ARTICLES

BANKRUPTCY LAW

The Honorable Kevin R. Huennekens *
Nathan Kramer **

INTRODUCTION

This survey of bankruptcy and insolvency case law is the third installment in this series, which was initiated in 2009[1] following Congress's enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") in 2005.[2] The previous version of this article was published in 2012,[3] not long after the Supreme Court's 2011 ruling in *Stern v. Marshall*, which restricted the authority of bankruptcy courts to issue final judgments on issues arising under state law.[4] As was noted in the 2012 installment, "[t]he full impact of *Stern* both nationally and in the Fourth Circuit remains to be seen."[5] There has been a significant amount of development concerning *Stern* claims both nationally and with-

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1. Hon. Douglas O. Tice, Jr., Suzanne E. Wade & K. Elizabeth Sieg, *Annual Survey of Virginia Law: Bankruptcy Law*, 44 U. RICH. L. REV. 201 (2009).

2. Pub. L. No. 109-8, 119 Stat. 23 (2005) (codified as amended in scattered sections of 11 U.S.C.).

3. Hon. Douglas O. Tice, Jr., K. Elizabeth Sieg & David W. Gaffey, *Annual Survey of Virginia Law: Bankruptcy Law*, 47 U. RICH. L. REV. 51 (2012).

4. 131 S. Ct. 2594, 2620 (2011).

5. Tice, Sieg & Gaffey, *supra* note 3, at 51.

in the Fourth Circuit in the past three years.[6] It is fitting that this installment should come on the heels of the Supreme Court's decision in *Wellness International Network, Ltd. v. Sharif*, which has resolved many of the issues posed by *Stern*, at least for the time being.[7] More generally, the Supreme Court has decided an abnormally large number of bankruptcy cases in the past few years.

This article will cover both consumer and business bankruptcy issues, and is limited primarily to decisions by courts within the Fourth Circuit since mid-2012. Despite these general parameters, because bankruptcy is federal law, there are some cases outside the Fourth Circuit that are included due to their influential and instructive nature. The intention of this update is to provide bankruptcy practitioners in Virginia with concise, yet comprehensive, case summaries that will prove to be a valuable research tool.

This article begins with a discussion of the *Stern* developments over the past three years, and how *Wellness* has resolved many of the questions posed by *Stern*. Next, the article provides summaries of cases within a number of different topic areas, including: property of the estate, the automatic stay, asset sales, discharge, avoidance powers, standing, and issues related to plan confirmation and res judicata.

I. *STERN* AND *WELLNESS*

In 2011, the Supreme Court addressed the constitutionality of the structure of the bankruptcy judiciary for the first time in thirty years.[8] Following the Supreme Court's decision in *Northern*

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6. "'*Stern* claims' are those claims designated core claims by the Bankruptcy Statute, but prohibited from final resolution by bankruptcy courts as a constitutional matter by *Stern*." Shaunna D. Jones & Paul V. Shalhoub, *Supreme Court Provides Guidance to Bankruptcy Courts in Addressing "*Stern *Claims" and Holds That "*Stern *Claims" May Proceed as Non-Core Claims*, WILLKIE FARR & GALLAGHER LLP 2 (June 18, 2014), http://www.willkie.com/~/media/Files/Publications/2014/06/Supreme_Court_Provides_Guidance__to_Bankruptcy_Courts_in_Addressing_Stern_Claims.pdf.

7. 135 S. Ct. 1932 (2015).

8. *Stern* has received a plethora of scholarly attention since it was decided. Because of this wealth of existing analysis, this article presents only a brief discussion of *Stern*'s actual holding. For greater discussion of *Stern*'s background, see Katie Drell Grissel, Stern v. Marshall*—Digging for Gold and Shaking the Foundation of Bankruptcy Courts (or Not)*, 72 LA. L. REV. 647, 648 (2012).

Pipeline Construction v. Marathon Pipe Line Co., which held that the power granted to bankruptcy courts by the Bankruptcy Act of 1978 violated Article III of the Constitution,[9] Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 (the "1984 Act") in an attempt to comply with the *Marathon* decision.[10] Essentially, the 1984 Act altered the manner in which judges were named and how higher federal courts reviewed the rulings of the bankruptcy courts.[11] Despite these changes, *Stern* ultimately determined that the 1984 Act still violated Article III by giving bankruptcy courts the final authority to decide claims based solely on state law.[12] The Court based its decision on separation-of-powers principles, finding that because bankruptcy judges are not Article III judges, and as the Constitution "provides that the judicial power of the United States may be vested only in courts whose judges enjoy the protections set forth in that Article," Congress exceeded this limitation in the 1984 Act by allowing non-Article III judges to decide issues exclusively based on state law.[13]

Following *Stern*, there was a great deal of uncertainty at the bankruptcy, district, and circuit court levels regarding how to comply with the Supreme Court's decision.[14] Ultimately, one primary way of coping with *Stern* emerged in the lower courts—consent.

For example, the United States District Court for the Eastern District of Virginia addressed this issue in *Corliss Moore & Associates, LLC v. Credit Control Services, Inc.*[15] In *Corliss*, the liquidating trustee under the debtors' Chapter 11 plan brought an adversary proceeding against a company that the debtor retained pre-confirmation, seeking collection of customer accounts and alleging breach of contract and indemnification against a subcon-

9. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982).

10. Pub. L. No. 98-353, 98 Stat. 333 (codified in scattered sections of 11 U.S.C. and 28 U.S.C.).

11. *See* Med. Educ. & Health Servs., Inc. v. Indep. Municipality of Mayaguez (*In re* Med. Educ. & Health Servs., Inc.), 459 B.R. 527, 548 (Bankr. D.P.R. 2011).

12. Stern v. Marshall, 131 S. Ct. 2594, 2620 (2011).

13. *Id.* at 2620.

14. *See, e.g.*, Tice, Sieg & Gaffey, *supra* note 3, at 92 ("Bankruptcy, district, and circuit courts continue to grapple with *Stern*'s impact, and clear consensus on *Stern*'s reach has not yet emerged.").

15. 497 B.R. 219 (E.D. Va. 2013).

tractor of the company.[16] After the parties engaged in unsuccessful mediation, the defendant filed a motion to dismiss and sought discovery from the liquidating trustee, at which point the company sought to withdraw the district court's reference to the bankruptcy court.[17] Ultimately, Judge Spencer held that the defendant company had impliedly consented to the bankruptcy court's jurisdiction over this non-core matter by entering into a post-petition contract with the debtors and by filing motions and seeking discovery.[18] Therefore, withdrawal of the reference was not warranted.[19] Thus, post-*Stern*, within the Eastern District of Virginia, bankruptcy courts continued to issue final decisions on *Stern* claims, so long as each party consented.

In the summer of 2014, the Supreme Court shed additional light on its *Stern* decision in *Executive Benefits Insurance Agency v. Arkison*, where it held that bankruptcy courts could rule on core *Stern* claims so long as the court treated the claim as a non-core claim and submitted proposed findings of fact and conclusions of law that the district court would review de novo.[20] Despite this holding, the Court still left unanswered whether bankruptcy courts could issue final decisions on *Stern* claims with the consent of both parties. It was not until late May 2015 that the Supreme Court finally addressed this issue.

The facts of *Wellness* are relatively intricate, but can be summarized as follows. Following the entry of a judgment in excess of $650,000 in the United States District Court for the Northern District of Texas against defendant Sharif for discovery abuses, Sharif was arrested and held in civil contempt.[21] Upon his release, Sharif filed for Chapter 7 bankruptcy in the Northern District of Illinois.[22] The judgment creditor, Wellness International Network, Ltd. promptly filed an adversary proceeding in the bankruptcy court.[23] The first four counts of Wellness's complaint sought to ob-

16. *Id.* at 222.
17. *Id.* at 222–23.
18. *Id.* at 228–29.
19. *Id.* at 229.
20. Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2174 (2014).
21. Wellness Int'l Network, Ltd. v. Sharif, 727 F.3d 751, 756 (7th Cir. 2013).
22. *Id.* at 754.
23. *Id.* at 757.

ject to the debtor's discharge under Bankruptcy Code § 727.[24] The fifth count of the complaint sought a declaration that a trust, of which the debtor was the trustee, was in fact the debtor's alter ego and that the assets of the trust should be treated as part of the bankruptcy estate.[25]

The United States Court of Appeals for the Seventh Circuit held that the bankruptcy court lacked constitutional authority to enter a final judgment on count five because the alter ego claim was a state law claim entirely independent of federal bankruptcy law.[26] The court further held that a litigant cannot waive an Article III, constitutional objection to the bankruptcy court's authority to enter a final judgment on a core proceeding.[27] Previously, the Ninth Circuit held in *In re Bellingham Insurance Agency, Inc.*, that litigants may consent to the bankruptcy court's jurisdiction,[28] while the Sixth Circuit held in *Waldman v. Stone* that *Stern* objections cannot be waived.[29] Because of this circuit split, the Supreme Court granted certiorari in *Wellness* to answer whether Article III permits the exercise of judicial power by the bankruptcy court on the basis of litigant consent.[30]

The Supreme Court ultimately ruled, in a 6-3 decision authored by Justice Sotomayor, to which Chief Justice Roberts and Justices Scalia and Thomas dissented, that Article III permits bankruptcy judges to adjudicate *Stern* claims based on the parties' consent.[31] The Court relied on language from *Commodity Futures Trading Commission v. Schor*, which held that "[t]he entitlement to an Article III adjudicator is 'a personal right' and thus ordinarily 'subject to waiver.'"[32] The crux of the Court's analysis is essentially that "allowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority

24. *Id.* All further references to the Bankruptcy Code are to the Bankruptcy Code as codified at 11 U.S.C. §§ 101–1532 (2012).

25. *Id.*

26. *Id.* at 775–76.

27. *Id.* at 773.

28. 702 F.3d 553, 566–70 (9th Cir. 2012).

29. 698 F.3d 910, 917–18 (6th Cir. 2012).

30. Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1942, 1944 (2015).

31. *Id.* at 1944–45.

32. *Id.* at 1944 (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986)).

over the process."[33] The Court placed emphasis on the practical effects of finding the bankruptcy judicial system unconstitutional, noting that whether the integrity of the judicial branch is threatened is "decided not by 'formalistic and unbending rules,' but 'with an eye to the practical effect that the' practice 'will have on the constitutionally assigned role of the federal judiciary.'"[34] The Court then proceeded to hold that allowing parties to consent to the bankruptcy court's jurisdiction does not threaten the integrity of Article III because bankruptcy judges are subject to removal by Article III judges, serve as officers of the district court, constitute a unit of the district court, and hear matters solely as a result of the district court's reference, which it may revoke sua sponte or by request of any party.[35]

The practical considerations of the Supreme Court holding otherwise would likely have been substantial. A contrary ruling would have had the potential to unsettle the entire bankruptcy judicial system, disrupt the utilization of magistrate judges, and require district court judges to adjudicate an extremely large number of matters currently handled by other courts. Such a decision, however, would not have been entirely shocking, as the Supreme Court has not been reluctant to shake up the bankruptcy system in the past, for example as it did in *Marathon*.[36]

The Court in *Wellness* noted that consent does not need to be express.[37] In the United States Bankruptcy Court for the Eastern District of Virginia, the pretrial orders of most of the judges contain language providing that any party that does not consent to the entry of a final order by the bankruptcy judge must make a motion to withdraw the reference or request other appropriate relief within thirty days of the entry of the pretrial order, or the

33. *Id.* at 1944.

34. *Id.* (quoting *Schor*, 478 U.S. at 851).

35. *Id.* at 1944–45.

36. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982).

37. *Wellness*, 135 S. Ct. at 1947 ("Nothing in the Constitution requires that consent to adjudication by a bankruptcy court be express. Nor does the relevant statute, 28 U.S.C. § 157, mandate express consent; it states only that a bankruptcy court must obtain 'the consent'—consent *simpliciter*—'of all parties to the proceeding' before hearing and determining a non-core claim.").

party is deemed to have consented to the entry of final orders by the bankruptcy judge.[38]

In the previous installment of this article, the authors noted that they believed "most matters of bankruptcy administration will continue to be carried out by the bankruptcy courts with little impact from *Stern*."[39] Following *Wellness*, it appears that this prediction will likely remain accurate. Although, any practitioners that do not wish to have a *Stern* claim adjudicated by the bankruptcy court must be cautious not to take action in the bankruptcy court that will rise to the level of implied consent.

II. PROPERTY OF THE ESTATE

There have been a number of noteworthy cases related to property of the estate that have been decided by the Supreme Court and within the Fourth Circuit over the past several years. In the 2014 Supreme Court case *Clark v. Rameker*, the debtor's mother established an individual retirement account ("IRA") in 2000.[40] The debtor's mother subsequently passed away in 2001, at which point the IRA passed to the debtor and became an inherited IRA.[41] The debtor filed for bankruptcy in 2010.[42] The debtor listed the inherited IRA as exempt under Bankruptcy Code § 522(b)(3)(C).[43] The Chapter 7 trustee objected to the claimed exemption, arguing that the funds in the inherited IRA did not qualify as "retirement funds" within the meaning of the statute.[44]

The bankruptcy court agreed with the trustee's argument and disallowed the debtor's exemption.[45] The district court reversed, holding that the exemption covers accounts containing funds that were "'originally' 'accumulated for retirement purposes.'"[46] The Seventh Circuit then reversed the district court, finding that because inherited IRAs are available for current consumption they

38. *See, e.g.*, Pretrial Order at 3–4, Terry v. Evans (*In re* Evans), 527 B.R. 228 (Bankr. E.D. Va. 2015).
39. Tice, Sieg & Gaffey, *supra* note 3, at 51.
40. 134 S. Ct. 2242, 2245 (2014).
41. *Id.*
42. *Id.*
43. 11 U.S.C. § 522(b)(3)(C) (2012); *Clark*, 134 S. Ct. at 2245.
44. *Clark*, 134 S. Ct. at 2245.
45. *Id.* at 2246.
46. *Id.* (quoting Clark v. Rameker (*In re* Clark), 466 B.R. 135, 139 (W.D. Wis. 2012)).

are not a form of retirement savings.[47] The debtor appealed to the Supreme Court, which affirmed the Seventh Circuit's decision.[48]

The Court distinguished traditional IRAs from inherited IRAs, noting that the traditional variety imposes a 10% penalty on any funds withdrawn from the account prior to the holder reaching the age of fifty-nine and one-half.[49] The holder of an inherited IRA, on the other hand, is permitted to withdraw funds at any time without incurring a penalty (and is in fact required to do so within five years after the original owner's death or take minimum distributions annually).[50] The additional penalty imposed by the Internal Revenue Code helps ensure that the traditional IRA is "used for retirement purposes and not as general tax-advantaged savings vehicles . . . ."[51]

While the Bankruptcy Code does not define "retirement funds," the Court found the ordinary meaning of the phrase, "sums of money set aside for the day an individual stops working," instructive.[52] The Court then imposed an objective test, whereby the court must examine "the legal characteristics of the account in which the funds are held, asking whether . . . the account is one set aside for the day when an individual stops working."[53] The Supreme Court held that inherited funds were not exempt and, as a result, debtors are now prohibited from claiming an exemption in inherited IRAs.[54]

In another case dealing with inherited funds, the Fourth Circuit held in *Carroll v. Logan* that the debtor's Chapter 13 bankruptcy estate includes an inheritance obtained more than 180 days after the limit imposed by Bankruptcy Code § 541.[55] The

47. *Id.* at 2246.

48. *Id.* The Supreme Court granted certiorari to resolve the circuit split between the Seventh and Fifth Circuit, which held in *In re Chilton*, that funds contained in an inherited IRA constituted "retirement funds" within the meaning of 11 U.S.C. § 522 and were therefore exempt from the bankruptcy estate. 674 F.3d 486, 489 (5th Cir. 2012).

49. 26 U.S.C. § 72(q)(1)–(2) (2012); *Clark*, 134 S. Ct. at 2247–48.

50. *Clark*, 134 S. Ct. at 2247.

51. 26 U.S.C. § 72(q)(1)–(2) (2012); *Clark*, 134 S. Ct. at 2245.

52. *Clark*, 134 S. Ct. at 2246.

53. *Id.*

54. *Id.* at 2249–50.

55. 735 F.3d 147, 152 (4th Cir. 2013); *see also* 11 U.S.C. § 541(a)(5) (2012) (providing that property of the estate includes "property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such

Carrolls filed a voluntary petition under Chapter 13 of the Bankruptcy Code in February 2009 and the court confirmed the debtors' plan in August 2009.[56] In August 2012, the debtors notified the bankruptcy court that Mr. Carroll expected to receive an inheritance of $100,000 because of the death of his mother.[57] The Chapter 13 trustee moved to modify the debtors' estate to include an amount of the inheritance sufficient to pay all unsecured creditors in full.[58] The bankruptcy court held that the inheritance was property of the estate, over the debtors' objection.[59] The bankruptcy court noted a direct appeal to the Fourth Circuit.[60]

The Carrolls' argument on appeal was that the bankruptcy court incorrectly included the inheritance in their estate because Bankruptcy Code § 541 imposes a 180-day time limit for identifying property that must be included in the bankruptcy estate.[61] The Fourth Circuit disagreed, reading § 541 in conjunction with § 1306(a).[62] While § 541 generally imposes a 180-day limitation, § 1306(a) operates to expand the scope of § 541 to also include "all property of the kind specified in [§ 541] that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted . . . whichever occurs first."[63] Thus, these two sections create the following formula for calculating property of the estate in Chapter 13 bankruptcy cases: (1) all property described in § 541; plus (2) "[t]he kind of property (e.g., inheritances) described in Section 541 and acquired before the Chapter 13 case is closed, dismissed, or converted."[64]

date—(A) by bequest, devise, or inheritance . . . .").

56. *Carroll*, 735 F.3d at 149.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 149–50.

61. *Id.* at 150.

62. *Id.*

63. 11 U.S.C. §§ 541(a)(5), 1306(a)(1) (2012).

64. *Carroll*, 735 F.3d at 151. This decision places the Fourth Circuit in agreement with a number of bankruptcy courts in other circuits that have addressed this issue. *See, e.g.*, *In re* Brensing, 337 B.R. 376, 383 (Bankr. D. Kan. 2006); *In re* Johnson, 335 B.R. 805, 806 (Bankr. W.D. Tenn. 2006); *In re* Drew, 325 B.R. 765, 770 (Bankr. N.D. Ill. 2005); *In re* Solis, 137 B.R. 121, 126 (Bankr. S.D.N.Y. 1992). In 2000, the United States Bankruptcy Court for the Eastern District of Virginia decided a substantially similar issue. In *Montclair Property Owners Ass'n. v. Reynard* (*In re Reynard*), Judge Mayer held that "the estate continues and assets set out in § 1306(a) acquired after confirmation become property of the chapter 13 estate when acquired." 250 B.R. 241, 246 (Bankr. E.D. Va. 2000).

The Supreme Court also dealt with property of the estate in the case of *Law v. Siegel*. In *Siegel*, the debtor filed for Chapter 7 and Siegel was appointed the trustee in the case.[65] The debtor's estate was essentially comprised of a single asset—the debtor's house valued at $363,348.[66] The debtor claimed that $75,000 of the home's value was exempt under California's homestead exemption, and disclosed two liens on the home—one note for $147,156.52, and another for $156,929.04.[67] Therefore, the property had no equity.[68] Siegel brought an adversary proceeding to strip off the second mortgage alleging that it was fraudulent.[69] After extensive litigation, the bankruptcy court ultimately determined that "'the loan was a fiction, meant to preserve [Law's] equity in his residence beyond what he was entitled to exempt' by perpetrating 'a fraud on his creditors and the court.'"[70] Siegel incurred more than $500,000 in legal fees "overcoming Law's fraudulent misrepresentations. [The bankruptcy court] therefore granted Siegel's motion to 'surcharge' the entirety of Law's $75,000 homestead exemption, making those funds available to defray Siegel's attorney's fees."[71]

The Supreme Court ruled that the Bankruptcy Code did not authorize such a "surcharge."[72] While § 105(a) does provide the bankruptcy court with the power "necessary or appropriate to carry out the provisions of this title," the Court noted that the statutory provision does not allow the bankruptcy court to ignore specific mandates in the Code.[73] The Court held that the "surcharge" violated express provisions of Bankruptcy Code § 522 by ordering an amount protected by the debtor's homestead exemption to be used to reimburse the trustee for attorney's fees, which is an administrative expense.[74]

65. 134 S. Ct. 1188, 1193 (2014).
66. *Id.*
67. *Id.*
68. *Id*.
69. *Id.*
70. *Id.* (quoting *In re* Law, 401 B.R. 447, 453 (Bankr. C.D. Cal. 2009)).
71. *Id.*
72. *Id.* at 1195.
73. 11 U.S.C. § 105(a) (2012); *Siegel*, 134 S. Ct. at 1194.
74. *Siegel*, 134 S. Ct. at 1195.

The Supreme Court also addressed the topic of legal fees in its decision *Baker Botts L.L.P. v. Asarco LLC*.[75] This case involved Bankruptcy Code § 330(a), which applies to professional fees for all professionals employed in a bankruptcy case.[76] In this case, the reorganized debtor challenged its bankruptcy counsel's request for compensation, despite the fact that bankruptcy counsel successfully helped reorganize the debtor in a manner that ultimately paid all creditors in full.[77] After extensive discovery and a six-day trial on attorney's fees, the bankruptcy court overruled the reorganized debtor's objections, awarded professional fees, and also awarded the law firm over $5 million in fees for the time expended defending the fee applications.[78]

The Supreme Court held that the Bankruptcy Code does not permit bankruptcy courts to award additional attorney fees to professionals employed by the estate for expenses incurred defending fee applications filed with the court.[79] In essence, the Court found that § 330(a)(1), which provides that fees may be awarded for "'reasonable compensation for actual, necessary services rendered' neither specifically nor explicitly authorizes courts to shift the costs of adversarial litigation from one side to the other—in this case, from the attorneys seeking fees to the administrator of the estate—as most statutes that displace the American Rule do."[80]

The Supreme Court also resolved a relatively narrow issue dealing with property of the estate in *Harris v. Viegelahn*.[81] There the Court considered what happens to the funds that the Chapter 13 trustee has collected from the debtor's wages and is holding to distribute to creditors when the Chapter 13 debtor converts his case to Chapter 7.[82] The Court found that Bankruptcy Code § 348(f) "makes one thing clear: A debtor's postpetition wages, including undisbursed funds in the hands of a trustee, ordinarily do not become part of the Chapter 7 estate created by conversion."[83]

75. 135 S. Ct. 2158, 2162 (2015).
76. *Id.* at 2162–63.
77. *Id.* at 2163.
78. *Id.*
79. *Id.* at 2165.
80. *Id.* (quoting 11 U.S.C. § 330(a)(1)(A) (2012)).
81. 135 S. Ct. 1829, 1834 (2015).
82. *Id.* at 1834–35.
83. *Id.* at 1837; *see also* 11 U.S.C. § 348(f) (2012).

While this provision is unclear on what should happen to those funds following conversion, the Court decided that it would not be compatible with the Code if those funds were to be distributed to creditors upon conversion.[84] Therefore, the Court held that undistributed plan payments made by the debtor from his or her wages that are being held by the Chapter 13 trustee at the time the debtor converts to Chapter 7 must be returned to the debtor.[85]

The final noteworthy decision on the topic of property of the estate comes from the United States Bankruptcy Court for the Western District of Virginia. In *Official Committee of Unsecured Creditors v. Virginia Broadband, LLC* (*In re Virginia Broadband, LLC*), one of the managing members of the debtor-LLC filed a personal Chapter 13 petition, which was quickly dismissed twenty days after it was filed.[86] Virginia law provides that a membership interest in an LLC constitutes personal property[87] and that upon an LLC member filing for bankruptcy the member retains his economic interest in the LLC, but loses all management authority over the LLC.[88] While the individual Chapter 13 case was still pending, the debtor-member participated in an action that replaced two other members of the debtor-LLC.[89] After the debtor-member's individual Chapter 13 case was dismissed, the debtor-member and other managers ratified and re-authorized the prior action that replaced two other members of the debtor-LLC and ultimately authorized the LLC to file for Chapter 11 bankruptcy.[90] The unsecured creditor's committee objected to the LLC's bankruptcy filing, arguing that under Virginia law the debtor-member lost all non-economic rights in the LLC upon his own bankruptcy filing.[91] If the debtor-member's vote was removed from the prior actions that ultimately resulted in the debtor-LLC filing for bankruptcy, no majority vote existed and those actions are of no effect.[92]

84. *Harris*, 135 S. Ct. at 1837.
85. *Id.*
86. 498 B.R. 90, 92 (Bankr. W.D. Va. 2013).
87. *Id.* at 94; *see also* VA. CODE ANN. § 13.1-1038 (Repl. Vol. 2011).
88. *In re Virginia Broadband, LLC*, 498 B.R. at 93–94; *see also* VA. CODE ANN. § 13.1-1040.1(6)(a) (Repl. Vol. 2011 & Cum. Supp. 2015).
89. *In re Virginia Broadband*, *LLC*, 498 B.R. at 92.
90. *Id.* at 92–93.
91. *Id.* at 93.
92. *Id.*

The court determined that Bankruptcy Code § 541(c) overrides the Virginia law restriction on transfer of property of the estate.[93] Despite the debtor-member's personal bankruptcy filing, his entire interest in the LLC became property of his personal bankruptcy estate under § 541(a).[94] Bankruptcy Code § 349(b)(3) provides that upon dismissal of a case, property of the estate is re-vested "in the entity in which such property was vested immediately before the commencement of the case under this title."[95] This provision reverses the effects of the debtor-member's filing and restores property to its position prior to the case.[96] Dismissal re-vested the debtor-member with the entirety of his pre-petition management authority, thus providing him with the authority to ratify the prior members' action.[97]

III. AUTOMATIC STAY

The first noteworthy case that considered the effect of the automatic stay comes from the United States Bankruptcy Court for the Western District of Virginia. In *Sexton v. IRS* (*In re Sexton*), the debtor filed for Chapter 7 bankruptcy and listed her anticipated 2012 tax refund as an asset, which she exempted by filing a homestead deed.[98] The debtor scheduled a debt owed to the United States Department of Agriculture ("DOA") as one of her liabilities.[99] This debt arose out of a pre-petition secured loan on which the debtor defaulted.[100] After a foreclosure sale insufficient to satisfy the debt, the DOA held that the deficiency claim was unsecured.[101] The Chapter 7 trustee certified that there were no assets available for distribution to creditors, and the debtor received a discharge, including a discharge of the DOA debt.[102] Prior to the discharge, the DOA and IRS notified the debtor that the government was withholding the debtor's 2012 tax return and applying

93. *Id.* at 97.
94. *Id.* at 94–96; *see also* 11 U.S.C. § 541(a) (2012).
95. 11 U.S.C. § 349(b)(3) (2012).
96. *In re Virginia Broadband*, *LLC*, 498 B.R. at 97.
97. *Id.*
98. 508 B.R. 646, 650 (Bankr. W.D. Va. 2014); *see also* VA. CODE ANN. §§ 34-4 (Repl. Vol. 2014 & Supp. 2015), 34-13 (Repl. Vol. 2014).
99. *In re Sexton*, 508 B.R. at 650.
100. *Id.*
101. *Id.*
102. *Id.*

those funds to the DOA debt.[103] The debtor objected to the government's offset but the IRS and DOA failed to respond.[104] The debtor subsequently moved to reopen her bankruptcy case in order to challenge the offset.[105] The debtor filed an adversary proceeding against the IRS and DOA, alleging that the government violated the automatic stay by offsetting, post-petition, the debtor's pre-petition debt to the DOA with her 2012 tax return.[106]

The government, relying on the decision of the United States Court of Appeals for the Fifth Circuit in *IRS v. Luongo* (*In re Luongo*),[107] argued that the tax refund was contingent and that the debtor was not entitled to receive any funds until "[a]fter the Secretary of the Treasury complies with the provisions of 26 U.S.C. § 6402(d) and applies the tax overpayment to satisfy [the debtor's] preexisting debt to the DOA . . . ."[108]

The court declined to follow the reasoning in *In re Luongo* and held that the government willfully committed a violation of the automatic stay.[109] But the court found that the government's conduct was insufficient to warrant the imposition of punitive damages under Fourth Circuit precedent.[110] The court ordered the IRS to remit the tax refund to the debtor, and it also required the government to bear the debtor's attorney's fees and costs.[111]

In *Branch Banking & Trust Co. v. Construction Supervision Services, Inc.* (*In re Construction Supervision Services, Inc.*), the issue before the Fourth Circuit Court of Appeals was "whether construction subcontractors entitled to a lien on funds under

103. *Id.* at 650–51.

104. *Id.* at 651.

105. *Id.*

106. *Id.*

107. 259 F.3d 323, 336 (5th Cir. 2001) (allowing the IRS to set off the debtor's tax return for the pre-petition taxable year against a tax liability for a previous pre-petition taxable year that had been discharged).

108. *In re Sexton*, 508 B.R. at 653.

109. *Id.* at 662.

110. *Id.* at 667; *see also* Citizens Bank of Md. v. Strumpf (*In re* Strumpf), 37 F.3d 155, 159 (4th Cir. 1994) ("To constitute a willful act, the creditor need not act with specific intent but must only commit an intentional act with knowledge of the automatic stay.").

111. *In re Sexton*, 508 B.R. at 667. The government subsequently appealed this decision to the district court, which held that "[t]he USDA failed to timely note its appeal, and the court [did] not have jurisdiction to that hear it. Accordingly, the court [affirmed] the bankruptcy court's . . . order and [dismissed] the USDA's appeal . . . ." U.S. Dep't of Agric. v. Sexton, 529 B.R. 667, 675 (W.D. Va. 2015).

North Carolina law had an interest in property when the debtor contractor filed for bankruptcy, by which time the subcontractors had not yet served notice of, and thereby perfected, their liens."[112] The facts of the case are straightforward. The debtor served as a general contractor and hired various subcontractors that furnished materials for projects.[113] Once the general contractor filed for bankruptcy, the subcontractors sought to serve notice of and perfect liens on funds that others owed to the general contractor.[114] Additionally, the subcontractors "asked the bankruptcy court to clarify the extent of the stay to determine whether their post-petition notice and perfection would fall within the stay's ambit," essentially asking the court whether the subcontractors could properly perfect these pre-petition liens.[115]

The court considered Bankruptcy Code § 362(b)(3), holding that it permits the post-petition perfection of an interest in property that arose pre-petition in certain limited instances.[116] Section 362(b)(3) provides an exception to the automatic stay for "any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) . . . ."[117] An exception exists for those that hold an unperfected interest in property that predates the bankruptcy filing if "the perfected interest would be effective against a third party acquiring rights prior to that perfection" in the absence of bankruptcy.[118] Following this determination, the court examined the applicable North Carolina law, finding that upon delivery of materials to a general contractor, subcontractors are entitled to "a lien upon funds that are owed to the contractor . . . that arise out of the improvement on which the first tier subcontractor worked or furnished materials."[119] Because the subcontractors in the case delivered materials prior to the petition date, the subcontractors had an interest in

112. 753 F.3d 124, 126 (4th Cir. 2014).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 132.

117. 11 U.S.C. § 362(b)(3) (2012); *see also id.* § 546(b)(1)(A) (2012) (subjecting the bankruptcy trustee's rights and powers to laws permitting the perfection of a security interest "to be effective against an entity that acquires rights in such property before the date of perfection").

118. *In re Constr. Supervision Servs., Inc.*, 753 F.3d at 126.

119. N.C. GEN. STAT. § 44A-18(a) (2014).

the property as of the date the materials were delivered.[120] Therefore, the exception in Bankruptcy Code § 362(b)(3) applied and the subcontractors could perfect post-petition.[121]

IV. ASSET SALES

A. *Credit Bidding*

One bankruptcy topic that drew significant attention within the past several years concerns the rights of secured creditors to credit bid. This issue not only was considered by the Supreme Court but it also produced a widely discussed case from the Bankruptcy Court for the Eastern District of Virginia.

First, in *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, the Supreme Court held that a Chapter 11 "cram down" plan[122] that proposes sale of collateral may not deprive a secured creditor of the right to credit bid its claim.[123] The lender in this case held a lien on substantially all of the debtor's assets. The assets had a value that was less than the amount of the lender's claim.[124] The debtor proposed a plan that would result in a sale of substantially all of the debtor's assets, with the sale proceeds going to the secured lender.[125] The sale and bidding procedures prohibited the secured lender from credit bidding its secured claim.[126] The secured lender objected to this treatment under the debtor's pro-

120. *In re Constr. Supervision Servs., Inc.*, 753 F.3d at 131–32.

121. *Id.* at 132. One final, relatively minor, point of law worth referencing before concluding this section is the United States District Court for the Eastern District of Virginia's decision in *Sanders v. Farina*. In this case the Alexandria Division held that the automatic stay of § 362(a)(1), which stays

> the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title

does not prevent the district court from remanding a case to state court. 11 U.S.C. § 362(a)(1) (2012); Sanders v. Farina, 67 F. Supp. 3d 727, 729 (E.D. Va. 2014).

122. *See* 11 U.S.C. § 1129(b) (2012).

123. 132 S. Ct. 2065, 2070 (2012).

124. *Id.* at 2068–69.

125. *Id.* at 2069.

126. *Id.* Credit bidding is the process whereby a secured lender can use the debt it is owed as an offset against the purchase price. *See id.*

posed plan, the bankruptcy court denied the debtor's sale and bidding procedures, and the Seventh Circuit affirmed.[127]

The Supreme Court affirmed.[128] Section 1129(a) generally provides that a court may confirm a Chapter 11 plan only if each class of affected creditors accepts the plan.[129] However, the court may also confirm a plan if it does not discriminate against and is fair and equitable to each impaired, non-consenting class.[130] Under § 1129(b)(2)(A), a plan is fair and equitable to a class of secured claims if it provides:

> (i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;
> (ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or
> (iii) for the realization by such holders of the indubitable equivalent of such claims.[131]

Section 363(k) authorizes the holder of a secured claim to credit bid the amount of its claim unless the court, for cause, orders otherwise.[132] Relying on the statutory interpretation maxim that the specific governs the general, the Court held that subsection 1129(b)(2)(A)(iii) could not apply to a matter that is specifically governed by subsection 1129(b)(2)(A)(ii).[133] Therefore, even if the

127. *Id.*

128. *Id.* at 2073.

129. 11 U.S.C. § 1129(a)(8) (2012) ("The court shall confirm a plan only if all of the following requirements are met: . . . (8) With respect to each class of claims or interests—(A) such class has accepted the plan; or (B) such class is not impaired under the plan."); *see also RadLAX*, 132 S. Ct. at 2069–70.

130. 11 U.S.C. § 1129(b)(1) (2012); *see also RadLAX*, 132 S. Ct. at 2069.

131. 11 U.S.C. § 1129(b)(2)(A) (2012).

132. *Id.* § 363(k) (2012) ("At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.").

133. *RadLAX*, 132 S. Ct. at 2070–71.

resulting sale would provide the secured lender with the indubitable equivalent of its claim, the plan still must satisfy subsection (b)(2)(A)(ii) by allowing the lender to credit bid, unless the court orders otherwise for cause.[134] As the debtor could not identify any such "cause" in this case, the Court could not confirm the plan.[135]

In *In re The Free Lance-Star Publishing Co. of Fredericksburg*, the United States Bankruptcy Court for Eastern District of Virginia found sufficient cause to limit the credit bidding rights of a secured debt purchaser.[136] In January 2014, the Free Lance-Star Publishing Company of Fredericksburg and a property development company filed a voluntary petition under Chapter 11.[137] Prior to the petition date, the debtors borrowed funds from Branch Banking and Trust ("BB&T") in the amount of $50.8 million.[138] As security for this loan, the debtors granted BB&T liens and security interests on various pieces of the debtors' personal and real property.[139] Notably, BB&T did not obtain a lien on certain assets associated with the debtors' radio broadcasting activities, including the leases and rents derived therefrom, FCC licenses, rolling stock, insurance policies, bank accounts, or any proceeds that may be derived from the disposition of any of these assets (collectively, the "Unencumbered Assets").[140]

DSP Acquisition, LLC ("DSP") purchased BB&T's loan and immediately began negotiation with the debtors for a bankruptcy sale whereby DSP would be able to credit bid to acquire all of the debtors' assets.[141] After its purchase of the loan and without informing the debtor, DSP attempted to obtain liens on the Unencumbered Assets.[142] DSP and the debtors continued negotiations, during which DSP demanded that the advertisement period for the sale of the debtors' assets be shortened, and any related advertising materials include a disclosure that any sale would be subject to DSP's right to credit bid.[143] The debtors refused this

134. *Id.* at 2072.
135. *Id.* at 2070 n.3.
136. 512 B.R. 798, 808 (Bankr. E.D. Va. 2014).
137. *Id.* at 799.
138. *Id.* at 802.
139. *Id.*
140. *Id.* at 802, 805–06.
141. *Id.* at 802–03 & n.5.
142. *Id.* at 803.
143. *Id.* at 806.

proposal and filed for Chapter 11 bankruptcy without an agreement with DSP.[144]

After filing, the debtors sought to sell substantially all of their assets.[145] The approved bidding procedures provided that DSP had the right to credit bid its valid liens "as either (i) agreed to by the Debtors, DSP, and the Official Committee of Unsecured Creditors . . . or (ii) as determined by the Court at a hearing . . . ."[146] The parties failed to reach an agreement, and the court conducted a hearing to determine the validity of DSP's liens and its right to credit bid.[147]

The court held that DSP did not have a valid, perfected security interest in the Unencumbered Assets and limited the right of DSP to credit bid in this case.[148] As stated above, Bankruptcy Code § 363(k) allows the court to prohibit a secured creditor from credit bidding its claim for cause.[149] While credit bidding is intended to protect against undervaluation, when a credit bid of a purchased claim has the potential to depress the market—as was the case here due to DSP's aggressive loan-to-own strategy—its intended purpose is thwarted.[150] Because credit bidding is not an absolute right, the court limited DSP's right to credit bid as a result of DSP's inequitable conduct.[151] Here, DSP did not have a lien on all assets, engaged in an aggressive negotiating strategy, and unilaterally filed financing statements.[152] All of these actions had an adverse effect, depressing enthusiasm for the sale in the market and limiting participation in the auction process.[153] Thus, the court found it necessary to limit DSP's right to credit bid to attract new interest in the auction process and increase the overall value of the debtor's assets.[154]

144. *Id.* at 803–04.
145. *Id.* at 799–800.
146. *Id.* at 800.
147. *Id.*
148. *Id.* at 807–08.
149. 11 U.S.C. § 363(k) (2012).
150. *In re Free Lance-Star*, 512 B.R. at 806.
151. *Id.* at 805–06.
152. *Id.* at 807–08.
153. *Id.* at 806–07.
154. *Id.* at 807–08. DSP sought an emergency interlocutory appeal of the bankruptcy court's decision, which the district court denied, finding that DSP had no risk of irreparable harm if the appealed issues were not resolved prior to the auction and that the ap-

Another noteworthy post-*RadLAX* decision is *In re Fisker Automotive Holdings, Inc*.[155] In *Fisker*, the United States Bankruptcy Court for the District of Delaware similarly limited a secured lender's right to credit bid, finding that bidding would be "frozen" without a credit bid cap.[156] The United States Bankruptcy Court for the Western District of Tennessee recently departed from *Free Lance-Star* and *Fisker*, noting "that the mere 'chilling' of third party bids is [not] sufficient cause to justify modifying or denying a secured creditor's rights [to credit bid]."[157]

These decisions following *RadLAX* have presented a number of interesting issues regarding when the "for cause" exception in § 363(k) is appropriate. While credit bidding is undoubtedly an important protection for secured creditors, it is not a limitless protection and remains subject to court supervision. As the issues presented by the "for cause" exception to credit bidding are highly fact-specific, it will be interesting to see how this line of cases continues to develop over the coming years.

B. *General Asset Sale Issues*

In *In re Zota Petroleums, LLC*, the bankruptcy court considered the issue of whether a sublessee whose sublease was rejected by the debtor was entitled to remain in possession of the property following the debtor's sale of its leasehold interest in the property free and clear of all interests.[158] The debtor in the case was the lessee of a gas station, who leased its own interest in the property to a sublessee.[159] The appointed Chapter 11 trustee filed a motion seeking authorization to sell substantially all of the debtor's assets and to assume and assign the debtor's leases.[160] The trustee

proval of an interlocutory appeal was not appropriate because granting the appeal "is more likely to impede, rather than hasten, resolution of the cases by delaying, for instance, the Bankruptcy Court's ability to resolve the issues remaining." DSP Acquisition, LLC v. Free Lance-Star Publ'g Co., 512 B.R. 808, 811, 814 (E.D. Va. 2014) (quoting Hybrid Tech Holdings, LLC v. Official Comm. of Unsecured Creditors of Fisker Auto. Holdings, Inc. (*In re* Fisker Auto. Holdings), No. 14-CV99 (GMS), 2014 U.S. Dist. LEXIS 15497, at *18 (D. Del. Feb. 7, 2014)).

155. 510 B.R. 55 (Bankr. D. Del. 2014).

156. *Id.* at 60.

157. *In re* RML Dev., Inc., 528 B.R. 150, 155 n.11 (Bankr. W.D. Tenn. 2014).

158. 482 B.R. 154, 156–57 (Bankr. E.D. Va. 2012).

159. *Id.* at 156.

160. *Id.*; *see also* 11 U.S.C. § 365 (2012) (detailing the law regarding executory contracts and unexpired leases).

subsequently sought to reject the lease between the debtor and the sublessee.[161] The debtor sold its interest in the lease at auction, and the court order approving the sale provided that the buyer was to receive the purchased assets free and clear of all claims.[162]

The sublessee then filed a motion seeking a determination that Bankruptcy Code § 365(h)(1)(A) allowed it to retain its rights under the rejected sublease and remain in possession of the property.[163] The buyer responded by contending that the sublessee lost all right to possess the property following the court's prior order approving the sale.[164]

The court first identified that a split in authority exists regarding whether a sale under § 363(f) extinguishes any right held under § 365(h).[165] The Seventh Circuit is the highest court to address the issue. In *Precision Industries, Inc. v. Qualitech Steel SBQ, LLC*, the court held that a sale under § 363(f) extinguished any possessory interest that a sublessee may have held prior to the sale.[166] Rather than following the Seventh Circuit, the court instead found the reasoning of the United States Bankruptcy Court for the District of Massachusetts in *In re Haskell L.P.* more persuasive.[167] In *Haskell*, the court held that a sale free and clear does not extinguish a sublessee's right to possession.[168] Because § 365(h)(1)(A) allows a lessee to retain its rights under the lease following rejection for the term of the lease so long as the lease is enforceable under non-bankruptcy law, the court held that the transaction that took place had a dual nature: (1) a sale free and clear, and (2) an assumption and assignment.[169] The parties were on notice that § 365 applied to the sale because the asset sale agreement contained a list of the leases to be assumed and assigned, and the lease at issue was explicitly rejected under § 365.[170] The court concluded by noting that even if the facts were different and the transaction was solely a § 363 sale, the result

161. *In re Zota Petroleums, LLC*, 482 B.R. at 156.
162. *Id.* at 156–57.
163. *Id.* at 158; *see also* 11 U.S.C. § 365(h)(1)(A) (2012).
164. *In re Zota Petroleums, LLC*, 482 B.R. at 158.
165. *Id.* at 160.
166. 327 F.3d 537, 540 (7th Cir. 2003).
167. *In re Zota Petroleums, LLC*, 482 B.R. at 160–63.
168. 321 B.R. 1, 9–10 (Bankr. D. Mass. 2005).
169. 11 U.S.C. § 365(h)(1)(A) (2012); *In re Zota Petroleums, LLC*, 482 B.R. at 163.
170. *In re Zota Petroleums, LLC*, 482 B.R. at 163.

would be identical, as "[t]he rights of the tenant may not be extinguished by a § 363 sale; to hold to the contrary would give open license to debtors to dispossess tenants by utilizing the § 363 sale mechanism."[171]

The Fourth Circuit has also decided a case dealing with asset sales. In *Reeves v. Callaway*, the Chapter 7 trustee sought to sell the debtor's residence free and clear under § 363.[172] The parties stipulated to the fact that the property had a fair market value of $325,000, but the property was encumbered by a first mortgage and federal tax lien totaling more than $575,000.[173] The debtors objected to the trustee's sale on the grounds that the value of their interest in the property did not exceed the aggregate interest the debtors claimed as exempt under North Carolina law, namely $60,000.[174] The debtors reasoned that their right to claim the property entirely exempt under § 522 removed the property from the bankruptcy estate.[175] Therefore, they argued, the court lacked any authority to permit a sale under § 363.[176]

The Fourth Circuit held that the allowance of an exemption only affected the debtors' interest in the property of the bankruptcy estate and not the actual property itself.[177] While the debtors were allowed to exempt a $60,000 aggregate interest in the property subordinate to the mortgage and tax lien, the "[d]ebtors' argument that the Trustee lacks the statutory authority to sell Debtors' Residence because such asset is no longer property of the bankruptcy estate is without merit."[178]

V. DISCHARGE

Courts have not been especially active in deciding issues related to discharge, but a few cases warrant discussion. First, the Supreme Court's decision in *Bullock v. BankChampaign, N.A.* settled the standard of proof needed to prevail on a claim brought

171. *Id.*

172. 546 F. App'x 235, 238 (4th Cir. 2013) (per curiam); *see also* 11 U.S.C. § 363(f) (2012).

173. *Reeves*, 546 F. App'x at 237.

174. *Id.* at 239; *see also* N.C. GEN. STAT. § 1C-1601(a)(1) (2014).

175. *Reeves*, 546 F. App'x at 239.

176. *Id.*

177. *Id.* at 240–41.

178. *Id.* at 241–42.

under Bankruptcy Code § 523(a)(4).[179] Bankruptcy Code § 523 (a)(4) provides that a debt incurred "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny" is non-dischargeable.[180]

Prior to *Bullock*, disagreement existed among lower courts as to whether the word "defalcation" in § 523(a)(4) included a scienter requirement, and, if so, what evidence was required to meet that burden.[181] For example, in the Fourth Circuit, "negligence or even an innocent mistake which results in misappropriation or failure to account is sufficient" to prove defalcation.[182] In contrast, other circuits required a finding of objective or extreme recklessness.[183] Settling this circuit split, the Supreme Court ultimately held that if "bad faith, moral turpitude, or other immoral conduct" is not present, there must be a finding of intent, which includes not only intentional wrongdoing but also reckless conduct.[184]

The United States Bankruptcy Court for the Eastern District of Virginia recently had the opportunity to apply the new *Bullock* standard. In *Figuers v. Roberson* (*In re Roberson*), the current trustee of a trust filed suit against the former trustee, alleging a breach of fiduciary duty.[185] The current trustee based his claim on allegations that the former trustee charged excessive hourly fees, made loans that harmed the trust, failed to identify and prevent an employee from embezzling nearly $200,000, used trust funds to pay personal debts, and charged an unauthorized commission on the sale of trust property.[186] The former trustee subsequently

179. 133 S. Ct. 1754, 1757 (2013).

180. 11 U.S.C. § 523(a)(4) (2012).

181. *Bullock*, 133 S. Ct. at 1758.

182. Republic of Rwanda v. Uwimana (*In re* Uwimana), 274 F.3d 806, 811 (4th Cir. 2001); *see also* Sherman v. SEC (*In re* Sherman), 658 F.3d 1009, 1017 (9th Cir. 2011) (stating that even innocent acts can result in a finding of defalcation and that no intent to defraud is required).

183. *See, e.g.*, Bullock v. BankChampaign, N.A. (*In re* Bullock), 670 F.3d 1160, 1165–66 (11th Cir. 2012); Rutanen v. Baylis (*In re* Baylis), 313 F.3d 9, 20 (1st Cir. 2002).

184. *Bullock*, 133 S. Ct. at 1759. When defining reckless conduct, the Supreme Court looked to the Model Penal Code; thus, "[w]here actual knowledge of wrongdoing is lacking, [the court will] consider conduct as equivalent if the fiduciary 'consciously disregards' (or is willfully blind to) 'a substantial and unjustifiable risk' that his conduct will turn out to violate a fiduciary duty." *Id.* (citing MODEL PENAL CODE § 2.02 (2)(c) (AM. LAW INST. 1985)).

185. No. 13–11103–BFK, 2014 WL 1876340, at *2 (Bankr. E.D. Va. May 8, 2014).

186. *Id.* at *1–8.

filed for Chapter 7 bankruptcy, which precipitated the filing of a complaint under § 523(a)(4) objecting to the dischargeability of the claim held by the current trustee.[187]

Under *Bullock*, the court determined that the former trustee's hourly fees and imprudent loans did not equate to defalcation.[188] The fees were not excessively unreasonable and the loans did not rise to the level of reckless disregard of the trustee's fiduciary duty.[189] Notably, the court held that while the trustee's "actions here could be described as a breach of his fiduciary duties under State law, the Court [found] that his actions [did] not rise to the level of willfulness or a reckless disregard of a known duty under *Bullock*," and thus, the debts were dischargeable.[190]

Despite these findings, however, the court determined that the trustee's failure to supervise the employee embezzling funds and reconcile bank records that would have revealed this misconduct did rise to the level of "a conscious disregard of his known duties as a fiduciary within the meaning of *Bullock*."[191] Additionally, taking an unauthorized commission on the disposition of trust assets and using trust assets to pay personal debts both amounted to knowing violations of a fiduciary duty, making these debts non-dischargeable.[192] While application of the new *Bullock* standard will be highly fact dependent, *In re Roberson* represents the first application of this standard by a court within the Eastern District of Virginia.

The next noteworthy case dealing with dischargeability is *Lewis v. Long* (*In re Long*). The debtor, Mr. Long, was involved in a sexual relationship with a minor, Ms. Lewis, at various times between 1999 and 2000.[193] The debtor and Ms. Lewis ultimately conceived a child.[194] As a result of this relationship, the debtor pled guilty to two counts of carnal knowledge under Virginia Code section 18.2-63.[195] Following the debtor's conviction, Ms. Lewis ob-

187. *Id.* at *2.
188. *Id.* at *9–11.
189. *Id.*
190. *Id.* at *12.
191. *Id.*
192. *Id.* at *12–13.
193. Lewis v. Long (*In re* Long), 504 B.R. 424, 427 (Bankr. W.D. Va. 2014).
194. *Id.*
195. *Id.*; *see* VA. CODE ANN. § 18.2-63 (Repl. Vol. 2014 & Supp. 2015).

tained a default civil judgment against the debtor for intentional infliction of emotional distress and sexual assault and battery.[196] The debtor did not make any appearance in the civil case prior to appearing pro se at the default judgment hearing.[197]

Turning to the bankruptcy adversary proceeding, Ms. Lewis filed a nondischargeability suit against the debtor, alleging that the judgment obtained in state court could not be discharged under § 523(a)(6).[198] At the conclusion of Ms. Lewis's case in chief, the debtor argued that she failed to present evidence sufficient to establish intent, as the only evidence Ms. Lewis presented at trial was information pertaining to the parties' relationship, and that she obtained a default judgment against the debtor in state court.[199] Ms. Lewis argued that she did not need to prove intent in the adversary proceeding because the state court default judgment had a collateral estoppel effect.[200]

The court held that Ms. Lewis failed to carry her evidentiary burden.[201] The state court judgment did not have any collateral estoppel effect because the bankruptcy court was unable to determine which issues were actually litigated in state court and the court had no evidence before it that the state court made any finding regarding the debtor's intent.[202] For an issue to be subject to collateral estoppel, it must have actually been previously litigated.[203] While the debtor was present at the default judgment hearing, such presence, on its own, did not prove the issue was actually litigated.[204]

One final issue in the case dealt with a waiver of dischargeability provision included in a note signed by the debtor in favor of Ms. Lewis, which the parties entered into prior to the petition date.[205] The court found the provision unenforceable because the

196. *In re Long*, 504 B.R. at 427.

197. *Id.*

198. *Id.*; *see* 11 U.S.C. § 523(a)(6) (2012) (excepting from discharge debts incurred "for willful and malicious injury by the debtor to another entity or to the property of another entity").

199. *In re Long*, 504 B.R. at 428–29.

200. *Id.* at 429.

201. *Id*. at 436.

202. *Id.* at 434–35.

203. *Id.* at 429–30.

204. *Id.* at 433.

205. *Id.* at 427–28.

debtor did not reaffirm the debt under Bankruptcy Code § 524(c).[206] Therefore, the bankruptcy court held that the default judgment did not have a collateral estoppel effect, Ms. Lewis failed to prove that her injury was the result of willful and malicious conduct as required by the statute, and the waiver of dischargeability provision signed by the debtor was unenforceable.[207] Ms. Lewis subsequently appealed the bankruptcy court's decision, which the district court later affirmed.[208]

Before leaving this section, perhaps the largest issue looming within the realm of dischargeability is the treatment of student loans. While this topic has garnered a significant amount of scholarly attention,[209] cases within the Fourth Circuit have remained consistent in disallowing the discharge of student loan debts following the adoption of the *Brunner* test in 2005.[210]

VI. AVOIDANCE ACTIONS

The Fourth Circuit has been quite active in the area of avoidance actions recently, issuing several decisions since 2013. The first case is *Grayson Consulting, Inc. v. Wachovia Securities, LLC* (*In re Derivium Capital LLC*), where the debtor filed for Chapter 11 bankruptcy after its alleged Ponzi scheme collapsed.[211] Essentially, the debtor directed customers to deposit securities directly into a bank account in exchange for loans worth 90% of the stock's current market value.[212] When these loans reached ma-

206. *Id.* at 437–38.

207. *Id.* at 438–39.

208. Lewis v. Long, 521 B.R. 745, 753–54 (W.D. Va. 2014).

209. *See, e.g.*, Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495 (2012); Richard B. Keeton, *Guaranteed to Work or It's Free!: The Evolution of Student Loan Discharge in Bankruptcy and the Ninth Circuit's Ruling in* Hedlund v. Educational Resources Institute Inc., 89 AM. BANKR. L.J. 65 (2015).

210. Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393, 400 (4th Cir. 2005) (adopting the *Brunner* test for determining dischargeability of student loans); *see* Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987) (per curiam). One of the more noteworthy cases decided in Virginia in the past several years dealing with the dischargeability of student loans is *Erbschloe v. Department of Education* (*In re Erbschloe*), where the court held that the debt remaining after the debtor's completion of an income-based repayment plan represents the portion of student loan debt that imposes an undue hardship. 502 B.R. 470, 483 (Bankr. W.D. Va. 2013).

211. 716 F.3d 355, 358 (4th Cir. 2013).

212. *Id.* at 359.

turity, the debtor gave borrowers the option to repay the principal, plus interest, and regain their stock, surrender the stock, or refinance the terms of the loan.[213] The debtor promised customers that it would hedge their collateral, but instead the debtor directed the bank to immediately transfer the stocks into different accounts and liquidate them.[214] The court eventually converted the case to Chapter 7, and the trustee filed nine tort claims against the bank and two claims under Bankruptcy Code §§ 544 and 548.[215] The trustee later assigned these claims to Grayson Consulting.[216]

The Fourth Circuit held that the transfers were not "an interest of the debtor in property or any obligation incurred by the debtor," and therefore Grayson Consulting could not prevail on the claims brought under §§ 544 and 548.[217] Next, the court held that the bank was not the "initial transferee" under § 550, and therefore could not recover any fraudulently transferred property.[218] Third, under § 546(e), a trustee cannot avoid a transfer, except in some very limited situations, of an interest of the debtor in property that is a "settlement payment" to a stockbroker.[219] A settlement payment is generally defined to include "preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, or any other similar payment commonly used in the securities trade."[220] The court determined that the commissions paid to the bank in this case were reasonable and customary, and therefore fell under the defense of § 546(e).[221] Finally, the Fourth Circuit determined that as the assignee of the trustee, the doctrine of *in pari delicto* barred Grayson Consulting

213. *Id.*

214. *Id.*

215. *Id.*; *see also* 11 U.S.C. § 544 (2012) (providing the trustee with the power to avoid certain pre-bankruptcy transfers made by the debtor that could have been avoided by a judgment lienholder or a bona fide purchaser); 11 U.S.C. § 548 (2012) (allowing the trustee to avoid fraudulent transfers made by the debtor prior to the commencement of the bankruptcy case).

216. *In re Derivium Capital, LLC*, 716 F.3d at 359.

217. *Id.* at 361; *see also* 11 U.S.C. §§ 544(b)(1), 548(a) (2012).

218. *In re Derivium Capital, LLC*, 716 F.3d at 362; *see also* 11 U.S.C. § 550(a) (2012).

219. *In re Derivium Capital, LLC*, 716 F.3d at 361; *see also* 11 U.S.C. § 546(e) (2012).

220. 11 U.S.C. § 741(8) (2012).

221. *In re Derivium Capital, LLC*, 716 F.3d at 364–65.

from suing on the alleged torts because the debtor engaged in the alleged torts.[222]

The second Fourth Circuit case is *Guttman v. Construction Program Group* (*In re Railworks Corp.*). In this case, the debtor, Railworks, purchased insurance through an insurance agent.[223] Construction Program Group ("CPG") served as the general underwriter for the debtor's insurance company and it collected all premiums for the insurance company.[224] The litigation trustee brought an action to avoid and recover premiums transferred by the debtor to CPG.[225] The debtor made a number of payments to CPG within the ninety days before the petition date.[226] CPG later transferred the payments it had collected to the insurance company.[227]

Bankruptcy Code § 550(a)(1) allows a trustee to recover a transfer for the benefit of the estate from "the initial transferee of such transfer or the entity for whose benefit such transfer was made."[228] Because CPG was not the initial transferee, the trustee made the argument that CPG was "the entity for whose benefit such transfer was made."[229]

The court held that CPG, as underwriter, did not qualify as an "entity for whose benefit" the debtor's premium payments were made.[230] CPG served as a mere conduit for the party with the relationship with the debtor.[231] Thus, the trustee was not permitted to recover the premium payments.[232]

The final Fourth Circuit case in the topic area that this article will cover is *Gold v. First Tennessee Bank N.A.* (*In re Taneja*).[233] In this case, a bank opened a credit line to a mortgage originator,

222. *Id.* at 366–69.
223. Guttman v. Constr. Program Grp. (*In re* Railworks Corp.), 760 F.3d 398, 400 (4th Cir. 2014).
224. *Id.* at 401.
225. *Id.* at 400.
226. *Id.* at 402.
227. *Id.* at 400.
228. 11 U.S.C. § 550(a)(1) (2012).
229. *Id.*; *In re Railworks Corp.*, 760 F.3d at 404.
230. *In re Railworks Corp.*, 760 F.3d at 404.
231. *Id.*
232. *Id.* at 405.
233. 743 F.3d 423 (4th Cir. 2014).

unaware that the mortgage originator had been creating fraudulent mortgages.[234] During the economic downturn, the mortgage originator began to have difficulty selling mortgages on the secondary market and was unable to pay the bank on time.[235] The bank ultimately pressured the originator for repayment, at which point the originator repaid a large portion of the credit line prior to filing for bankruptcy.[236] The trustee sought to recover payments from the defendant bank based on the premise that they were fraudulent transfers, arguing that the bank knew, or should have known that the debtor acted with the intent to hinder, delay, or defraud over the course of its operations.[237]

A fraudulent transferee is not liable to the extent value was taken in good faith.[238] This good faith requirement contains both an objective and subjective element.[239] Subjective good faith requires honesty in fact and an innocent state of mind, while objective good faith requires that the party act in a commercially reasonable manner, abiding by routine business practices.[240] Here, the court found that the bank's conduct was standard in the banking industry, and that the bank sought and reasonably received assurances that the originator was not issuing fraudulent mortgages.[241] The court took the economic downturn into consideration, to which the bank reasonably could have attributed the originator's problems.[242] Therefore, the bank acted reasonably in good faith.[243]

VII. STANDING, CONFIRMATION, AND RES JUDICATA

This topic area of standing, confirmation, and res judicata is divided into two subsections. First, this section addresses case developments dealing with standing itself. Next, this section turns attention toward confirmation and res judicata issues, a

234. *Id.* at 425.
235. *Id.* at 426.
236. *Id.* at 426–27.
237. *Id.* at 427.
238. *See* 11 U.S.C. § 548(c) (2012).
239. *In re Taneja*, 743 F.3d at 430.
240. *Id.*
241. *Id.* at 430–31.
242. *See id.* at 434.
243. *Id.*

topic which has produced a number of noteworthy and interesting decisions recently.

A. *Standing*

In *Wilson v. Dollar General Corp.*, the Fourth Circuit considered the issue of whether a Chapter 13 debtor retains standing to file a cause of action under the Americans with Disabilities Act of 1990 ("ADA").[244] The Fourth Circuit began by noting that in the Chapter 7 context, the court has recognized "[i]f a cause of action is part of the estate of the bankrupt then the trustee alone has standing to bring that claim."[245] While the court had made this determination in Chapter 7, it had not "considered to what extent the Chapter 13 debtor—who, unlike the Chapter 7 debtor, retains possession of the bankruptcy estate—may also possess standing to assert a cause of action, either exclusive of, or concurrent with, the authority vested in the trustee."[246]

While this was an open question in the Fourth Circuit, all other circuits that addressed the question determined that Chapter 13 debtors retain standing to bring a cause of action on their own behalf for the benefit of the estate.[247] Following these other circuit decisions, the Fourth Circuit concluded that unlike a Chapter 7 debtor, a Chapter 13 debtor may maintain non-bankruptcy causes of action concurrent with the trustee.[248]

In *SunTrust Bank v. Matson* (*In re CHN Construction, LLC*), the United States Bankruptcy Court for the Eastern District of Virginia examined the rights of a secured creditor in Chapter 7 to pursue avoidance actions on behalf of the Chapter 7 trustee.[249] In this case, the Chapter 7 trustee and the principal secured creditor disagreed whether a cash collateral order had specifically authorized a number of post-petition payments made by the debtor-in-

244. 717 F.3d 337, 342 (4th Cir. 2013).
245. *Id.* (quoting Nat'l Am. Ins. Co. v. Ruppert Landscaping Co., 187 F.3d 439, 441 (4th Cir. 1999)) (alteration in original).
246. *Id.* at 343.
247. *See* Smith v. Rockett, 522 F.3d 1080, 1082 (10th Cir. 2008); Crosby v. Monroe Cty., 394 F.3d 1328, 1331 n.2 (11th Cir. 2004); Cable v. Ivy Tech State Coll., 200 F.3d 467, 472–74 (7th Cir. 1999); Olick v. Parker & Parsley Petroleum Co., 145 F.3d 513, 515–16 (2d Cir. 1998); Mar. Elec. Co. v. United Jersey Bank, 959 F.2d 1194, 1209 n.2 (3d Cir. 1991).
248. *Wilson*, 717 F.3d at 343.
249. 531 B.R. 126, 127 (Bankr. E.D. Va. 2015).

possession to a number of third parties who did business with the debtor while the case was in Chapter 11.[250] The trustee ultimately decided not to pursue any avoidance actions against the third parties under Bankruptcy Code § 549.[251] The creditor sought to establish derivative standing so that it could pursue these actions on the trustee's behalf.[252]

The court recognized that despite the general rule that only trustees and debtors-in-possession can pursue avoidance actions, there are two limited situations where creditors are permitted to pursue avoidance actions on behalf of the estate: (1) when the trustee or debtor-in-possession unreasonably refuses to bring suit on its own; and (2) where the trustee or debtor-in-possession grants consent.[253] Both of these exceptions, however, are only applicable in the context of Chapter 11, and are not applicable in Chapter 7, where an independent fiduciary acting as an officer of the court is specifically charged with deciding whether to bring these actions.[254] The court noted that the Chapter 7 trustee is provided with a substantial degree of discretion, and the court would be hesitant to substitute its own business judgment for that of the trustee.[255] Therefore, the court determined that the trustee acted reasonably and the creditor was not permitted to pursue the avoidance actions.[256]

B. *Confirmation and Res Judicata*

This has perhaps been one of the most active areas of bankruptcy litigation within the Fourth Circuit recently. A number of cases have been decided at the appellate level, including one recent decision by the Supreme Court.

In *Bullard v. Blue Hills Bank*, the Supreme Court resolved a large circuit split by holding that the denial of confirmation of a Chapter 13 plan is not a final, appealable decision.[257] While the

250. *Id.* at 128–29.
251. *Id.* at 129.
252. *Id.* at 127.
253. *Id.* at 131.
254. *Id.* at 131, 133.
255. *Id.* at 133.
256. *Id.* at 134.
257. 135 S. Ct. 1686, 1692 (2015). The Fourth Circuit previously held in *Mort Ranta v.*

decision arises in the context of a Chapter 13 case, it may also have repercussions for Chapter 11 cases. In *Bullard*, a Massachusetts bankruptcy court denied confirmation of the debtor's plan, and the Bankruptcy Appellate Panel for the First Circuit determined that it had discretionary authority to hear the debtor's appeal under 28 U.S.C. § 158(a)(3).[258]

The Supreme Court began by noting, "bankruptcy cases may be immediately appealed if they finally dispose of discrete disputes within the larger case."[259] The creditor in the case argued that "[a]n order denying confirmation is not final, so long as it leaves the debtor free to propose another plan."[260] The Supreme Court ultimately agreed with the creditor, reasoning that only confirmation and dismissal "fixes the rights and obligations of the parties."[261] While a debtor is permitted to submit a new plan after the denial of confirmation, the automatic stay remains in effect.[262] The Court also noted that the interlocutory appeal process for review of the denial of a plan remained in place; as such, appeals could still be taken when, for example, a pure question of law was at issue.[263] Thus, in the larger scheme of things, the *Bullard* decision will likely change little, given the ability of courts to still hear interlocutory appeals.

One of the most interesting, and potentially problematic, decisions in this arena came from the Fourth Circuit. In *Covert v. LVNV Funding, LLC*, creditor LVNV Funding, LLC ("LVNV") acquired a defaulted debt against each of the separate plaintiffs in the case.[264] The separate plaintiffs each filed Chapter 13 bankruptcy cases and LVNV filed an unsecured proof of claim in each of the plaintiffs' bankruptcy cases.[265] After the Chapter 13 cases had concluded, the plaintiffs filed suit in federal district court, al-

Gorman that an order denying confirmation of a Chapter 13 plan is, in fact, final and appealable. 721 F.3d 241, 248 (4th Cir. 2013). Thus, *Bullard* overruled the Fourth Circuit's *Mort Ranta* decision.

258. *Bullard*, 135 S. Ct. at 1690–91; *see also* 28 U.S.C. § 158(a)(3) (2012).

259. *Bullard*, 135 S. Ct. at 1692 (quoting Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co., 547 U.S. 651, 657 n.3 (2006)).

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* at 1695–96.

264. 779 F.3d 242, 244 (4th Cir. 2015).

265. *Id.* at 244.

leging that LVNV had violated the Fair Debt Collection Practices Act along with other Maryland debt collection licensing laws.[266] LVNV moved to dismiss, arguing that the plaintiffs' state and common law claims were barred by res judicata, as the prior confirmation of the debtors' Chapter 13 plans under which LVNV had participated as an unsecured creditor based upon its filed proofs of claims constituted a final judgment.[267]

The court began by outlining the elements of res judicata.[268] The court proceeded to hold that confirmation of the debtors' plans constituted a final judgment on the merits, the parties to both proceedings were the same, and the claims "ar[ose] out of the same transaction or series of transactions, or the same core of operative facts."[269] Thus, the court concluded that all of the claims were barred by res judicata.[270] The appellants could have raised their Fair Debt Collection Practices Act claims during the bankruptcy proceeding, but chose not to do so.[271] Allowing the debtors to raise these claims at this point would frustrate one of the fundamental tenants of bankruptcy, providing a final and binding plan.[272]

The decision is problematic because plan confirmation in Chapter 13 cases often occurs before the claims bar date. Situations arise where a creditor files a proof of claim on the eve of (or even after) the confirmation hearing, at which point the confirmed plan would be res judicata to the claim, per *Covert*. Both the Eastern and Western District of Virginia Bankruptcy Courts are considering the adoption of a new local rule to address this issue that *Covert* has created for Chapter 13 debtor attorneys.

There are two other Fourth Circuit decisions in this area that warrant highlighting. First, in *Morris v. Quigley* (*In re Quigley*), the court ruled that the projected disposable income of an above-median Chapter 13 debtor had to include the debtor's intention to surrender two all-terrain vehicles on which the debtor had been

266. *Id.* at 245.
267. *Id.*
268. *Id.* at 246 (quoting First Union Commercial Corp. v. Nelson (*In re* Varat Enters., Inc.), 81 F.3d 1310, 1315 (4th Cir. 1996)) (alteration in original).
269. *Id.* at 246–47 (quoting *In re Varat Enters., Inc.*, 81 F.3d at 1316 (citation omitted)).
270. *Id.* at 247.
271. *Id.* at 248.
272. *See id.* at 248.

making payments to the secured creditors.[273] The issue the court faced was "whether a debtor's 'projected disposable income' must be equal to the debtor's 'disposable income' for purposes of satisfying § 1325(b)(1)(B), or whether the projected disposable income should reflect changes that have occurred or that will occur and that are known as of the date of plan confirmation."[274] The court answered this question by turning to the Supreme Court's recent decision in *Hamilton v. Lanning*. In *Hamilton*, the Supreme Court held that when calculating a debtor's projected disposable income, the court can take into consideration changes in the debtor's income or expenses that are known or virtually certain at confirmation.[275] Applying this decision, the Fourth Circuit determined that the debt at issue was significant relative to the bankruptcy case "and removing that deduction would increase the Debtor's projected disposable income by almost two-thirds."[276]

Next, in *Pliler v. Stearns*, the above-median debtor proposed a plan with early termination language that could require him to make monthly payments for fifty-five months, rather than sixty.[277] Bankruptcy Code § 1325(b)(1) provides that the court may not approve a plan unless "the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan."[278] The debtor believed that this provision was satisfied because he did not have any projected disposable income, and therefore would be devoting all projected disposable income for the commitment period of the plan.[279] The court disagreed, reading the "applicable commitment period" language as a strict time requirement and noting that allowing debtors to terminate early like this could potentially result in windfalls, such as in cases where inheritances come into play.[280]

273. 673 F.3d 269, 272–74 (4th Cir. 2012).

274. *Id.* at 272; *see also* 11 U.S.C. § 1325(b)(1)(B) (2012).

275. Hamilton v. Lanning, 560 U.S. 505, 513 (2010).

276. *In re Quigley*, 673 F.3d at 274.

277. 747 F.3d 260, 262 (4th Cir. 2014).

278. 11 U.S.C. § 1325(b)(1)(B) (2012).

279. *Pliler*, 747 F.3d at 265.

280. *Id.* at 264–65. Before moving past this section, two other cases warrant mention. First, in *Johnson v. Zimmer*, the Fourth Circuit held that when determining the debtor's household size, it was proper to take a fractional economic unit approach. 686 F.3d. 224, 225 (4th Cir. 2012). Second, in *In re McPhee*, the United States Bankruptcy Court for the

The final case dealing with confirmation issues is something of an outlier to these prior cases. In *In re Lemus*, the United States Bankruptcy Court for the Eastern District of Virginia addressed whether Bankruptcy Code § 1127 prevents an individual debtor from commencing a new Chapter 13 case after substantial consummation of her prior Chapter 11 plan.[281] The court held that the new Chapter 13 filing did not constitute a "modification" of the debtor's confirmed Chapter 11 plan, but rather was an entirely new case.[282] Nothing in the Bankruptcy Code prevents a debtor from filing a Chapter 13 after a Chapter 11, provided the subsequent Chapter 13 was filed in good faith.[283] The Court ultimately found "that the Debtor has experienced a substantial and unanticipated change in her financial condition and that she is proceeding in her Chapter 13 Bankruptcy Case with a good faith effort to repay her creditors."[284]

VIII. LIEN STRIPPING

In early Summer 2015, many anticipated change to this area of the law. However, following the Supreme Court's decision in *Bank of America, N.A. v. Caulkett*, bankruptcy law related to stripping a totally unsecured second mortgage remains largely the same as it has been for the last twenty-three years.[285] The issue in *Caulkett* was whether a Chapter 7 debtor can avoid a second lien on a piece of property when the value of property is less than the amount of the first lien on the property.[286] The Supreme Court's 1992 decision in *Dewsnup v. Timm* held that Chapter 7 debtors could not strip-down the value of a partially secured creditor's claim to the value of the collateral securing the claim.[287] When the Supreme Court granted certiorari in *Caulkett*, some believed that *Dewsnup* would be overturned. However, in *Caulkett*, the Court unanimously affirmed *Dewsnup* and found that under

Eastern District of Virginia held that Canadian Old Age Security Benefits do not constitute income, as a result of a treaty in effect between the United States and Canada that "mandates reciprocal treatment of government retirement benefits between the two countries." No. 13–36046–KRH, 2014 WL 4211068, at *1 (Bankr. E.D. Va. Aug. 26, 2014).

281. 516 B.R. 333, 336 (Bankr. E.D. Va. 2014); *see also* 11 U.S.C. § 1127(e) (2012).

282. *In re Lemus*, 516 B.R. at 338.

283. *Id.*

284. *Id.* at 340.

285. 135 S. Ct. 1995, 2001 (2015).

286. *Id.* at 1998.

287. 502 U.S. 410, 419–20 (1992).

Bankruptcy Code § 506(d), a lien that secures a claim against the debtor that is not an "allowed secured claim" is void.[288] Perhaps the most important part of the opinion is the sole (unnumbered) footnote, which reads as follows:

> From its inception, *Dewsnup v. Timm*, 502 U.S. 410, 112 S. Ct. 773, 116 L.Ed.2d 903 (1992), has been the target of criticism. *See, e.g.*, *id.*, at 420–436, 112 S. Ct. 773 (SCALIA, J., dissenting); *In re Woolsey*, 696 F.3d 1266, 1273–1274, 1278 (C.A.10 2012); *In re Dever*, 164 B.R. 132, 138, 145 (Bkrtcy. Ct. C.D. Cal. 1994); Carlson, Bifurcation of Undersecured Claims in Bankruptcy, 70 AM. BANKR. L.J. 1, 12–20 (1996); Ponoroff & Knippenberg, *The Immovable Object Versus the Irresistible Force: Rethinking the Relationship Between Secured Credit and Bankruptcy Policy*, 95 MICH. L. REV. 2234, 2305–2307 (1997); *see also Bank of America Nat. Trust and Sav. Assn. v. 203 North LaSalle Street Partnership*, 526 U.S. 434, 463, and n.3, 119 S. Ct. 1411, 143 L.Ed.2d 607 (1999) (THOMAS, J., concurring in judgment) (collecting cases and observing that "[t]he methodological confusion created by *Dewsnup* has enshrouded both the Courts of Appeals and . . . Bankruptcy Courts"). Despite this criticism, the debtors have repeatedly insisted that they are not asking us to overrule *Dewsnup*.[289]

Thus, while *Dewsnup* lives on, this footnote begs the question: for how much longer?

The Fourth Circuit has also recently decided two lien strip cases. The first is *Alvarez v. HSBC Bank, USA, N.A.* (*In re Alvarez*), where the debtor filed for Chapter 13, and his wife did not join his petition.[290] The debtor sought to strip off a lien on the marital residence, which was owned as tenants by the entirety.[291] The court held that the debtor could not strip off the lien because the wife's interest in the property was not part of the bankruptcy estate.[292] As filing does not sever the unity of tenants by the entirety property under Maryland law, the only asset to become part of the bankruptcy estate was the debtor's undivided interest in the whole property.[293]

Finally, in *Branigan v. Davis* (*In re Davis*), the Chapter 13 trustee challenged several confirmation orders entered by the

288. *Caulkett*, 135 S. Ct. at 1999–2001.
289. *Id.* at n. †, 135 S. Ct. at 2000 n. †.
290. 733 F.3d 136, 139 (4th Cir. 2013).
291. *Id.* at 139–40.
292. *Id.* at 140–41.
293. *Id.*

bankruptcy court, which stripped off junior liens against the various debtors' residences in these "Chapter 20" cases.[294] The trustee argued that the BAPCPA established a per se rule against lien stripping in Chapter 20 cases.[295]

The Fourth Circuit recognized that in light of the Bankruptcy Code's four-year prohibition on Chapter 13 discharges for debtors that have received a Chapter 7 discharge,[296] courts have "split on whether a debtor may strip off liens in a Chapter 20 case."[297] The court ultimately determined, looking to its prior decision in *Branigan v. Bateman* (*In re Bateman*), which held that despite the discharge bar imposed by BAPCPA, debtors can "still take advantage of the protections offered by Chapter 13 short of a discharge."[298] Following this precedent, the Fourth Circuit affirmed the lower courts and allowed the Chapter 20 debtors to strip off valueless junior liens against their residences.[299]

CONCLUSION

The Supreme Court has been uncharacteristically busy in the past three years within the realm of bankruptcy law. However, following the *Wellness* decision, the largest looming jurisdictional questions have been resolved. It will be interesting to watch future Supreme Court terms to see if the Court's interest in granting certiorari for bankruptcy petitions continues. While this article has focused exclusively on case law developments, there have also been growing comments by bankruptcy experts that the Bankruptcy Code is in need of reform. The American Bankruptcy Institute recently published its Final Report and Recommendations from its Commission to Study the Reform of Chapter 11, which was formed in early 2012.[300] That report provides a large number of recommended changes to Chapter 11 of the Bankrupt-

294. 716 F.3d 331, 332 (4th Cir. 2013). "'Chapter 20' is a colloquial reference to a Chapter 13 bankruptcy filed within four years of a Chapter 7 bankruptcy that concluded with a discharge." *Id.* at 332 n.1.

295. *Id.* at 332.

296. *See* 11 U.S.C. § 1328(f)(1) (2012).

297. *In re Davis*, 716 F.3d at 336.

298. *Id.*; 515 F.3d 272, 283 (4th Cir. 2008).

299. *In re Davis*, 716 F.3d at 339.

300. AM. BANKR. INST., COMMISSION TO STUDY THE REFORM OF CHAPTER 11: FINAL REPORT & RECOMMENDATIONS 13 (2014).

cy Code. As the introduction to the report states, "[i]t may be that four decades is the maximum amount of time that any financially driven regulation can remain relevant."[301] As the Bankruptcy Code underwent its last major revision in 1978, "the general consensus among restructuring professionals is that the time has come once again to evaluate U.S. business reorganization laws."[302]

Therefore, with the Court's recent activity level and the ever-growing requests for legislative changes, bankruptcy law likely will remain in a state of change. As such, the authors are hopeful that this article will provide those who read it with a comprehensive, yet concise, review of how bankruptcy case law has developed both nationally and within the Fourth Circuit so as to help them stay informed of these developments.

301. *Id.* at 2 (noting that reorganization laws within the United States have historically been changed approximately every forty years: in 1898, 1938, and 1978).

302. *Id.*