recent indications that this trend is coming to an end. The filings in the Western District for the month of October were actually higher than October, 2012. Total filings for the month were up 4.7% from 597 in 2012 to 625 this year. Chapter 13 cases were off slightly but Chapter 7 filings went from 390 last October to 426 this year.

COURT FUNDING AND STAFFING

Due to a myriad of factors I presented in my last article, among which was the decrease in filings, funding to the court and therefore staffing have been greatly reduced. In fact in the last 9 years this court has lost 22 Deputy Clerks due to retirement, or reduction in force and only had adequate funding to replace 2 of them. This net loss of 20 employees of the Clerk’s office represents a decrease of 42.5% and leaves only 27 people left serving the district including myself. With further cuts looming, including possible further sequestration cuts, the future looks dim.

BANKRUPTCY RULE CHANGES TO TAKE EFFECT DECEMBER 1, 2013

Rule 1007(b)(7) is amended to allow the provider of an instructional course concerning personal financial management to directly notify the court that the debtor has completed the course.

The revised rule will read as follows:

(7) Unless an approved provider of an instructional course concerning personal financial management has notified the court that a debtor has completed the course after filing the petition:

(A) An individual debtor in a chapter 7 or chapter 13 case shall file a statement of completion of the course, prepared as prescribed by the appropriate Official Form; and

(B) An individual debtor in a chapter 11 case shall file the statement if § 1141 (d) (3) applies.

{Course providers will be allowed to request limited access to CM/ECF for this purpose.}

Rule 5009(b) is revised in conjunction with the change in Rule 1007(b)(7). Currently the rule requires the Clerk to send a warning notice to the debtor within 45 days after the first date set for the meeting of creditors is if no certification has been filed. The revised version reads as follows:

(b) NOTICE OF FAILURE TO FILE RULE 1007(b)(7) STATEMENT. If an individual debtor in a chapter 7 or 13 case is required to file a statement under Rule 1007(b)(7) and fails to do so within 45 days after the first date set for the meeting of creditors under §341(a) of the Code, the clerk shall promptly notify the debtor that the case will be closed without entry of a discharge unless the required statement is filed within the applicable time limit under Rule 1007(c).

Rule 4004(c)(1)(H) now provides that the
court must delay entering a discharge for a debtor who has not filed Official Form 23, only if the debtor was in fact required to do so under Rule 1007(b)(7). The revised rule reads as follows:

(1) In a chapter 7 case, on expiration of the times fixed for objecting to discharge and for filing a motion to dismiss the case under Rule 1017(e), the court shall forthwith grant the discharge, except that the court shall not grant the discharge if:

(H) the debtor has not filed with the court a statement of completion of a course concerning personal financial management if required by Rule 1007(b)(7);

Rule 9006(d) amends the title to add a reference to the “time for motion papers.” The change is consistent with Civil Rule 6. The rule currently covers only the timing of serving opposing affidavits. The proposed amendments expand the coverage of subdivision (d) to address the timing of the service of any written response to a motion. The new version reads as follows:

(d) MOTION PAPERS. A written motion, other than one which may be heard ex parte, and notice of any hearing shall be served not later than seven days before the time specified for such hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion. Except as otherwise provided in Rule 9023, any written response shall be served not later than one day before the hearing, unless the court permits otherwise.

Rule 9013 and Rule 9014 are amended to reference and conform to the change in Rule 9006(d).

CHANGES TO THE OFFICIAL FORMS
DECEMBER 1, 2013

Official Form 3A – Application for Individuals to Pay the Filing Fee in Installments
Has been revised as part of the Forms Modernization Project. Additionally, the declaration and signature section for a non-attorney bankruptcy petition preparer has been removed.

Official Form B 3B – Application to Have the Chapter 7 Filing Fee Waived
Has been revised as part of the Forms Modernization Project. Line 2 now directs the debtor to exclude non-cash governmental assistance. Also, the declaration and signature section for a non-attorney bankruptcy petition preparer has been removed.

Official Form B 6I – Schedule I: Your Income
Official Form B 6J – Schedule J: Your Expenses
Official Form B 6 – Summary (Summary of Schedules)
Have all been revised as part of the Forms Modernization Project.

Official Form B 23 – Debtor’s Certification of Completion of Instructional Course Concerning Financial Management
Has been updated to reflect amendment of Rule 1007(b)(7).

Official Form B 27 – Reaffirmation Agreement Cover Sheet
Has been updated to reflect new line number references to Schedules I & J.

Subpoenas – B 254, B 255, B 256, B 257
Have been clarified for the average person to read and understand.
SUMMARY OF FEE CHANGES
DECEMBER 1, 2013

Motion to sell property free and clear of liens under 11 U.S.C. § 363(f)
Item (19) of the Bankruptcy Court Miscellaneous Fee Schedule is being added; a new fee will be charged upon the filing of a motion for the sale of property free and clear of liens under 11 U.S.C. §363(f), as follows:

(19) For filing the following motions, $176:
To terminate, annul, modify or condition the automatic stay;
To compel abandonment of property of the estate pursuant to Rule 6007(b) of the Federal Rules of Bankruptcy Procedure; or
To withdraw the reference of a case or proceeding under 28 U.S.C. §157(d); or
To sell property of the estate free and clear of liens under 11 U.S.C. §363(f).

Retrieval of file from Archives
Item (12) of the Bankruptcy Court Miscellaneous Fee Schedule has been amended to provide as follows:

For retrieval of one box of records from a Federal Records Center, National Archives, or other storage location removed from the place of business of the court, $64. For retrievals involving multiple boxes, $39 for each additional box.

Lack of funds
Item (13) of the Bankruptcy Court Miscellaneous Fee Schedule was amended as follows:

For any payment returned or denied for insufficient funds, $53.

JUDICIAL CHANGES

The Honorable William F. Stone, Jr. will be retiring from the bench in January 2014. Judge Stone was first appointed a Federal Bankruptcy Judge on July 23, 1999 and has served as Chief Judge the last 2½ years.

Paul Markham Black will be sworn in as a Judge of the United States Bankruptcy Court for the Western District of Virginia in early January 2014. A native of Roanoke, he received his undergraduate degree from Washington and Lee University in 1982 and his Juris Doctor degree from the T. C. Williams School of Law at the University of Richmond in 1985. He then served as Law Clerk to the late Judge Blackwell N. Shelley before going into practice at the firm of Mays and Valentine in Richmond. He returned to practice in Roanoke in 1991 and is currently a member of the firm of Spilman, Thomas, and Battle.

It was with great sadness that the court announced the death of Judge William E. Anderson this past June. Judge Anderson was initially appointed Judge of the United States Bankruptcy Court for the Western District of Virginia on December 5, 1980 and served with distinction until his death on June 20, 2013. Judge Anderson was nationally recognized for his many contributions to the bankruptcy system and is greatly missed by all.
Recent Circuit Court Decisions


Background: The debtors, residents of North Carolina, filed for chapter 7 in the Eastern District of North Carolina. On Schedule A, the debtors listed their residence, and at a hearing, the parties stipulated that the fair market value of the house was $325,000. The parties also agreed that the property is encumbered by a first mortgage lien in the approximate amount of $195,500 and that the excess value is encumbered by a federal tax lien in the approximate amount of $382,300. There was no equity over and above the liens. The debtors claimed as exempt, under North Carolina law, $60,000 as to the value of the property. The debtors further noted on their schedules that they were attempting to exempt their entire interest in the property despite the lack of any equity. The trustee objected to the exemption on the ground that the debtors had no equity in it; the debtors responded that they had a right to exempt interests even if there was no equity. The bankruptcy court entered an order denying the trustee’s objection, holding that the debtors were entitled to assert and reserve available exemptions in the property, even if there was no equity. The order further provided that the its ruling did not preclude the trustee from filing a motion to sell the property in order to provide some distribution to unsecured creditors if there was a carve out assigned by the IRS or some other method. The order further provided that any objections the debtors might have to such motion were reserved. The trustee moved for the authority to sell the property, free and clear of liens, with the transfer of any valid liens to attach to the net sale proceeds. The trustee asserted that the IRS had agreed to carve out 30% of the net proceeds for the payment of allowed administrative claims, with any balance to be paid to the debtors’ unsecured creditors on a pro rata basis. The debtors objected on the ground that the order allowing their claimed exemption to the property removed the property from the estate. The bankruptcy court granted the trustee’s motion to sell, and held that while the debtors’ exemptions were allowed, such exemptions only protected their interest in the property, not the property itself and therefore the property could be sold as property of the estate. The debtors appealed the bankruptcy court’s decision and the district court affirmed on the reasoning of the bankruptcy court. The debtors then timely appealed the district court’s decision.

Holding: The Fourth Circuit affirmed. The debtors’ residence remained property of the estate even though the debtors were permitted to reserve an exemption of $60,000 as their interest in the property subordinate to the liens against the residence. Any argument that the trustee did not have standing to pursue the sale was without merit. The trustee was permitted to sell the debtors’ residence based upon the carve-out from the IRS, notwithstanding the lack of any apparent equity and notwithstanding the exemption claims in the residence (which applied only to theoretical equity). The Court reasoned that since the IRS provided the carve-out, there was equity in the property and thus justified the sale of the property rather than abandoning the estate’s interest in the property.

Inherited Property Received More than 180 Days After Filing by Chapter 13 Debtor is Property of the Estate

Background: In February 2009, husband and wife filed for chapter 13. Their chapter 13 plan called for a 60 month term, and required them to pay $2,416 for the first
six months and $2,480 for the remaining 54 months. In August 2012, the debtors notified the bankruptcy court that the mother of the debtor husband passed away, and he anticipated an inheritance of approximately $100,000. The trustee moved to modify the plan to include the inheritance as additional funding for the debtors’ plan and the debtors objected. The bankruptcy court held that the inheritance was property of the estate, pursuant to 11 U.S.C. § 1306, which extended the 180 day time limit of 11 U.S.C. § 541. The bankruptcy court ordered the inheritance to be included in the plan to pay unsecured creditors. The debtors appealed and the bankruptcy court stayed its order and certified a direct appeal to the Fourth Circuit.

**Holding:** The Fourth Circuit affirmed. The plain language of section 1306 reflects Congress’s intent to expand the type of property deemed property of the estate, as identified in section 541. Pursuant to section 1306, the estate goes until the case is closed, dismissed or converted and therefore any inheritance received during the pendency of the case is considered property of the estate and should be pledged as additional funding. In addition, if a debtor’s position improves, the debtor’s creditors also should benefit. To accept the debtors’ position that the 180 day period of section 541 applies to inheritances received in a chapter 13 would mean that section 1306 would lose “all meaning.” In addition, after employing the rule of construction that the specific governs the general, the Court concluded that the inheritance was property of the estate for the benefit of creditors.


Chapter 13 Debtor Could Not Strip off Lien Held in Tenants by the Entireties when Only One Spouse in Bankruptcy

**Background:** Chapter 13 debtor owned property with his wife, which property was owned tenants by the entirety. He filed for chapter 13. His wife did not file for bankruptcy. After filing his case, he and his wife initiated an adversary proceeding seeking to strip off the lien of the second lienholder because the amount owed on the first lien was greater than the value of the house. The bankruptcy court denied the relief, holding that the lien could not be stripped off because both of the parties had not filed for bankruptcy. The District Court affirmed and the husband and wife appealed.

**Holding:** The Fourth Circuit affirmed. Because, under Maryland law, a tenancy by the entirety is a joint tenancy of spouses with rights of survivorship between the spouses, the property in question was not owned by either spouse but by the marital unit, with each spouse having an undivided interest in the whole property. The filing of the bankruptcy by the husband did not sever the units of the tenancy, and therefore only his interest in the property, and not the whole of the entireties property became part of the bankruptcy estate. The complaint, although filed by both spouses, did nothing to change this result. The wife’s interest in the property was not properly before the court because she did not file for bankruptcy relief. In addition, 11 U.S.C. § 363(h), which allows a trustee, in limited circumstances, to sell a non-debtor spouse’s interest in entireties property, does not provide a basis for extinguishing the lienholder’s rights with respect to the non-filing spouse’s interest in property.

Recent District Court Decisions


**Party Lacked Standing to Reopen Case; Sale of Assets Following Reopening Deemed Void**

**Background:** The debtor filed for chapter 11 in March 2010, which case was converted to one under chapter 7 in January 2012. After the debtor ceased operations, Alexandria Surveys, LLC (“AS”) began doing business out of the debtor’s old location. In October 2012, Alexandria Surveys, LLC acquired the debtor’s old telephone number and web address and acquired other property owned by the debtor. In November 2012, Alexandria Consulting Group,
LLC (“ACG”), another surveying firm, filed a Motion to Reopen the debtor’s case to administer assets, claiming that it was interested in purchasing some of the personal property remaining in the estate that had not been listed in the schedules, including its customer lists, files, web page, and phone and facsimile numbers. The debtor opposed the motion. The bankruptcy court granted the motion. AS was not a named party to the proceeding. The chapter 7 trustee provided notice of the sale of the assets, to which AS objected on the basis that the assets had been abandoned when the case closed, but also stated it would participate in the sale. At the sale, ACG outbid AS and purchased the assets for $28,100, which funds were paid to the trustee. Following the sale, the chapter 7 trustee moved for an order requiring AS to turn over the purchased assets to ACG, to which AS objected. In April 2013, the bankruptcy court entered an order granting the motion for turnover. As to the debtor’s physical files and computers, the bankruptcy court held that they were scheduled and were abandoned when the case closed, but the survey and title files, the server and digital files, and the phone numbers and the website, were not scheduled and were not abandoned and therefore could be sold as part of the estate; and (iii) the bankruptcy court erred in holding that the servers were not abandoned and were properly sold, since the schedules listed “Computers” (and the servers were covered under this category).

**Holding:** The district court reversed. As to the standing issue, the district court noted that pursuant to 11 U.S.C. § 350(b), a case may be reopened by a debtor or other party in interest, which includes the trustee, a creditors’ committee, an equity security holders’ committee, or a creditor. Since ACG did not fall into any of these categories, it was not an interested party and lacked standing to reopen the debtor’s case. Therefore, any sale of the debtor’s assets was deemed void. As to the issue concerning the sale of the web address and phone numbers, the district court held that in Virginia, ownership interests in phone numbers and web addresses are not recognized. Since such ownership interests are not recognized, they could not be considered part of the debtor’s estate. Because they were not part of the estate, they should not have been sold at the auction. The district court further explained that to the extent the debtor had possessory interests in the phone numbers or web addresses, those interests were the result of executory contracts with Cox Communications that were rejected by the trustee prior to the reopening of the debtor’s case. Each of these contracts was scheduled, the trustee did not assume them within the required time and, therefore, all were abandoned. The district court also held that the servers were included in the category of computers, as listed on the schedules, and were therefore abandoned and no longer property of the estate at the time the case was reopened.


**Attorney’s Fees Awarded in Divorce Case Deemed Non-Dischargeable; Attorney Had Standing to Pursue Claim in Adversary Proceeding**

**Background:** In April 2012, a divorce decree was entered granting Ms. Collins a final divorce from Mr. Collins and as part of the decree, Ms. Collins was awarded attorney’s fees in the approximate sum of $40,000, which was to be paid in monthly installments of $5,000 until the balance was paid in full. The divorce case involved a number of matters, including various motions due to Mr. Collins’s failure to provide discovery information. In the divorce case, the court noted that the case really involved business litigation and that the court has spent more time trying to determine Mr. Collins’s income than in any other divorce case. After the divorce decree was entered, Mr. Collins filed for chapter 13. In his schedules, he listed the award of attorney’s fees as a non-priority debt and named Ms. Collins’s attorney as the creditor. Ms. Collins and her attorney filed a complaint to determine the
dischargeability of the attorney’s fees, as well as to declare, as non-dischargeable, the spousal support and equitable distribution obligation owed to Ms. Collins. Ms. Collins filed for chapter 7 after she filed the complaint. At the same time, she terminated her attorney client relationship with the attorney who had represented her in the divorce proceeding. Following her bankruptcy filing, Mr. Collins moved to dismiss the complaint, arguing that Ms. Collins had filed for bankruptcy relief, had terminated the attorney-client relationship with her divorce attorney, withdrawn her claims for equitable distribution, had reached an agreement with him as to the issues between them, and finally that the attorney’s fees were not in the nature of support and therefore were not entitled to priority in his case. He also argued that the attorney had no standing to assert a claim for the fees in his case, since Ms. Collins was not asserting them on her behalf. The bankruptcy court conducted a hearing on Mr. Collins’s motion to dismiss, and denied the relief, finding that the attorney’s fees were not in the nature of support and therefore were not entitled to priority in his case. He also argued that the attorney had no standing to assert a claim for the fees in his case, since Ms. Collins was not asserting them on her behalf.

Following the bankruptcy court’s ruling that the debtor’s student loans would not be discharged in her bankruptcy case, the debtor filed a plethora of pleadings, including a Motion for Reconsideration, Motion for a New Trial, Motion to Amend Finding of Fact, Motion for Court Appointed Attorney, and Motion for Guardian Ad Litem or Other Order to Protect Incompetent. The bankruptcy court denied the debtor’s various motions, including Motion for New Trial and Motion to Amend the Findings of Fact, Motion for Continuance, Motion to Appoint Counsel or Guardian Ad Litem. Finally, the Court admonished the use of “ghost-writing,” in the debtor’s case and indicated that this was considered the unauthorized practice of law.

Holding: The district court affirmed. The fees in question were incurred because of the attorney’s, and Ms. Collins’s, efforts to prosecute the underlying divorce proceeding and that the amount of the fee award was a direct result of Mr. Collins’s failure to provide accurate financial records and his “obfuscation” and “intransigence” during the divorce proceedings. It would be unfair to deprive counsel of the compensation due her and it would be counter to the Circuit Court’s intent. Because the final divorce decree included a provision that the fees would be paid to counsel, she had standing to assert the claim in the adversary proceeding.


Denial of Debtor’s Request to Have Student Loans Declared Non-Dischargeable Affirmed

Background: Following the bankruptcy court’s ruling that the debtor’s student loans would not be discharged in her bankruptcy case, the debtor filed a plethora of pleadings, including a Motion for Reconsideration, Motion for a New Trial, Motion to Amend Finding of Fact, Motion for Court Appointed Attorney, and Motion for Guardian Ad Litem or Other Order to Protect Incompetent. The bankruptcy court denied the debtor’s various motions, including Motion for New Trial and Motion to Amend the Findings of Fact, Motion for Continuance, Motion to Appoint Counsel or Guardian Ad Litem. Finally, the Court admonished the use of “ghost-writing,” in the debtor’s case and indicated that this was considered the unauthorized practice of law.

No Basis for Withdrawal of Reference Given Consent to Jurisdiction of Bankruptcy Court

Background: Debtors filed for chapter 11 in February 2010 and submitted their joint plan of liquidation in July 2010. The court confirmed the plan in October 2010. After the plan was submitted, but prior to confirmation, the debtors retained Credit Control Services, Inc. (“CCS”) to collect their outstanding customer accounts. CCS subcontracted the majority of this work to National Credit Solutions, Inc. (“NCS”). Since the effective date of the plan, a liquidating trustee had been administering the debtors’ assets. In April of 2012, the liquidating trustee filed a complaint against CCS, alleging that CCS and NCS employed unlawful collection practices, in violation of their applicable contracts. The complaint was amended and CCS filed an answer, counterclaim against the liquidating trustee, and a cross claim against NCS. In the answer, CCS explicitly denied the bankruptcy court’s jurisdiction over the adversary proceeding and argued that the matter was not a core proceeding and did not consent to entry of any final orders or judgments in the suit. The parties attempted mediation, which proved unsuccessful. CCS then filed a motion for withdrawal of the reference.

Holding: The motion for withdrawal of the reference was denied. Matters must be withdrawn from the bankruptcy courts for good cause shown. 2013 U.S. Dist. LEXIS 126396, *8 (E.D. Va. Sept. 4, 2013) (citing 11 U.S.C. § 157(d)). In making this determination, courts consider, on a case by case basis, six factors: (1) whether the proceeding is core; (2) the uniform administration of bankruptcy proceedings; (3) expediting the bankruptcy process and promoting judicial economy; (4) the efficient use of the parties’ resources; (5) the reduction of forum shopping; (6) the preservation of the right to a jury trial. Id. at *8 - *9 (citing In re U.S. Airways Group, Inc., 296 B.R. 673, 681 (Bankr. E.D. Va. 2003)).

With respect to the first factor, the district court had to determine whether postpetition contracts and transactions were core or non-core. Noting the split in the circuits on this issue, the district court found that this adversary proceeding, which involved a state law breach of contract claim, was non-core proceedings, but found that the contract dispute qualified as “related to” because the parties entered into the contract after the plan had been filed and related to the receivables of the company in bankruptcy. Accordingly, the district court found that the bankruptcy court might have the jurisdiction to enter a final judgment in this case, as long as the parties have consented to the jurisdiction of the bankruptcy court.

The district court found that CCS consented to the jurisdiction, based upon its conduct in the proceeding. First, it entered into the postpetition contract with the debtors. Second, it issued discovery requests in the adversary proceeding and was actively involved in the proceeding. Third, it waited approximately nine months to request withdrawal of the reference.


Summary Judgment Not Appropriate; Evidence Needed as to Allegation of Defalcation

Background: On December 2, 2002, the Albemarle County Circuit Court appointed Chidester as the permanent guardian and conservator of the estate of Clemmer. Chidester was required to post a bond without surety related to his appointment as a guardian and a much larger bond with surety in connection with his appointment as conservator. The bond was filed with the Circuit Court. As a conservator and guardian, Chidester had certain statutory fiduciary duties he had to fulfill, including those placed upon him by Va. Code § 64.2-1305, which requires guardians and conservators to file a statement of accounts with the Commissioner of Accounts. He did initially comply with this requirement. In April of 2007, Clemmer died and Chidester was required to file a final accounting, which he failed to do. As a result, the Circuit Court issued a sum-
mons for Chidester to appear and show cause why the bond should not be forfeited. While counsel for Cincinnati Insurance, the attorney for the executor of Clemmer’s estate and the Commissioner of Accounts attended this hearing, Chidester failed to appear. As a result, the Circuit Court issued an order forfeiting the bond and ordering Cincinnati Insurance to pay Clemmer’s estate the bond’s $200,000 value. After paying the estate, Cincinnati Insurance filed a complaint against Chidester alleging indemnification under the bond agreement and breach of contract; Chidester failed to answer. Cincinnati Insurance filed a motion for entry of a default judgment and at the hearing on it, Cincinnati Insurance presented evidence related to Chidester’s failure to respond and the amount of damages. A default judgment for $200,000, plus 6% interest, as well as fees and costs, was awarded. Approximately one year later, Chidester filed for chapter 7 and Cincinnati Insurance initiated an adversary proceeding seeking to have the bond debt declared non-dischargeable under section 523(a)(4), arguing that Chidester committed defalcation. It filed a motion for summary judgment and the bankruptcy court denied the motion, concluding it was premature to determine if a genuine issue of material facts because of the pending Supreme Court case related to defalcation (as well as the split between the circuits as to what is “defalcation”). In addition, the bankruptcy court would not give the circuit court order preclusive effect because the proceed-
ings did not address how Chidester may have misused or misappropriated funds. Cincinnati Insurance was granted leave to file an interlocutory appeal.

**Holding:** The district court vacated in part and remanded in order for the bankruptcy court to apply Bullock factors; affirmed as to the bankruptcy court’s holding that the Circuit Court’s default judgment does not have preclusive effect on the issue. In Bullock, the Supreme Court held that defalcation “includes a culpable state of mind requirement . . . [or] one involving knowledge of, or gross recklessness in respect to, the improper nature of the relevant fiduciary behavior.” Bullock v. BankChampaign, N.A., 133 S. Ct. 1754 (2013). In reaching its decision, the Supreme Court abrogated In re Uwimana, 274 F.3d 806 (4th Cir. 2001), in which the Fourth Circuit held that negligence or an innocent mistake could be considered defalcation. Under Bullock, Cincinnati Insurance must show bad faith or gross recklessness on the part of Chidester in order to be successful in having its debt declared non-dischargeable pursuant to section 523(a)(4). Accordingly, the District Court held that the parties should be afforded an opportunity to present evidence, and therefore vacated the opinion and order in part and remanded to give the bankruptcy court an opportunity to decide the issue. With respect to Cincinnati Insurance’s argument that the Circuit Court order should be given preclusive effect, the District Court held that the Bankruptcy Court’s holding would be affirmed since the issue of defalcation was not actually litigated.

**Recent Bankruptcy Court Decisions**


**Background:** AMF Bowling Worldwide, Inc. (the “Debtors”) filed for bankruptcy relief in November of 2012. The Court entered an order authorizing and approving the rejection of a lease with Summit City Limits, LLC (“Summit”). Summit was authorized, per this order, to file a lease rejection damage claim by the claims bar date established by the Court. Notice of the filing of the debtors’ case , as well as the order rejecting certain leases was provided to Summit, which notice was sent by first class mail to Summit’s business address. On December 20, 2012, the Court entered an order, pursuant to sections 105 and 502, and Bankruptcy Rules 2002, 3003(c)(3) and 9007, establishing bar dates for filing proofs of claim, approving the form and manner for filing proofs of claim, and approving notice of same. This too was served on Summit at its business address. An attorney timely filed a proof of claim on behalf of Summit, in his capacities as Summit’s counsel and agent. The proof of claim stated that future notices to Summit
should be sent to the attorney at his office address. The Court later entered an order approving procedures for filing omnibus objections to claims, which provided, among other things, the methods for service of the omnibus objection, including service pursuant to Bankruptcy Rule 7004, if counsel for a claimant is not known, by first class mail, postage prepaid, on the signatory of the claimant’s proof of claim form or other representative identified in the proof of claim form or any attachment thereto, or by first class mail, postage prepaid, on any counsel that has appeared on the claimant’s behalf in the debtors’ case. The Debtors filed an omnibus objection to claims, which sought to reduce Summit’s claim. This objection was served upon Summit, care of its attorney, at the address provided for in the claim, as well as upon Summit at its business address. Summit did not respond to the claim objection and did not attend the hearing on the objection. The Court entered an order reducing Summit’s claim.

Summit then filed a motion to alter or amend this judgment pursuant to Bankruptcy Rules 9023 and 9024. At the hearing on the Motion, Summit advised it would not be pursuing relief pursuant to Bankruptcy Rule 9023, which requires motions seeking to alter or amend a judgment to be filed within fourteen (14) days after entry of the judgment. Summit moved forward on its motion, pursuant to Bankruptcy Rule 9024, which incorporates by reference Rule 60. In seeking this relief, Summit had to meet four initial requirements: (a) the motion be timely; (b) the movant must have a meritorious defense to the action; (c) the opposing party would not be unfairly prejudiced by having the judgment set aside; and (d) that exceptional circumstances exist to justify the requested relief. Additionally, the movant must then show it satisfies one of the six separate grounds of relief set forth in Rule 60(b).

Summit argued that service of the objection was inadequate to satisfy the requirements of Bankruptcy Rule 7004 and, therefore, the order sustaining the objection was void, pursuant to Bankruptcy Rule 9024.

**Holding:** Motion denied. The Court found that no basis existed for setting aside its omnibus objection order since Summit received proper notice of the objection to its claim, which was mailed to its agent at the address indicated in Summit’s proof of claim. The Court held that the issue before it was governed by Bankruptcy Rule 3007, which deals with claim objections and service of those objections. The Court further found that the notice provided was reasonably calculated, under the circumstances, to notify Summit of the objection to its claim and that service of the objection to the address designated by Summit in its proof of claim was proper service. Accordingly, Summit failed to demonstrate any basis for relief under Rule 60.


**Facts:** Smith filed a complaint seeking to deny the entry of a chapter 7 discharge as to the debtor pursuant to 11 U.S.C. § 727(a) (2)(A). Prior to the filing, Smith, the debtor and the debtor’s then-husband were involved in a boating accident, and Smith suffered serious injuries. Smith filed a lawsuit against the husband, seeking $1,000,000 in damages. After the debtor and the husband were in a physical altercation, the debtor separated from the husband and they were officially divorced. In 2011, Smith amended her personal injury suit to add the debtor. The next month, the debtor surrendered some interests in business and personal assets to her husband, including her share of the family business and her interest in a car. She did not ask for anything in return. In September of 2011, a state court awarded judgment in favor of Smith for $700,000. Prior to the entry of the judgment, Smith had made a settlement offer to the debtor and husband. After this settlement offer was made, but before the judgment was entered, the debtor and the husband sold two lots to the debtor’s then sister-in-law. The purchase price was $41,750. The debtor did not receive anything for the transfer. In 2012, the debtor filed for bankruptcy and Smith filed the complaint, based upon the transfer of the lots to the sister-in-law, arguing that the transfer was made with the intent to hinder, delay or
defraud Smith.

**Holding:** The request to deny the discharge was denied since the creditor failed to meet her burden. Based upon the facts garnered at trial, Smith did not establish that the debtor had the actual intent to hinder, delay, or defraud Smith. There was no proof of actual intent by a preponderance of the evidence, and Smith failed to carry her burden. While actual intent may be inferred through the presence of “badges of fraud,” Smith failed to meet her burden. The badges of fraud include: (1) a relationship between the debtor and transferee; (2) lack of consideration for the conveyance; (3) debtor’s insolvency or indebtedness; (4) transfers of debtor’s entire estate; (5) reservation of benefits, control, or dominion; (6) secrecy or concealment of the transaction; and (7) pendency or threat of litigation at the time of transfer.” 2013 Bankr. LEXIS 4187, *8 (Bankr. W.D. Va. Oct. 4, 2013) (citing In re Smoot, 265 B.R. 128, 142 (Bankr. E.D. Va. 1999)). Plaintiff established that badges 1, 2 and 7 existed, but the debtor provided a satisfactory explanation for her actions so that the Court found that no actual intent to hinder, delay or defraud Smith existed. As to the relationship between the debtor and the sister-in-law, while it did exist, it was a strained relationship, since they were estranged and the debtor was in the middle of a divorce proceeding with the husband. The Court found that given the separation of the debtor and the husband at the time of the transfer, the relationship between the debtor and the sister-in-law was strained. In addition, consideration of $41,750 was paid, so although none of it went directly to the debtor, there was consideration. The bulk of the proceeds were used to satisfy mortgages on the property transferred, as well as towards other obligations associated with the property and owed by the debtor. Therefore, consideration was received by the debtor. While the transfer did occur while the litigation with Smith was pending, it was not enough to find that the Debtor actually intended to hinder, delay or defraud Smith since the debtor benefitted from the transfer, by the pay off and down of certain obligations owed by her.


**Modification of Chapter 13 Plan, Reducing Plan Term, Appropriate Under the Circumstances**

**Background:** The debtors filed for chapter 13 in October of 2011. While their income was below the median income for a family of the debtors’ size in Virginia, they proposed a five year plan, which provided for, among other things, the cure of an arrearage on their home loan and proposed a repayment of 10% to their unsecured creditors. The primary reason for the length of the plan was based upon the attempt to cure the mortgage arrearage. The plan was confirmed in December of 2011. In June of 2012, their mortgage lender filed a motion for relief from the automatic stay, alleging that the debtors had fallen behind on its postpetition obligations. The debtors filed a response stating that they were attempting to do a loan modification with the lender. The parties negotiated a modification of the loan, allowing the debtors to cure the existing default through the modified loan. After negotiating the modification with their lender, the debtors filed a modified plan, reducing the commitment period from 60 months to 36 months, with the distribution to unsecured creditors remaining the same. The chapter 13 trustee objected, on the grounds that there had been no material change in the debtors’ circumstances to justify the reduction in the plan term.

**Holding:** Objection overruled and plan confirmed. The Court found that the modification was a substantial and unanticipated change in circumstances. Because the debtors’ income was below the median and because the reason for plan to be for a 60 month term had been resolved through the modification of the mortgage, the debtors no longer had a basis to justify a commitment period longer than 3 years.


**Cause Existed to Grant Motion to Extend Time to File Credit Counseling Certificate**
Background: Mr. Denson and Ms. Heath filed for chapter 13. While Mr. Denson was able to complete the credit counseling course, Ms. Heath was only able to complete a portion of it, and indicated that because of her work schedule (she is a licensed physician), she was unable to complete the entire course and obtain the certificate within seven days from the date she begun the course. She further indicated that she filed for bankruptcy relief to stop a garnishment and a potential levy on her personal assets. Ms. Heath indicated she would complete the course within 30 days from the filing, which she did.

**Holding:** The Court found that Ms. Heath met the requirement under section 109(h), by complying with section 109(h)(3), as evidenced by her timely filing a certificate in support of temporary waiver of completion of counseling along with her bankruptcy petition. This certificate contained the two required statements: (a) a description of the exigent circumstances that merit a waiver of the credit counseling requirement; and (b) certification that the debtor did attempt to obtain counseling, but was told that it would not be available to her for the seven days from the date of the request. Given her work schedule as a medical professional, she was unable to complete the course, although she had taken the steps necessary to take the course. In addition, she obtained the counseling within the first 30 days after the filing and filed the certificate evidencing this.


Debtors to File Modified Plan or Motion to Dismiss Case or Convert to Case under Chapter 7 by Date Certain or Case Would be Dismissed

Background: Chapter 13 debtors filed their case pro se. They filed a chapter 13 plan and the trustee objected to confirmation on various grounds, including: (a) unfair discrimination against a designated class of unsecured claims; (b) failure to provide for the retention of a lien held by an allowed secured claim holder; and (c) failure to file all applicable tax returns. The trustee also filed a motion to show cause why their case should not be dismissed. The debtors also failed to provide the trustee with copies of their federal and state tax returns, copy of pay stubs or the like for the 60 days prior to the filing, and the completed chapter 13 questionnaire. As of the date set for the hearing on the motion to show cause, creditors had filed proofs of claim totaling more than $430,000.

**Holding:** Confirmation denied. Debtors provided an opportunity to confer with legal counsel to advise them as to their case. In addition, debtors were given approximately 3 weeks to file either a modified plan or a motion to convert their case to one under chapter 7 or dismiss the case. If they fail to do one of these options, the case would be dismissed without further notice or a hearing. The court continued the trustee’s motion to show cause, as well as his report, to the date set for confirmation hearing on the modified plan, if filed.


Collection of Debt Following Entry of Discharge Resulted in Determination of Willful Violation of Discharge

Background: In a chapter 7 bankruptcy case, debtor listed a bank as a creditor on Schedule F, and the bank received notice of the bankruptcy filing. This debt was included in the debts discharged by the debtor, which discharged was entered in November of 2009. According to the debtor, the bank retained a debt collection agency, and in November of 2012, the debt collection agency contacted the debtor by calling her cell phone, and during the call demanded that she pay on the discharged debt. During the call, the debtor contends that the debt collection agency threatened to take certain actions, including intercepting her car payments, garnishing her bank accounts and/or her wages unless she arranged for a debit payment of $3,500. The debtor also alleged that the debt collection agency contacted her mother and sent her an email (which she included as an exhibit to her complaint) reiterating that its client would accept $3,663.15 in settlement of the debt owed to it by the debtor.
and in exchange it would dismiss an action. The debtor testified that she was very fearful of what would happen and therefore asked her mother to transfer the funds to pay the settlement into her account and then she arranged for a payment to the debt collection agency. After making the payment, she contacted her bankruptcy counsel, who sent two letters to the debt collection agency, advising of the discharge and requesting the funds be returned. The debt collection agency did not respond to either letter. The debtor then filed a complaint, containing two counts. The first count alleges willful violation of the discharge injunction provided by 11 U.S.C. § 524 and the second claim alleges violations of the Fair Debt Collection Practices Act based upon the misrepresentations of the imminence of legal action and making other false and misleading representations, as well as for unfair and unconscionable methods of collection. In the complaint, the debtor sought various forms of relief, including: (a) ordering a full refund of the monies collected; (b) finding of contempt for violating section 524; (c) awarding reasonable attorney’s fees; (d) awarding damages; (e) declaring the policies of the bank and the debt collection agency to be unlawful; (f) enjoining the defendants from continuing their collection practices and policies; and (g) for other and further relief as the bankruptcy court deems appropriate. At the pre-trial conference, counsel for the debtor indicated he reached a settlement with the bank, but no settlement with the debt collection agency and therefore requested a continuance in order to file a motion for default judgment as to it. The motion for default was filed and alleged that the summons and complaint had been served on the president of the debt collection agency and that no response had been filed. The adversary was dismissed as to the bank. At the continued pre-trial conference, counsel requested another continuance because the debtor was unable to be present and testify. The court requested that the debtor prepare an affidavit setting forth the assertions in the complaint and that counsel submit a statement setting forth the time spent on the matter and his belief as to what reasonable compensation would be in this matter. The debtor prepared and filed the affidavit and counsel filed his statement, indicating he had spent 26.7 hours on the matter at a rate of $200 per hour, for a total of $5,340. The statement also indicated that, while the settlement with the bank was confidential, the debtor and counsel agreed to pay the amount demanded, which he argued was a violation of the discharge injunction. In addition, it violated the Fair Debt Collection Practices Act by collecting an amount not permitted by law, which does not appear to require its knowledge that the collection is not permitted by law.

**Holding:** Judgment entered against the debt collection agency in favor of the debtor in the amount of $9,003.15, which included compensatory and punitive damages, as well as an award of attorney’s fees in the net amount of $3,840. In addition, the Court would enter an order conditionally granting a judgment against the debt collection agency for contempt of the Court in the amount of $10,000 plus interest from the date of entry payable to the Clerk should the debt collection agency fail to pay the judgment awarded in the adversary proceeding within thirty days of the entry of the judgment. In reaching its decision, the Court noted that while evidence
was lacking as to whether the debt collection agency knew of the debtor’s discharge at the time the collection activity was initiated, it was put on notice upon the mention by the debtor of needing to consult with her bankruptcy attorney, and that it failed to make any inquiry as to this representation, but instead pushed even harder for the debtor to make the payment. This, along with its failure to respond to counsel’s letters or to correct its actions once the adversary proceeding was filed, evidences either an actual awareness of the discharge of the debt or a reckless disregard as to whether the debtor had any legal liability as to the debt it was trying to collect from her. The Court held that while it had jurisdiction over the count related to the discharge violation, it did not have jurisdiction over the other count related to the Fair Debt Collection Practices Act, since they are not arising under the Bankruptcy Code or arising in the case and have no effect on the estate. Accordingly, the Court dismissed this count, without prejudice.


Evidence Inadequate to Establish Debtor Filed Chapter 7 Case in Bad Faith

Background: Chapter 7 debtor filed for bankruptcy and timely filed his bankruptcy documents. The chapter 7 trustee issued a No Distribution Report. Hitachi Capital America Corp. (“Hitachi”) filed a motion to dismiss the case, pursuant to 11 U.S.C. § 707(b). Hitachi argued that the debtor had improperly completed his means test form (the “Means Test”), and that had it been completed properly there would have been a presumption of abuse pursuant to section 707(b), and the debtor would have to overcome this presumption by a totality of the circumstances. After Hitachi filed its motion, the debtor amended the Means Test twice. Hitachi argued that the filing of three Means Tests also supported a finding that the case was filed in bad faith pursuant to section 707(b).

Holding: Motion denied. The bankruptcy court, after a thorough review of the various Means Tests, found that the debtor had properly completed the form and that the presumption of abuse did not arise. The court employed the eleven (11) factors set forth by the District Court in McDow v. Smith, 295 B.R. 69 (E.D. Va. 2003), in reviewing the totality of the circumstances under section 707(b) (3). The court also considered the analysis employed in the recent case of In re Matthews, 2013 Bankr. LEXIS 1319 (Bankr. E.D. Va. April 3, 2013) (Kenney, J.), in reaching its decision. Applying both analyses, the court concluded that Hitachi had not met its burden of proof.


Award of Partial Fees Related to Successful Objection to Proof of Claim

Background: Gordon Properties, LLC (“Gordon”) objected to a proof of claim filed by First Owners’ Association of Forty Six Hundred Condominium, Inc. (“FOA”). Once the objection was sustained, counsel for Gordon sought reimbursement of its fees associated with the objection, in the amount of $364,870, arguing that the award of fees was appropriated pursuant to section 55-79.53(a) of the Virginia Condominium Act, which provides that the prevailing party in an action for enforcement of condominium documents is entitled to its reasonable attorney’s fees. While the Virginia Supreme Court has not ruled on this particular statute, it has ruled on fees pursuant to section 55-515(A), which provision is identical to the one in question.

Holding: Fees, at reduced amount, were awarded. The burden was on Gordon to establish the amount due to it, and that such fees were reasonable and necessary, under the factors laid out in Johnson v. Ga. Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), as incorporated by the Fourth Circuit in
Barbara v. Kimbrell’s Inc., 577 F.2d 216, 226 n.28 (4th Cir. 1978).

Some of the time entries provided were found to be ambiguous, and therefore were not allowed. In addition, some of the time entries were not allowed because the issues had been previously litigated. Some of the fees could not be awarded without expert testimony showing the reasonableness of the time expended. Since Gordon had not met its burden of establishing a prima facie case of reasonableness as to some of the time expended, the court could not award all of the fees. The total award was $59,850.


Motion to Appoint Chapter 11 Trustee Continued Given Status of Negotiations; Cause Existed to Restrict Debtor’s Operations During Interim

Background: The two main creditors in these cases are First Owners’ Association of Forty Six Hundred Condominium, Inc. (“FOA”) and Stites & Harbison (“S&H”). FOA is comprised of all of the unit owners in Forty Six Hundred Condominium. The condominium is comprised of 450 units in three buildings, a high-rise building and two other buildings.

Gordon Properties, the debtor, owned 31 residential units, nine commercial units and a restaurant unit at the time of its filing. It also held approximately 19% of the votes in the association, of which approximately 11% appertain to the restaurant unit. For years, Gordon Properties disputed the fees and charges made against it by FOA.

The debtor owns Condominium Services, Inc. (“CSI”), a management company that managed FOA for a number of years, but in 2006 the board of directors of FOA terminated its management contract, which termination led to litigation. The litigation resulted in a judgment in favor of FOA for $436,792. S&H represented Gordon Properties in the state court suit and Gordon Properties did not pay all of the legal bills. In October of 2009, Gordon Properties filed for bankruptcy, primarily to give it relief from two claims it could not pay in the ordinary course, the FOA claim for additional assessments and the S&H claim for its attorney’s fees. However, its schedules reflected sufficient capital to operate and an ability to deal with the claims. The schedules reflected net equity of over $9,000,000 and over $350,000 in its bank account at the time of filing. The bankruptcy was financed by loans from two of its members, and presumably, this approach could have been taken to resolve the claims in state court with FOA. In the case, it did not object to the FOA claim until approximately one year after filing and did not take any action as to the S&H claim for four years. During the bankruptcy case, rather than focus on either of these claims, Gordon Properties focused on the automatic stay in order to recover its ability to vote at an annual meeting and after successfully meeting this goal, it sought to take control of the board. While having an absolute majority on the board, it took certain actions to the detriment of FOA (and in violation of a court order). There were a number of conflicts of interests, which were managed in such a way that after the board was reconstituted, the actions taken to address the conflicts precluded the court from approving them.

As the bankruptcy case continued, Gordon Properties had significant issues managing the case, suffered from continued losses and did not present a plan of reorganization. As a result, the Office of the U.S. Trustee (“UST”) filed a motion to appoint a chapter 11 trustee and S&H filed a motion to convert the case to one under chapter 7. The Court conducted a hearing on each of the motions.

Holding: UST’s Motion to Appoint Trustee continued for 60 days, but debtors’ right to operate limited; S&H’s motion to convert denied. Because there was a chance of a global settlement, the Court did not appoint a trustee (at this time). While there have been significant losses, the losses have been funded by the owners, not the creditors. In addition, there is ample equity for the equity owners. Given the status of the negotiations by the parties, a continuance of the UST’s motion was granted in order to allow the negotiations to continue. As to
the issue of conflict of interests, the Court, pursuant to 11 U.S.C. § 1107, held that Gordon Properties could only vote for one Gordon Properties-affiliated candidate for director. If no election is completed at the annual meeting, Gordon Properties had to take steps necessary for two of the three current Gordon Properties-affiliated directors to resign upon adjournment of the meeting. In addition, the Court ruled that a Gordon Properties-affiliated director could not serve as president of the association. It was also precluded from voting for write-in candidates. All of these restrictions also applied to any proxies it holds.


Continuation of Interrogatories Violated Automatic Stay When Creditor and Its Attorney Were Aware of Bankruptcy Filing

Background: In October of 2012, judgment was entered against the debtor, in favor of Skillforce Inc. (“Skillforce”), for $13,000, which judgment arose out of the debtor’s guaranty of a certain business debt owed to Skillforce. In December of 2012, counsel for Skillforce, submitted a request for a Summons to Answer Debtor’s Interrogatories, directed to the debtor. The clerk issued the Summons on December 28, 2012, returnable to February 6, 2013. In connection with this, counsel for Skillforce also filed a request for a Subpoena Duces Tecum, to compel the debtor to bring with her certain documents, which subpoena was issued, commanding the debtor to bring the documents with her to the interrogatories. The debtor filed a petition under chapter 7 early on morning of the date for the interrogatories hearing. She listed Skillforce as a creditor, care of counsel. Skillforce filed a proof of claim in the case. The debtor brought the notice of the bankruptcy filing with her to the interrogatories hearing. When the judge took the bench, the debtor presented the judge with the notice of the bankruptcy filing. While there was conflicting testimony, evidence was presented that the judge continued the hearing for status, without counsel requesting such continuance. At the status hearing, the judge again continued the matter, over the debtor’s protests. In May, the debtor received her discharge, and counsel for Skillforce then dismissed the state court matter based upon its being unsatisfied. In August, the debtor filed the motion for sanctions against Skillforce and its attorney. Following the filing of that motion, counsel for Skillforce filed an amended praecipe, this time requesting that the matter be dismissed based upon the entry of the discharge.

Holding: Motion for sanctions granted. The evidence presented was clear that Skillforce and its attorney had actual notice of the filing of the case and upon learning of the filing, should have dismissed the interrogatories summons. While counsel did not request the continuance, she should have dismissed the matter, which would have eliminated the need for the continuance. The burden was improperly shifted to the debtor, requiring the debtor to affirmatively prove she received her discharge, following the bankruptcy filing. The Court found that there had been a violation of the stay when counsel failed to dismiss the summons. No stay violation occurred, however, as to the first praecipe, dismissing the matter as “unsatisfied.” Given that counsel acted as Skillforce’s agent, it was liable for her actions. The debtor was awarded $500 as actual damages and $250 in attorney’s fees, which judgment was jointly and severally against Skillforce and its counsel.

In re Niday, 498 B.R. 83 (Bankr. W.D. Va. 2013) (Stone, Jr., J.)

The Applicable Commitment Period is a Temporal Requirement in Below-Median Chapter 13 Cases

Facts: Chapter 13 debtors, following confirmation of their plan, which provided for a 36 month term, sought to pre-pay the full amount due under the plan and obtain a discharge. First, the debtors tendered to the chapter 13 trustee a check for the balance due under their plan, approximately one month after their plan was confirmed. The trustee did not accept the payment. The debtors then filed various pleadings with the Court, including a Motion to Modify Plan and a Motion for Order Approving Early Completion of Plan, seeking approval of the early pay-out and entry of a discharge order.

**Debtor’s Motion to Reopen Case in Order to Reaffirm Debt Denied When No Purpose Would be Served by Reopening the Case**

**Facts:** Debtor filed for chapter 7, pro se, in October of 2010. The Court granted a discharge to the debtor in March of 2011 and the case was closed the same day. In July of 2013, the debtor filed a letter requesting the case be reopened in order to enter into a reaffirmation agreement with her mortgage company, and requested the reopening fee be waived. The Court treated the letter as a pro se motion, which the Court denied. In the order denying the request, the Court noted that no purpose would be served by reopening the case because the reaffirmation agreement was not entered into before the entry of a discharge pursuant to 11 U.S.C. § 727. While the debtor may have been unaware of this requirement while her case was open, such lack of knowledge does not change the application of the law. The Court noted that any modification of the mortgage is not dependent on the existence of a reaffirmation agreement.

**Holding:** Motion denied. In reaching its decision, the Court relied upon 11 U.S.C. § 524(c)(1), which provides that a reaffirmation agreement is enforceable only if such agreement was made prior to the entry of a discharge pursuant to 11 U.S.C. § 727. While the debtor may have been unaware of this requirement while her case was open, such lack of knowledge does not change the application of the law. The Court noted that any modification of the mortgage is not dependent on the existence of a reaffirmation agreement.


**Background:** The chapter 7 trustee initiated an adversary proceeding against the debtor’s wife, in order to avoid certain alleged transfers pursuant to 11 U.S.C. §§ 548 and 550, as well as Va. Code §§ 55-80, 55-81, 55-82 and 55-82.1. One of the transferred assets the trustee was attempting to recover for the benefit of the estate was an annuity issued by John Hancock Life Insurance Company (the “Annuity”). According to the complaint, the debtor transferred his ownership interest in the Annuity, which had an approximate value of $162,000, to his wife within the two year period prior to the bankruptcy filing, which transfer was without consideration and was done with the intent to hinder, delay or defraud his creditors. Ms. Shaheen timely filed a response to the complaint and in that response admitted that the transfer was void and further stated that she was prepared to turn over the Annuity.
The trustee filed a motion for summary judgment under Bankruptcy Rule 7056. Ms. Shaheen did not file a response to this motion. A hearing on this motion was set for October 9, 2013. On October 1, 2013, Ms. Shaheen’s counsel filed a motion to withdraw as counsel and for a continuance of the trial and hearing dates and the request to hear this motion to withdraw on an expedited basis was granted. After conducting the hearings on both motions, the bankruptcy court granted partial summary judgment in favor of the trustee for the recovery of the Annuity, as there were no material facts in dispute on that matter. The court also granted the motion to withdraw. The bankruptcy court entered its Order for Turnover of Assets (the “Order”) wherein the court ordered Ms. Shaheen to turn over the funds held in the Annuity. An order authorizing the withdrawal of counsel followed soon thereafter. Ms. Shaheen then filed her motion to reconsider the court’s Order under Bankruptcy Rule 9024 (the “Motion to Reconsider”).

**Holding:** Motion to Reconsider denied based upon Ms. Shaheen’s failure to establish certain threshold requirements. Specifically, in order to be granted the relief sought, she had to establish: (a) the motion is timely; (b) the movant has a meritorious defense to the action; (c) the opposing party would not be unfairly prejudiced by having the judgment set aside; and (d) exceptional circumstances warrant the requested relief. After meeting this burden, the mov- ing party must then show that she meets one of the six separate grounds for relief provided by Rule 60, incorporated by reference by Bankruptcy Rule 9024. The court found that Ms. Shaheen could not show that she had a meritorious defense to the Annuity and she is estopped from taking a new position inconsistent from one she previously asserted throughout the adversary proceeding. The only real change for Ms. Shaheen is the retention of new counsel. In addition, the Court found that the trustee would be unfairly prejudiced if the Order was set aside and Ms. Shaheen did not assert any unusual or extraordinary circumstances justifying that the Order be set aside. Obtaining new counsel is not a basis for re-starting the litigation.


**The Appropriate Type of Valuation of Property, for Purposes of Confirmation of Chapter 11 Plan, is Highest and Best Use, Under the Circumstances**

**Background:** Chapter 11 debtors owned 15 parcels of unimproved real property. In their plan of reorganization, they proposed to sell the property to a developer, which sale was contingent upon the property being re-zoned to a higher density. The secured creditor made its section 1111(b) election. At the confirmation hearing, the appraiser presented two valuations: (a) As-Is Market Value; and (b) Highest and Best Use Market Value.

**Holding:** For purposes of the confirmation hearing and the section 1111(b) election, the Court found that the appropriate valuation was the Best Use Valuation, considering that the plan proposes to sell the property to a developer, subject to the contingency of re-zoning, and once the re-zoning is complete, to close the contract. This is so because of the intended disposition of the property.


**Debtor’s LLC Rights Revested Upon Dismissal of Personal Bankruptcy Case; Business Case Appropriately Filed**

**Background:** The Official Committee of Unsecured Creditors sought the dismissal of the chapter 11 case of Virginia Broadband LLC, arguing that the bankruptcy filing was not properly authorized by a majority of the debtor’s board and therefore the case should not proceed. The committee reasoned that, pursuant to applicable Virginia law, one of the members lost his non-economic rights as a member when he personally filed for bankruptcy relief and therefore his vote in favor of the filing was meaningless.

**Holding:** Motion denied. In reaching its decision, the Court considered both applicable Virginia
and bankruptcy law. While under Virginia law his bankruptcy filing would have resulted in his disassociation and his loss of being a voting member, applicable bankruptcy law precluded such a result. While Va. Code Ann. § 13.1-1040.1(6)(a) provides that a member is dissociated from the limited liability company upon the filing of a bankruptcy by the member, it is an ipso facto provision pursuant to 11 U.S.C. § 541(c)(1)(B), and therefore his economic and non-economic interests in Virginia Broadband, upon filing, became property of the estate. Upon the dismissal of his bankruptcy case, the property of the estate, including his membership interest in Virginia Broadband, revested. His interest, as a result, was restored as if he had not filed for bankruptcy and therefore the motion was denied. No cause existed to grant the motion.


**Purchaser of Loan Entitled to be Equitably Subrogated to Second Priority Lien Status**

**Background:** At the time of filing for bankruptcy relief under chapter 11, the debtor owned a condominium unit, which was the subject to a first lien deed of trust in favor of GMAC Mortgage, which at the time of filing, was owed approximately $48,000. The debtor, prior to filing for relief, had also taken out a home equity line of credit loan with GMAC in the principal amount of $90,000, and this loan was secured by a second priority lien against the property. This loan provided that it was a revolving line and would include future advances. Several months later, the debtor decided to form his own practice and purchased assets of another dental practice. In order to obtain the necessary funds to purchase the assets, the debtor took a loan with Wachovia and pursued an increase on the HELOC. Wachovia received a first priority lien on the dental practice’s assets and third against the debtor’s house. The HELOC loan closed in August of 2007 and part of the proceeds went to satisfy the prior $90,000 HELOC. GMAC did not perform a title search in connection with the closing of the HELOC and did not immediately record its deed of trust. Wachovia’s deed of trust was in fact recorded before GMAC recorded its lien. The debtor defaulted on the loan with Wachovia, and Wachovia obtained a judgment against him. The GMAC $90,000 deed of trust was released in December of 2011. At the time of the filing of the case, GMAC maintained its first lien position with a debt of approximately $47,000, Wachovia’s loan was in second lien position and GMAC’s $140,000 deed of trust was in third position. In September of 2011, Asset Management Holdings, LLC (“Asset Management”) purchased the GMAC $140,000 loan, prior to the bankruptcy case being filed. Before acquiring the loan, Asset Management only ran a credit report on the debtor and reviewed the property value as reported on Zillow.com. It did not have a title search done before it purchased the loan. In March of 2013, Asset Management objected to confirmation of the debtor’s plan, which depended on a settlement that he reached with Wachovia’s successor, Wells Fargo. It would be treated as a secured creditor for the value of the property, less the value of the first GMAC lien and as an unsecured creditor for the balance owed. In the objection, it did not argue that it was equitably subrogated to GMAC’s $90,000 lien, but instead assumed it was in third position, based upon the recording dates of the liens and also asserted its entire claim was unsecured. Confirmation of the first plan was denied and he filed an amended plan, which again relied upon the agreement with Wells Fargo. Following approval of the third amended disclosure statement, new counsel for Asset Management noticed his appearance and filed an adversary proceeding, seeking among other things, equitable subrogation to the $90,000 GMAC lien position. It also objected to confirmation of the amended plan, asserting that it was entitled to equitable subrogation to the GMAC lien position. The bankruptcy court conditionally approved confirmation of the plan, with the condition being the resolution of the adversary proceeding not rendering the plan infeasible. In the adversary proceeding, the debtor, Wells
Fargo and Asset Management filed cross-motions for summary judgment.

**Holding:** Motion granted and third lienholder’s cross-motion denied. GMAC did not act as a volunteer in refinancing a prior loan, and that Wachovia bargained for its third priority lien; it was appropriate to subordinate to the second priority lien against the real property. The fact that Asset Management purchased the loan at a discount also was not a reason to deny equitable subrogation. To adopt such a rule, the Court noted, would be “inconsistent with Virginia’s ‘liberal application’ of the law of equitable subrogation.” 2013 Bankr. LEXIS 4899, *34 (Bankr. E.D. Va. Nov. 19, 2013). Asset Management’s negligence in failing to perform a title search was also not a basis for denying equitable subrogation. While Asset Management was negligent in failing to conduct a title search prior to its purchase of the loan, its negligence did not prejudice the third lienholder. Wachovia was not an intervening lienholder because it had specifically bargained to be in third position.


Failure to Honor Settlement Terms Not Bad Faith – Creditor Fails to Meet Burden

**Background:** A judgment creditor of a chapter 7 debtor filed a Motion to Dismiss the debtor’s bankruptcy case pursuant to 11 U.S.C. § 707(b)(3)(A). The creditor alleged that the debtor’s filing the chapter 7 case was solely to escape paying his judgment and therefore the case should be dismissed as being filed in bad faith. Prior to the filing, there was a pending lawsuit between the creditor and debtor. The debtor informed the creditor unless he agreed to a much smaller sum to settle the claim, he would file for bankruptcy. The creditor agreed but the debtor failed to pay the agreed upon sum. As a result, the creditor obtained a default judgment on the claim and then the debtor filed for bankruptcy.

**Holding:** Motion denied. While some evidence suggested that the debtor might have filed the case when he had the ability to resolve the majority of the debt he owed, the evidence offered by the creditor simply did not satisfy his obligation of proving, by a preponderance of the evidence, that the case was filed in bad faith. No proof was offered as to why the settlement, that was negotiated, was not completed by the debtor. Based upon his financial information, it was clear that the debtor was eligible to file for bankruptcy relief, and the evidence provided by the creditor did not demonstrate that the filing was in bad faith.
On September 23, 2013, the Bankruptcy Section of the Richmond Bar Association hosted a portrait unveiling ceremony and reception for the Honorable Douglas O. Tice, Jr. The unveiling ceremony included remarks from the Hon. Stephen C. St. John, Hon. William F. Stone, Jr., Hon. Kevin R. Huennekens, Harry Shaia, Jr., Robert E. Hyman, H. Slayton Dabney, Jr., Robert A. Lefkowitz, Douglas M. Foley, and John H. Maddock, III. The portrait was painted by Henry Wingate and was commissioned by law firms, attorneys, bar associations, and members of the community who donated to the Richmond Bar Foundation. Following his retirement, the portrait will hang in the bankruptcy courtroom used by Judge Tice.
L. to R.: Mike Mueller, Ellen Ray, Robbie Westermann, Tyler Brown, Judge and Mrs. Phillips, Donna Hall

Martha and Judge Tice

Sarah Boehm and Lisa Hudson Kim

Lynn Tavenner and Paula Beran

Peggy Gibbs, Gail Fathergill, and Judy Clarke

Pete Zemanian, Robbie Westermann, and Chris Jones
About the Bankruptcy Law Section

The Bankruptcy Law Section of the Virginia State Bar, established in 1990, maintains a membership of over 600 attorneys. The Section’s primary goal is to enhance the communication and exchange of ideas and information involving bankruptcy issues among Virginia attorneys. A further objective is to foster unity among members of the Section by providing a forum where they can share information and experiences. Finally, the Section seeks to promote public understanding of the field of bankruptcy law.

To further these goals and objectives, the Section conducts and assists with a number of activities, which are described on the Calendar of Events on the Section’s website at www.vsb.org/sections/bk/. Anyone interested in learning more about the Bankruptcy Law Section, in joining one of the Section’s committees, or in becoming a member, may contact the Chair of the Section, Steven Ramsdell, at 703-549-5003 or any of the Board of Governors.

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Have an Idea or Comment for the Virginia State Bar?

The Board of Governors of the Virginia State Bar Bankruptcy Section has established a membership committee to evaluate future projects to be undertaken by the Bankruptcy Law Section that would be of benefit and importance to its members. The committee is interested in any ideas or views that the section’s members may have for the planning committee to consider. Any ideas or comments can be directed to Steve Ramsdell at 703-549-5003.

The Bankruptcy Law Section of the Virginia State Bar produces the Bankruptcy Law News for its members. The purpose of the Bankruptcy Law Section is to promote the efficient administration of bankruptcy law and practice, including sponsoring programs, publications, and seminars on bankruptcy law and practice. For more information about the Bankruptcy Law Section, please see our website at www.vsb.org/sections/bk/.