Bankruptcy Law News

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Guitar Center, Inc. Marks First "Pre-Pack" Case in Eastern District of Virginia

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On December 17, 2020, just 26 days after the Petition Date,[2] Judge Huennekens confirmed the *Joint Pre-Packaged Plan of Reorganization of Guitar Center, Inc. et al.* (the "Plan"), marking the first successful pre-packaged (or "pre-pack") case in the Eastern District of Virginia. The ensuing reorganization was the quickest accomplished to date in the Eastern District and allowed the business to avoid many of the typical chapter 11 steps that might have kept the business from emerging with sufficient financial strength to attempt to weather the COVID-19 pandemic.

So what exactly is a "pre-packaged" bankruptcy case?

Generally speaking, "pre-packaged" refers to the debtor's pre-petition solicitation of votes on a chapter 11 plan. (This differs from a "pre-arranged" case in which, although the debtor may have entered into a pre-petition restructuring or transaction support agreement, the debtor has not commenced solicitation prior to filing for bankruptcy protection, such as in the chapter 11 cases filed in the Eastern District by J. Crew and its affiliates.) "Pre-packaged" cases come in at least two types: "true pre-packs" and "straddle pre-packs." In a "true pre-pack," the debtor has both commenced and completed solicitation prior to filing for bankruptcy protection. In a "straddle pre-pack", the debtor has commenced, but has not completed, solicitation prior to filing, and so the solicitation period "straddles" the petition date. *Guitar Center* was a "straddle pre-pack."

I. Guitar Center Background

Guitar Center Inc., the nation's largest musical instrument retailer, and seven of its affiliates, filed for

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Message from the Editor

Veronica Brown-Moseley

I hope this edition of *Bankruptcy Law News* finds you well. This edition features three substantive articles that contain recent developments in bankruptcy law that you do not want to miss! Tyler P. Brown, a partner of Hunton Andrews Kurth LLP, and Jennifer E. Wuebker, an associate of Hunton Andrews Kurth LLP, submitted an article that provides the details of the Eastern District of Virginia's first "Pre-Pack" case. Caleb Chaplain, the career law clerk of the Honorable Rebecca B. Connelly, submitted an article that focuses on the new claim created by the recently enacted subsection (f) of section 501 of the Bankruptcy Code. Christopher Flynn and Daniel Webster, attorneys of the Boleman Law Firm PC, submitted an article that explores the most notable changes proposed in the Consumer Bankruptcy Reform Act of 2020.

Additionally, you will find in this issue:

- A welcoming Message from the Chair by Hannah W. Hutman of Hoover Penrod PLC.
- Important updates in the Clerks Corner by James W. Reynolds of the United States Bankruptcy Court Western District of Virginia.
- Informative Case Summaries by Kelly M. Barnhart of Roussos & Barnhart, PLC.

Thank you very much to those who contributed to this edition of *Bankruptcy Law News*. I encourage readers to suggest topics and contribute to upcoming editions. If you are interested, please contact me via email at vdbrown-moseley@bolemanlaw.com or phone at 804-358-9900. I would love to hear from you!

I hope that you enjoy this edition of *Bankruptcy Law News*.

~ Veronica

Message from the Chair of the Section

Hannah W. Hutman

As I write this message I can hardly believe that one year ago almost to the day I was preparing to travel to what would be the last in-person event I would attend in over a year. What a year it has been. The changes that we have implemented in our personal and professional lives are *almost* beginning to feel normal and the way things used to be are becoming something of a distant memory.

One year ago, I was excited to be moderating the Annual Bankruptcy Practice Seminar, which is cosponsored annually by the Bankruptcy Law Section of the Virginia State Bar and Virginia CLE. This year, despite the changes that have been necessary to keep everyone safe and healthy, the Bankruptcy Law Section once again hosted this annual event. Like almost everything, the seminar was conducted virtually. But that did not impact the quality of the content.

Dylan Trache lined up a stellar group of panelists and topics. COVID-19 has left its mark on all aspects of our lives, including the Bankruptcy Code and case law. The panels explored the impact of COVID-19 on the practice of bankruptcy law and discussed some of the hot topics (such as rent deferral and abatement) that have arisen since the beginning of the pandemic. If you weren't able to attend I encourage you to watch a replay through Virginia CLE.

As we look to the Spring, I know we are all (or at least most) hopeful that the world will begin to "open up." I for one am hopeful that we will be able to gather in person this fall. I come from a small firm in a small town and I miss seeing and connecting colleagues from all over the Commonwealth. The practice of law can feel isolating now more than ever. Until we can meet safely in person, we will continue to connect virtually and support each other.

With virtual and telephonic court hearings, it can be hard to overhear what is going on in other cases and take note of important issues or practice pointers. To that end, if you have been involved in a unique case this is a great time to reach out to Veronica Brown-Moseley, the editor of the newsletter, and discuss submitting an article. Do not be intimidated! No matter the size of your firm or the nature of your practice, we all benefit from articles from our diverse practice areas. If you have other thoughts for how we might continue to build our virtual community during this time, please let me know.

I hope that each of you and your families remain healthy and safe. Keep up the good work!

~ Hannah

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chapter 11 protection in the Richmond Division on November 21, reporting $1 billion to $10 billion in both assets and liabilities. Although the Debtors' began restructuring efforts prior to the COVID-19 pandemic, the pandemic, as with most retailers, imposed significant challenges on the company, which was facing a maturity of nearly $1 billion in secured debt in 2021.

Prior to their chapter 11 filing, the Debtors entered into a restructuring support agreement to document the terms of the negotiated restructuring and conditionally committed the contracting parties to support the reorganization plan. The plan was supported by holders of 100% of the debtors' senior secured superpriority notes, over 71% in principal amount of the debtors' senior secured notes, holders of 84% in principal amount of the debtors' senior unsecured cash/PIK notes, and the holder of substantially all of the debtors' existing common equity. The restructuring support agreement obligated the Debtors to file their petitions in the Eastern District of Virginia and included aggressive milestones for the Debtors to achieve confirmation of the negotiated plan.

Although there have been a number of successful pre-packaged cases filed in other jurisdictions, as the first pre-packaged case filed in the Eastern District of Virginia, the *Guitar Center* case provides a roadmap for future pre-packaged cases, including notable departures from the "standard" procedural mechanics of other chapter 11 cases. Of particular note, and highlighted here, are the Debtors' combined disclosure statement and confirmation hearing, the delay and subsequent waiver of the Section 341 meeting, and the all-trade vendor relief.

II. Combined Hearing

Perhaps the most unique procedural aspect of the *Guitar Center* case, and the hallmark of pre-packaged cases in other jurisdictions, is the so-called "Combined Hearing" motion. Through this motion, the Debtors sought to: (i) schedule a combined hearing on the adequacy of the disclosure statement and confirmation of the plan, (ii) approve the solicitation procedures, (iii) approve certain notices, including the notice procedures for assumption and rejection of executory contracts and unexpired leases, (iv) extend the deadline to file schedules and statements and for the Office of the United States Trustee to convene a Section 341 meeting (discussed in greater detail below), and (v) approve the overall case timeline, including certain key dates and deadlines.

Importantly, much of the relief the Debtors sought in the Combined Hearing motion was for retroactive approval of the solicitation well-underway. For example, although the motion sought approval to schedule and provide notice of a combined hearing on the adequacy of the disclosure statement and confirmation of the plan, in the meantime, the Debtors also sought retroactive and conditional approval of the adequacy of the disclosure statement for purposes of the pre-petition solicitation. Similarly, in seeking approval of the solicitation procedures, the Debtors sought retroactive approval of the ballots, notices, and other forms already employed. This retroactive approval is fairly unique to pre-packaged cases, both in a true pre-pack, in which the debtor must seek retroactive approval of the entire solicitation, balloting, and tabulation process, and in a straddle pre-pack, in which the debtor must seek retroactive approval of the solicitation procedures and balloting employed prior to the filing, but not tabulation of votes, which are not yet due.

The pre-packaged nature of the case also typically results in a shortened timeline, as it did in *Guitar Center*. While a typical chapter 11 case lingers while the debtor files its plan and disclosure statement, negotiates and solicits acceptance of the plan after approval of the disclosure statement, and then effectuates the plan after confirmation of the plan, in a pre-packaged case, much (and sometimes nearly all) of the plan process actually occurs pre-petition, outside of the bankruptcy.

This held true with *Guitar Center*. The Debtors sought an accelerated case timeline to reach plan confirmation just 26 days after filing their chapter 11 petitions. Although this may seem to deviate from the timelines set forth in Bankruptcy Rules 3017(a)[3] and 2002(b)[4] as well as Local Bankruptcy Rule 3016-1,[5] the pre-packaged nature of the case, and the fact that the Debtors already had secured plan approval from their key stakeholders, along with the flexibility of Bankruptcy Rule 9006(c)(1), provided cause for deviation from those otherwise applicable timelines. Further, in this particular case, Guitar Center's bankruptcy and the terms of its proposed restructuring were no secret: parties in interest had ample notice of the filing and the accelerated timeline even before the company filed its bankruptcy petitions. Although charting new procedures in the Eastern District, the Debtors received approval of the motion from the Court without objection.

III. Waiver of 341 Meeting

The Debtors also moved for modifications of the statutory obligation to attend a meeting of creditors and prepare and file schedules and statements. Specifically, the Debtors requested that the Court: (i) excuse the U.S. Trustee from scheduling a Section 341(a) meeting until at least January 22, 2021; (ii) extend the deadline for filing schedules and statements until the same date; and (iii) if the Debtors confirmed a plan on or before January 22, 2021, permanently waive the requirement for a Section 341(a) and excuse the Debtors from filing schedules and statements. Although debtors in complex chapter 11 cases routinely seek extensions of the deadline to prepare and file schedules and statements, the request to delay, and then permanently waive, the Section 341 meeting was a novel issue in the Eastern District.

Generally, section 341(a) of the Bankruptcy Code requires the Office of the United States Trustee to convene a meeting of the debtor's creditors "within a reasonable time."[6] However, section 341(e) of the Bankruptcy Code expressly allows a court to waive the requirement of a meeting of creditors altogether if a debtor has solicited acceptances of a plan prior to commencement of the case:

> Notwithstanding subsections (a) and (b), the court, on the request of a party in interest and after notice and a hearing, for cause may order that the United States trustee not convene a meeting of creditors or equity security holders if the debtor has filed a plan as to which the debtor solicited acceptances prior to the commencement of the case.[7]

Accordingly, the Debtors' prepetition solicitation of votes on the Plan triggered section 341(e) and provided the statutory authority for the Debtors' to seek a delay and subsequent waiver of the Section 341 meeting. The Debtors received approval from the Court without objection.

IV. All-Trade Vendor Relief

Like many retailers of specialized goods and services, the success of the Debtors' business hinges on their ability to timely provide quality products to their customers. Avoiding any disruption in the sourcing and delivery of those goods due to the bankruptcy filing is critical to the reorganization effort. In many complex chapter 11 cases, this manifests in the debtor filing a "critical vendor" or similar motion early in the case. This motion seeks authority from the bankruptcy court for the debtor to pay pre-petition amounts, and to continue paying post-petition amounts, to a subset of vendors and suppliers – those deemed "critical" by the debtor – in the ordinary course of business. The motion may also seek this authority subject to a cap, for the interim period or otherwise, to ensure that the debtor does not exceed a threshold of payments that might otherwise violate the traditional priority scheme of payments in a bankruptcy case.

In *Guitar Center*, the Debtors chose to forego the more standard "critical vendor" relief in favor of "all-trade vendor" relief. Under this approach, the Debtors sought authority to pay not merely a subset of their suppliers and vendors, but **all** of their suppliers and vendors, in the ordinary course of business, without regard to whether the amounts owed arose pre- or post-petition.[8] Such relief, the Debtors argued, would provide critical assurances to their suppliers and vendors in the lead-up to the busy holiday season and would permit the Debtors to successfully transition into chapter 11 with minimal business interruption. Additionally, and perhaps more importantly, the Debtors also argued that such relief would not harm any of the Debtors' other creditors or parties in interest because it would affect only the timing, and not the amount or priority, of payment since the Plan, if confirmed, contemplated the Debtors would pay all trade vendor claims in full in the ordinary course. Thus, payment to these claimants at an earlier date would not otherwise alter their treatment, or the treatment of other classes of claimants. This likely was instrumental in the seamless approval of the all-trade vendor relief being sought by the Debtors. The Debtors received approval of the motion from the Court on both an interim and final basis without objection.

V. Conclusion

On December 22, 2020, the Debtors filed a notice signifying that the effective date of the Plan had occurred and that the Debtors had successfully emerged from chapter 11 bankruptcy.[9] The remarkable results achieved by Guitar Center through its pre-packaged bankruptcy case may, and should, encourage other companies to consider a similar approach in preparing and filing cases in the Eastern District of Virginia. The pre-packaged structure permitted Guitar Center to transition into chapter 11, deleverage the company's balance sheet, and successfully emerge with minimal interruption to ongoing business operations and within one month's time. Notably, the *Guitar Center* case also was one of only three retail cases filed nationwide in which general unsecured creditors will receive a 100% recovery on their allowed claims. By any measure, the case was one of the most successful reorganizations accomplished during the ongoing COVID-19 pandemic, and it likely only could have been accomplished through the efficiencies provided by the Bankruptcy Code and approved by the Court through the pre-packaged plan process.

Endnotes

1. Hunton Andrews Kurth LLP was co-counsel with Milbank LLP in the bankruptcy cases of Guitar Center, Inc. and seven of its affiliates (the "Debtors") filed in the U.S. Bankruptcy Court for the Eastern District of Virginia, Richmond Division.

2. On November 21, 2020 (the "Petition Date"), the Debtors each commenced a chapter 11 case by filing a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

3. Bankruptcy Rule 3017(a) generally provides that "the court shall hold a hearing on at least twenty-eight (28) days' notice to the debtor, creditors, equity security holders, and other parties in interest as provided in [Bankruptcy] Rule 2002 to consider the disclosure statement and any objections or modifications thereto." Fed. R. Bankr. P. 3017(a).

4. Bankruptcy Rule 2002(b) generally provides that notice of not less than 28 days be given by mail to "the debtor, the trustee, all creditors and indenture trustees . . . of the time fixed (1) for filing objections and the hearing to consider approval of a disclosure statement . . . [and] (2) for filing objections and the hearing to consider confirmation of a . . . chapter 11 plan." Fed. R. Bankr. P. 2002(b). Under Bankruptcy Rule 3020(b)(1), objections to confirmation of a plan must be filed and served "within a time fixed by the court." Fed. R. Bankr. P. 3020(b)(1).

5. Local Bankruptcy Rules 3016-1(B) and (E) require objections to the disclosure statement and plan, respectively, be filed with the Court no later than seven (7) days prior to the date set for the hearing. Local Bankr. R. 3016-1(B),(E).

6. 11 U.S.C. § 341(a).

7. 11 U.S.C. § 341(e).

8. After informal discussions with the Office of the United States Trustee, the Debtors agreed to a $97.4 million cap on such payments for the interim period, pending approval from the Court on a final basis.

9. The Reorganized Debtors continue to administer these bankruptcy cases jointly under the lead case of Guitar Center Holdings, Inc., Case No. 20-34657 (KRH), and will continue to do so until these cases are fully administered.

New Claim in Town: CARES Forbearance Claims under Section 501(f)

By Caleb Chaplain[1]

Nestled away on page 2036 of the Consolidated Appropriations Act, 2021,[2] new subsection (f) of section 501 of the Bankruptcy Code became law for a year on December 27, 2020.[3] This new subsection establishes the legal framework for the newly created and aptly named "CARES forbearance claim." Section 501(f)(1)(A) defines the term as "a supplemental claim for the amount of a Federally backed mortgage loan[4] or a Federally backed multifamily mortgage loan[5] that was not received by an eligible creditor during the forbearance period of a loan granted forbearance under section 4022 or 4023[6] of the CARES Act."[7]

Sixty-three percent of outstanding mortgage debt is eligible for forbearance under the CARES Act.[8] If debtors in bankruptcy are representative of the general population, then the amount of mortgage loans that are eligible for CARES forbearance is not insignificant and accordingly CARES forbearance claims will impact many pending cases.

A supplemental claim is still a claim. Even every ingenue on the bankruptcy stage knows that a "claim" defined broadly is a "right to payment."[9] A CARES forbearance claim, therefore, still reflects a right to payment, albeit a supplemental right to payment. Its existence as a "claim" under the Bankruptcy Code triggers the applicability of several sections, and attorneys should be aware of the implications if a supplemental proof of claim is filed.[10]

This brief article simply seeks to provide an introduction to this newly important yet temporary type of claim.

Filing CARES forbearance claims

CARES forbearance claims certainly were important enough to stow away into the Consolidated Appropriations Act, 2021. The filing of a CARES forbearance proof of claim, however, is not a mandatory action for any holder of such a claim.

Section 501(f) is quite clear that "[o]nly an eligible creditor may file a supplemental proof of claim for a CARES forbearance claim."[11] "[T]he term 'eligible creditor' means a servicer[12] . . . with a claim for a Federally backed mortgage loan or a Federally backed multifamily mortgage loan of the debtor that is provided for by a plan under section 1322(b)(5)."[13] The language of section 501(f) is permissive ("may file"), leaving it to the creditor to decide whether or not to file the proof of claim. It is worth noting that although a debtor or trustee under Rule 3004 may be able to file a claim for a creditor who fails to file a proof of claim timely under Rule 3002(c) or Rule 3003(c), there seems to be no mechanism for the debtor or trustee to file a CARES forbearance claim. Filing under section 501(f) is strictly limited to the eligible creditor.

A bright spot in this procedure is the provision of information to parties in interest through the public record. Indeed, Director's Form 4100S has been developed to assist eligible creditors in communicating the relevant information.[14]

If the debtor and an eligible creditor have already agreed to either a loan modification or deferral as a means to address the forborne mortgage payments, the supplemental proof of claim must include three valuable pieces of information:

(i) the relevant terms of the modification or deferral;

(ii) for a modification or deferral that is in writing, a copy of the modification or deferral; and

(iii) a description of the payments to be deferred until the date on which the

mortgage loan matures.[15]

Eligible creditors that have already entered into a loan modification or deferral agreement, however, may not have much incentive to file a supplemental proof of claim. If the supplemental claim is not going to be paid through case administration under the plan, the filing of the supplemental proof of claim serves not much more than informational purposes. The terms of the agreement could be provided more easily through other means, such as in the agreements entered into with the debtors. In these cases, if the creditor opts to invest in filing the proof of claim, the proof of claim must comply with the statutory requirements. There will be costs associated with the completion of the form and the filing of it with the bankruptcy court. Further, some creditors may fret over a certain degree of risk in ensuring the accuracy of what is filed with the bankruptcy court. These factors may lead creditors to take refuge in the permissive language of section 501(f)(2)(A), if they have already worked out an arrangement with the debtor.

Nevertheless, there are benefits to the framework of filing CARES forbearance claims. If the debtor and the creditor have not come to an agreement on issues arising from a CARES forbearance, the filing of the supplemental proof of claim may trigger the debtor (or debtor's counsel, or the chapter 13 trustee) to look into the options to resolve the missed payments. Information on the supplemental proof of claim concerning the payments not received by the mortgage creditor during the forbearance period will facilitate a more informed decision on whether a loan modification or a deferral is in the best interests of the debtor. What is more, the information will assist chapter 13 debtors in deciding whether plan modification to provide for the missing payments is feasible or desirable.

Chapter 13 Plan Modification

CARES forbearance claims arguably have the most significant import in the chapter 13 context, particularly as to plan modification. If a proof of claim evidencing a CARES forbearance claim is filed, a debtor may seek modification of a confirmed chapter 13 plan to provide for the proof of claim under new subsection (e) of section 1329.[16] Requests for plan modification to provide for these claims, however, is not limited to just the debtor. Nor is non-debtor modification of a confirmed plan under section 1329(e) limited to requests from the trustee or the holder of an allowed unsecured claim in the way that modification under section 1329(a) is restricted.

If the debtor does not seek to modify the plan to provide for the claim within 30 days of the filing of the CARES forbearance claim, "the court, on a motion of the court or on a motion of the United States trustee, the trustee, a bankruptcy administrator, or any party in interest, may request a modification of the plan to provide for the proof of claim."[17] Now, not only can the bankruptcy court *sua sponte* require debtors to address the CARES forbearance claim in a modified plan, but more importantly secured creditors certainly may also request the chapter 13 plan be modified to provide for its supplemental claim.

This expanded breadth of potential parties moving for modification pursuant to section 1329(e), as compared to the more limited list of parties under section 1329(a), makes sense. If the debtor is unwilling to modify his plan to provide for the CARES forbearance, or if debtor's counsel can't be bothered to file such a request on behalf of his client, this provision allows for eligible creditors to have the court compel cure of the CARES forbearance claim, if practical, through the chapter 13 plan. This may provide some leverage for the eligible creditors when negotiating a loan modification or deferral of the loan payments deferred.

Debtor's counsel, nonetheless, should remain vigilant of requests to modify a confirmed plan to provide for a CARES forbearance claim from parties other than the debtor. Debtor's counsel should review and verify the terms and amounts listed in the supplemental proof of claim with their clients. Counsel should ensure that the requested modification is consistent with any agreement the debtor may have made with the creditor. The requested modification should be practical and comport with the debtor's desired intentions. If the

debtor opposes the requested modification, counsel should timely object and notice the objection for hearing.

Relatedly, chapter 13 plan modifications under sections 1329(a) and 1329(d) are both constrained by the requirements of sections 1322(a), 1322(b), 1323(c), and 1325(a) of the Bankruptcy Code.[18] No similar proviso was included in relation to plan modification under 1329(e). It remains an open question the extent to which a debtor must comply with those statutory provisions in seeking modification under section 1329(e). Be that as it may, modification under section 1329(e) should be constrained to providing for the CARES forbearance claim.

Conclusion

The COVID-19 pandemic has led to many changes in American life and law. Congress has been making and amending laws faster than Rumpelstiltskin can spin straw into gold. CARES forbearance claims have crept into the legislation and may not stick out next to more drastic alterations in the law.

Even so, knowledge of the existence of this new type of claim remains important for all bankruptcy practitioners (and judges, clerks, and law clerks). Although CARES forbearance claims may have no effect in some cases, these claims certainly will impact many debtors as they march on to the end of their case. The new framework may prove beneficial to those debtors by creating transparency and encouraging cooperation among the debtors, mortgage creditors, and other parties in interest. And if not, it will all be over within the year.

Endnotes

1. Caleb Chaplain is the career law clerk to the Honorable Rebecca B. Connelly of the U.S. Bankruptcy Court for the Western District of Virginia. The views expressed in this article are those of the author and not of the U.S. Bankruptcy Court for the Western District of Virginia.

2. Pub. L. No. 116-260, 134 Stat. 1182 (2020).

3. One year after the effective date of the Consolidated Appropriations Act, 2021, section 501(f) will be stricken from the Bankruptcy Code. *Id.* § 1001(d)(3), 134 Stat. at 3218. If the sunset is not further extended, the CARES forbearance claim will fade away in the final days of 2021.

4. "Federally backed mortgage loan" has the meaning given the term in section 4022(a) of the CARES Act. 11 U.S.C. § 501(f)(1)(C); *see* 15 U.S.C. § 9056(a)(2).

5. "Federally backed multifamily mortgage loan" has the meaning given the term in section 4023(f) of the CARES Act. 11 U.S.C. § 501(f)(1)(D); see 15 U.S.C. § 9057(f)(2).

6. Section 4022(b) of the CARES Act provides that "[d]uring the covered period, a borrower with a Federally backed mortgage loan experiencing a financial hardship due, directly or indirectly, to the COVID-19 emergency may request forbearance on the Federally backed mortgage loan, regardless of delinquency status." 15 U.S.C. § 9056(b)(1). Section 4023(a) provides similar relief for a multifamily borrower with a Federally backed multifamily mortgage loan. *Id.* § 9057(a).

7. 11 U.S.C. § 501(f)(1)(A).

8. *CRS: Forbearance Options Not Ideal If Coronavirus Impact Is 'Prolonged'*, 2869 FED. BANK. L. REP., May 28, 2020, at 10, 2020 WL 3274215.

9. See 11 U.S.C. § 101(5).

10. Because CARES forbearance claims are claims, unless a party in interest objects, if a proof of claim is filed under section 501(f), the supplemental claim is deemed allowed. *Id.* § 502(a).

These supplemental claims undoubtedly will be filed well outside the bar date. Yet, fear not, eligible creditor, as Congress has addressed the potential objection to a CARES forbearance claim based on its untimely filing after the bar date. Amended subsection 502(b)(9) accompanied new subsection 501(f)'s installation, albeit on page 2037 of the Consolidated Appropriations Act, 2021. The amendment clarifies that the CARES forbearance claims "shall be timely filed if the claim is filed before the date that is 120 days after the expiration of the forbearance period of a loan granted forbearance under section 4022 or 4023 of the CARES Act." *Id.* § 502(b)(9)(C). This is not excellent news for those holders of CARES forbearance claims for which the 120-day time period following the expiration of the forbearance period has already lapsed.

11. *Id.* § 501(f)(2)(A).

12. "Servicer" takes on the same meaning as it is defined in section 6(i) of the Real Estate Settlement Procedures Act of 1974. *Id.* § 501(f)(1)(B); see 12 U.S.C. § 2605(i).

13. 11 U.S.C. § 501(f)(1)(B).

14. Director's Bankruptcy Forms are not required to be used on a national level. Creditors may wish to use this form instead of creating their own. But it is not out of the question that some bankruptcy courts by local rule or order may require the use of the Director's Form. The "Supplemental Proof of Claim for CARES Forbearance Claim" (Form 4100S) is available at https://www.uscourts.gov/sites/default/files/form_4100s_0221_0.pdf.

15. 11 U.S.C. § 501(f)(2)(B)(i)–(iii).

16. *Id.* § 1329(e)(1).

17. *Id.* § 1329(e)(2).

18. *Id.* § 1329(b)(1) (making sections 1322(a), 1322(b), 1323(c) and 1325(a) applicable to modification under section 1329(a)); *id.* § 1329(d)(3) (same as to modification under section 1329(d)).

The Consumer Bankruptcy Reform Act: Sweeping Changes to the Status Quo

By Christopher Flynn and Daniel Webster
Boleman Law Firm, PC

Since the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), there have been very few major changes made to the laws governing bankruptcy, but recently-proposed legislation could lead to a significant overhaul of the consumer bankruptcy system. On December 9, 2020, Congressional Democrats, led by Senator Elizabeth Warren and Representative Jerrold Nadler, introduced the Consumer Bankruptcy Reform Act of 2020 (CBRA), seeking to simplify and modernize the consumer bankruptcy system to make it easier for individuals and families forced into bankruptcy to get back on their feet.[1] This article highlights some of the most notable changes proposed in the CBRA.

A New Chapter

Under the current bankruptcy system, consumer debtors may choose between filing a case under chapter 7 or chapter 13. In chapter 7 cases, consumer debtors with nominal disposable income receive a discharge from their debts, while their non-exempt assets may be liquidated to repay their creditors.[2] In chapter 13 cases, consumer debtors propose a plan to pay their disposable monthly income to their creditors over a period of three to five years.[3] Chapter 13 debtors are also able to cure mortgage arrears, restructure car loans, and satisfy tax obligations.[4] The CBRA would eliminate the choice between chapters.

Under the CBRA, consumer debtors would no longer be eligible for a chapter 7 discharge, and Section 103 of the CBRA proposes to repeal chapter 13 in its entirety. Instead of filing a case under chapter 7 or 13, all consumer debtors with debts of less than $7.5 million would seek relief from their debts under a new chapter 10, while consumer debtors with liabilities of $7.5 million or more would need to seek relief under chapter 11.[5]

Filing for relief under chapter 10 would require debtors to file a petition with the bankruptcy court, along with paperwork disclosing information related to the debtors' assets and liabilities that is very similar to what a debtor is currently required to file. Upon filing for relief under chapter 10, debtors would receive automatic stay protection and would retain control of their property.

Credit Counseling Requirement

Currently, consumer debtors are required, with few exceptions, to complete a credit counseling course prior to filing a bankruptcy petition.[6] Failure to complete the pre-filing credit counseling course prior to the filing of a petition can result in the dismissal of the bankruptcy case. Additionally, before debtors can obtain their discharge in either chapter 7 or chapter 13 cases, they must complete a personal financial management course. The CBRA would eliminate the requirement to complete both the pre-filing credit counseling course and the personal financial management course.[7]

§ 341 Meetings of Creditors

Within 30 to 45 days of filing for relief under chapter 7 and chapter 13, 11 U.S.C. § 341 requires debtors to attend a meeting of creditors in order to be examined under oath by the trustee of their bankruptcy estate and their creditors regarding the information in their schedules and statements filed

with the court. Before the COVID-19 pandemic, these meetings were usually held in person. Additionally, debtors are assigned a meeting date and time, rather than having the ability to schedule their own meeting date and time. Under the proposed CBRA, the § 341 meeting of creditors would no longer be held in person.[8] Instead, debtors would attend their meetings remotely via conference call or videoconference, which keeps in place a temporary change instituted as a result of the COVID-19 pandemic and the nationwide quarantine that followed.[9] Furthermore, debtors would have the ability to choose the date and time of their meeting in order to avoid conflicts with their work schedule.[10]

Chapter 10 Plans

One of the most significant changes proposed by the CBRA relates to the plan of reorganization. Under the current bankruptcy system, debtors who file a case under chapter 13 file one repayment plan that attempts to address nearly all of their liabilities.[11]

The CBRA would allow debtors to address their debts in a more piecemeal fashion by filing multiple plans that each address only specific categories of debt.[12] Under Chapter 10, there would be three types of plans—a Repayment Plan, a Residence Plan, and a Property Plan—and debtors would be allowed to file one or more of these plans.[13]

Repayment Plans

The "Repayment Plan", found in Section 1022(a), functions to address unsecured debts. Under the current bankruptcy system, chapter 7 debtors receive a discharge of unsecured debts without filing any plan, and chapter 13 debtors propose one plan that, in part, proposes to pay a dividend to unsecured creditors over a term of 36 to 60 months. The amount of the dividend is usually based on either a liquidation analysis–the amount creditors could receive from the sale of unexempt assets if the debtor filed under chapter 7–or the debtors' monthly disposable income, as determined by the means test.[14]

Section 1022(a)(1)(A)(i) of the CBRA states that under the new Repayment Plan, "the debtor shall satisfy the minimum payment obligation." Section 104(a)(54) defines the "minimum payment obligation" as the lesser of the allowed unsecured claims or the value of the debtor's interest in non-exempt property. It goes on to instruct that, if the debtor's income relative to her household size is in excess of 135% of the median household income in that region, that excess determines the amount of the debtor's minimum payment obligation under the plan. Therefore, despite being phrased differently, the CBRA's formula for determining the baseline minimum payments to unsecured creditors would still be based on a liquidation and/or a disposable income analysis. However, it is likely that, in most cases, the amount to be paid under the CBRA would be quite different than what would be required under the current bankruptcy system.

First, with respect to the liquidation analysis, the CBRA includes changes to federal exemptions that would be considerably more generous to debtors than the exemptions provided for in the current bankruptcy code.[15] By taking advantage of the increased exemptions, debtors would likely be required to pay considerably less to unsecured creditors than they would have under the current bankruptcy system. Most notably, the CBRA increases the federal wildcard exemption from $13,900 to $35,000, and does not allow states to opt out of the federal exemptions.[16]

Second, the new test for determining debtors' disposable income would also be much more advantageous to debtors. Under the current chapter 13 structure, the disposable income analysis often results in debtors who earn gross income even slightly above the median income threshold being required to pay significant amounts to their unsecured creditors. Under the CBRA, the minimum payment obligation does not arise until debtors are earning over 135% of the median income.[17] Additionally, unlike the current bankruptcy system, the CBRA does not focus on the reasonableness of debtors' expenses.[18]

Even in scenarios in which a debtor's income exceeds 135% of the median, the minimum payment obligation would often still be affordable if the debtor's income is close to the threshold because the CBRA would require only a portion of the excess income be paid to unsecured creditors. For example, Section 104(a)(54)(B)(ii) of the

CBRA provides that individuals whose income exceeds 135% of the median income by less than $10,000 are required to pay only 15% of the excess to unsecured creditors.[19] In Virginia, the current median annual income for a household of one is $64,079, 135% of which is $86,506.65.[20] Under the proposed CBRA, a hypothetical debtor earning $90,000 annually would therefore be required to pay only $524.01 to her unsecured creditors.

As is a theme of the CBRA, the situation is different for debtors who earn well above the median threshold. Debtors whose income exceeds 135% of the median income by more than $50,000, but less than $100,000, would be required to pay a baseline of $19,500, plus 75% of the excess over $50,000.[21] For example, a hypothetical debtor earning $145,000 annually would be required to pay up to $25,870.02 to her unsecured creditors.

The Repayment Plan requires debtors to make monthly payments to a trustee.[22] Unlike current chapter 13 plans, which must provide for a repayment term between three and five years, the CBRA's Repayment Plan would require payments to be made in 36 equal installments unless debtors can demonstrate good cause as to why their payments must be irregular.[23] For example, a debtor with seasonal employment or income may need to make irregular payments.

Under Section 1031 of the CBRA, chapter 10 debtors with a minimum payment obligation of zero would be eligible for an immediate discharge, whereas debtors with a positive minimum payment obligation would not become eligible for a discharge until the confirmation of their plan.

Residence Plans

The second type of plan proposed in the CBRA can be found in Section 1022(b), and is called the "Residence Plan". The Residence Plan would allow chapter 10 debtors to address debts secured by their real estate. Under the current bankruptcy system, chapter 13 debtors may continue to make their regular ongoing post-petition monthly mortgage payments, and cure any pre-petition arrearage through their chapter 13 plan payments.[24] In some instances, chapter 13 debtors may satisfy their mortgage loan in full through their chapter 13 plan.[25] The Residence Plan would make small changes to this approach.

Under the Residence Plan, chapter 10 debtors would not tender funds to a trustee. Instead, Section 1026 of the CBRA instructs debtors to make payments directly to the lienholder. Section 1022(b)(2) allows for the curing of arrears, but unlike current chapter 13 plans, which must specify the duration of the plan, CBRA's Residence Plans would require only that arrears be cured within "a reasonable period of time".

Finally, in current chapter 13 cases, if debtors fail to make any post-petition mortgage payments, either directly to the lender or indirectly through the plan, there are no restrictions on a lienholder's ability to immediately file a motion for relief from the automatic stay or a motion to dismiss a bankruptcy case.[26] That would change under the CBRA. Specifically, Section 1024(c)(6) of the CBRA provides that debtors would not be in default until they are 120 days late on a plan payment or mortgage payment.

Property Plans

The third type of plan proposed in the CBRA is found in Section 1022(c), and is referred to as a "Property Plan". Debtors would utilize the Property Plan to address liens against their personal property, such as motor vehicles. Under the current bankruptcy system, debtors may address liens encumbering their personal property by restructuring those loans in their chapter 13 plan, by continuing to make their contractual payments directly to the lienholder, or by surrendering the collateral.[27]

Section 1026 of the CBRA provides that debtors filing a Property Plan must tender payments directly to the lienholder for a period of five years or until the stated maturity date of the debt, whichever is longer. Additionally, the CBRA would dramatically reduce the length of time debtors must wait before they can "cram down" a loan secured by a motor vehicle. While the current bankruptcy code only allows motor vehicle loans open for at least 910 days to be crammed down[28], under Section 1024(d)(1)(B) of the CBRA, motor vehicle loans that have been open for only 90 days would qualify.

One area where the CBRA may be more

restrictive than the current bankruptcy code is in the limitations it places on debtors' treatment of certain personal property through a Property Plan. Under the current chapter 13 structure, debtors may propose a plan that provides for the payment of multiple motor vehicle loans as well as luxury items, such as boats or campers, but they may also have to pay a higher dividend to unsecured creditors in order to get the plan confirmed. Under chapter 10, debtors may not be afforded the same liberties. Section 1024(d)(2) of the CBRA instructs that motor vehicles to be paid through a plan must be regularly used by the debtors or their dependents as a means of transportation. Furthermore, Section 1024(d)(3) states that any personal property to be paid for through the plan must be reasonably necessary for the support and maintenance of the debtors or their dependents.

Conclusion

The proposed sweeping reforms to the current bankruptcy system set forth in the CBRA are an attempt to make bankruptcy more streamlined for consumers, to allow debtors to address only debts that they need to, to close loopholes for abuse of the system by wealthy filers, and to reduce disparities in the demographics of filers.[29] From the proposed complete overhaul of the current structure of repayment plans to the targeted changes to the exemptions, these goals shine through clearly. There is often a very long and winding road between a proposed bill and a law going into effect, and the eyes of the bankruptcy world will be closely monitoring the path the Consumer Bankruptcy Reform Act takes.

Endnotes

1. Caleb Consumer Bankruptcy Reform Act, S. 4991, 116th Cong. (2020).
2. 11 U.S.C. §704.
3. 11 U.S.C. §1322
4. 11 U.S.C. §1322.
5. Consumer Bankruptcy Reform Act, S. 4991, 116th Cong. (2020).
6. 11 U.S.C. §109(h).
7. 11 U.S.C. §§ 727, 1328.
8. Consumer Bankruptcy Reform Act, S. 4991, 116th Cong. §309(p) (2020).
9. Id.
10. Id.
11. 11 U.S.C. §1322.
12. Consumer Bankruptcy Reform Act, S. 4991, 116th Cong. §101 (2020).
13. Consumer Bankruptcy Reform Act, S. 4991, 116th Cong. §1022 (2020).
14. 11 U.S.C. §1325.
15. Consumer Bankruptcy Reform Act, S. 4991, 116th Cong. §309(f) (2020).
16. 11 U.S.C. § 522(d)(5) and Consumer Bankruptcy Reform Act, S. 4991, 116th Cong. §309(ff) (2020).
17. Consumer Bankruptcy Reform Act, S. 4991, 116th Cong. §309(a)(54) (2020).
18. Consumer Bankruptcy Reform Act, S. 4991, 116th Cong. §309(a)(54) (2020).
19. Consumer Bankruptcy Reform Act, S. 4991, 116th Cong. §104(a)(54)(B)(ii) (2020).
20. United States Census Bureau, Median Family Income By Family Size.
21. Consumer Bankruptcy Reform Act, S. 4991, 116th Cong. §104(a)(54)(B)(ii) (2020).
22. Consumer Bankruptcy Reform Act, S. 4991, 116th Cong. §1025 (2020).
23. Consumer Bankruptcy Reform Act, S. 4991, 116th Cong. §1022 (2020).
24. 11 U.S.C. § 1322.
25. 11 U.S.C. § 1322.
26. 11 U.S.C. § 362(d).
27. 11 U.S.C. § 1322.
28. 11 U.S.C. § 1325.
29. Consumer Bankruptcy Reform Act, S. 4991, 116th Cong. § 101 (2020).

Clerk's Corner

James W. Reynolds
United States Bankruptcy Court
Western District of Virginia

New Chief Bankruptcy Judge – Western District of Virginia

Judge Black has been appointed the new chief judge of the U.S. Bankruptcy Court for the Western District of Virginia. In the Western District, chief bankruptcy judges are appointed for seven (7) year terms. Judge Connelly completed her term as chief judge on January 2, 2021. Judge Black's term will run to January 2, 2028.

7th Annual Western District of Virginia Bankruptcy Conference – Save the Date

Last year we had to cancel the bankruptcy conference due to the COVID-19 pandemic, so we are extremely pleased to announce that the conference will be held this year on June 4, 2021. And because we are still grappling with the pandemic, the conference will be conducted by live video. As in prior years, Judge Black and Judge Connelly will be among the many well-qualified and experienced speakers. This conference is an excellent opportunity for attorneys and their staff to discuss current developments and best practices with the Western District Judges, other practitioners, and chapter 7 and 13 trustees. Please save the date, and additional information will be provided.

COVID-19 Issues

In response to the COVID-19 pandemic, the Western District implemented a reopening plan that consists of 4 phases. A copy of the plan can be found on the Court's website. On June 11, 2020, the Western District implemented phase 1 of the plan. Under phase 1, all hearings are conducted either by video or telephone, unless the Court orders otherwise for exigent circumstances only. Additionally the clerk's office is closed to the public with reference to in-person service. People requiring assistance can continue to contact the clerk's office by telephone or email (cmhelpdesk@vawb.uscourts.gov).

It is anticipated that the Court will remain in phase 1 through April – at least. Thereafter, the Court may move to phase 2 under the reopening plan. Meanwhile, the Court has entered several standing/general orders to assist counsel and the public. A copy of these orders can be found on the Court's website by clicking on the COVID-19 banner. For example, because social distancing is such a crucial component of reducing COVID-19's spread, the Court has temporarily suspended the requirement for counsel to obtain original signatures from debtors for electronic filings. The suspension is conditioned upon the attor-

ney, prior to filing the subject pleading, either (a) obtaining the debtor's digital signature via any commercially available digital signature software that provides signature authentication and maintaining a copy of the digitally signed document(s) in the debtor's case file or (b) obtaining express written permission from the debtor to affix the debtor's signature to the document(s) and maintaining a copy of the writing in the debtor's case file.

COVID-19 / Meetings of Creditors

For the purposes of maintaining social distancing, the Office of the U.S. Trustee in the Western District has been conducting all section 341 meetings of creditor by telephone. That will continue for the foreseeable future. The instructions and procedure for participating in meetings of creditor can be found on the Court's website by clicking on the COVID-19 banner. A list of the call-in phone numbers for each trustee with the corresponding access codes can also be found by clicking on the COVID-19 banner on the Court's website.

Bankruptcy Filings / Statistics

The COVID-19 pandemic has broken all the rules of what we once considered normal – like walking around the neighborhood in your underpants. Wait, I still do that. Never mind. What I meant to say is that it has broken all the rules of what we consider normal in bankruptcy.

Despite the historic economic turmoil, which resulted in a dramatic increase in unemployment, in 2020, bankruptcy filings nationally decreased by nearly 30% from 2019 to 2020. In 2019 there were 774,940 total bankruptcy filings (22,780 were business filings and 752,160 were non-business). In 2020 there were 544,463 total bankruptcy filings (21,655 were business filings and 522,808 were non-business).

There are several possible reasons for this surprising and significant decrease. In 2020 Congress passed legislation that provided short-term fiscal relief, including enhanced unemployment compensation and legal protections against some foreclosures, evictions, and repossessions. Many of those benefits have expired or will be expiring soon, and consumers may find themselves owing months and months of rent, mortgage and/or car payments. As a result, it is difficult to see this downward trend continuing for much longer.

There was only one category of bankruptcies that actually increased last year. That was chapter 11 reorganizations for large businesses (frequently in the retail sector). Between 2019 and 2020, those cases increased by slightly more than 19% (from 6,808 in 2019 to 8,113 in 2020). That is a trend that could continue well into 2021 and perhaps beyond.

In the Western District, we also experienced a significant decrease in bankruptcy filings over the last year. In 2019 there were 5,561 total bankruptcy filings. In 2020 there were 3,804 total filings.

Case Summaries[1]

By Kelly Barnhart, Esq.

Recent Supreme Court Cases

***City of Chicago v. Fulton*, 392 U.S. ___ (2021) (Alito, J.)**

Background: Four cases went to the Seventh Circuit Court of Appeals regarding unpaid parking fines owed to Chicago. In each case, the vehicles had been impounded pre-petition and despite subsequent bankruptcy cases being filed by the owners of the vehicles, Chicago would not release the cars unless the fines were paid. After the various chapter 13 cases were filed, the debtors requested the cars to be returned, but the City refused to release them until the fines and other charges were paid in full. The debtors initiated contempt proceedings against Chicago, arguing that the City had violated the automatic stay in refusing to return the cars until the fines were paid. The City was held in contempt, resulting in the return of the cars, but the City also appealed. The Seventh Circuit upheld the Bankruptcy Courts, concluding that the City had violated the automatic stay by keeping the cars after the bankruptcy cases had been filed. The City filed its petition with the Supreme Court, which was granted to address the circuit split on the issue. The Second, Seventh, Eighth, Ninth and Eleventh Circuits had ruled that creditors had an affirmative duty to turn over repossessed property following bankruptcy cases being filed, while the Third, Tenth and D.C. Circuits held that retaining the vehicles maintained the status quo and that there were no affirmative actions by the creditors to be the basis for stay violations.

Holding: Vacated and remanded. In an 8 – 0 decision, the Supreme Court held that retaining property does not violate the automatic stay. For there to be a violation of the stay, a party must have committed an affirmative act that would disturb the status quo of the estate property and retaining the property was not such an act.

Recent District Court Cases

***Fedewa v. JPMorgan Chase Bank, N.A. (In re Fedewa),* 2021 U.S. Dist. LEXIS 11641 (W.D. Va. Jan. 21, 2021) (Brinkema, J.)**

Background: Debtors filed two appeals from decisions rendered by the Bankruptcy Court, which were joined by the District Court because the facts and legal issues overlapped. In the first one, the debtors appealed the Bankruptcy Court's dismissal of their adversary proceeding on res judicata grounds and the denial of a motion for reconsideration of the dismissal. In the second appeal, they appealed the Bankruptcy Court's denial of their motion to remand the adversary proceeding to state court.

Holding: Both decisions affirmed. As to the first appeal, because the debtors had already challenged Chase's authority to foreclose on their home in at least 5 other proceedings, the Bankruptcy Court properly dismissed the complaint based upon res judicata. The District Court concluded the doctrine applied because there was (1) a final judgment on the merits in the prior matters; (2) there was identity of the cause of action in the suits and (3) the identity of the parties were the same or in privity. As to the second appeal, the District Court found that the Bankruptcy Court properly applied the factors identified in In re Ahearn and did not abuse its discretion by giving weight to the litigation history and its own experience with the parties. Finally, the District Court concluded the Bankruptcy Court properly denied the requests for reconsideration.

Recent Bankruptcy Cases

***In re E. Coast Custom Coaches, Inc.*, 2020 Bankr. LEXIS 3475 (Bankr. E.D. Va. Dec. 11, 2020) (Kindred, J.)**

Background: Pre-petition, the debtor was a corporation that bought motor trailers and converted them into food trucks. The debtor's principals included Mr. Bocock, as the President and CFO, and Mr. Tipton, Vice President of Operations. In early 2016, Messrs. Bocock and Tipton met with Mr. Snyder regarding the company's growth and its tech capabilities. Mr. Snyder became a minority shareholder in the company and a member of the Board of Directors. Mr. Snyder also made two loans to the company, totaling $500,000, and he was given a blanket lien on the company's assets. The balance sheet in 2016 reflected no debt. In 2017, a balance sheet was provided to Mr. Snyder reflecting $450,000 in debt and a dispute arose between the company and Mr. Snyder, and Mr. Snyder declared his loans in default (and he resigned from the board).

Litigation was initiated in state court, when Mr. Snyder filed suit against the company for breach of contract, and the company filed a counterclaim suit against Mr. Snyder for breach of fiduciary duty. During the litigation, Mr. Snyder learned the company's debts were approximately $2 million. A jury trial was conducted, and a judgment was awarded to both sides, and the judgment order included Mr. Snyder's objection that the judgments were not setoff against one another. He also appealed the judgment against him, posted a bond and asked that the judgments be offset which request was denied and a final order entered. Although the Virginia Supreme Court declined to hear the appeal, the bond continued to be held at the time the bankruptcy case was filed.

Various creditors of the company filed an involuntary petition against it. The petition was not contested and an order for relief was entered. The debtor's schedules, among other things, listed a debt owed to Mr. Snyder of approximately $620,000 and a judgment against him. Mr. Snyder filed an amended claim for approximately $746,000. The chapter 7 trustee made demand on Mr. Snyder to pay the judgment against him and in response, he filed a motion for relief from the automatic stay to allow him to offset the judgment against the judgment owed to him by the company, to which the trustee filed a response. Both sides submitted summary judgment motions on the issue of setoff.

Holding: Summary judgment motion filed by trustee granted and request for setoff denied. The state court had already considered and denied the request for a setoff and there was no basis to revisit that issue. In addition, the Bankruptcy Court concluded that Mr. Synder's claimed lien on the judgment was inferior to the trustee's interest in the judgment under § 544 because Mr. Snyder had not properly attached and perfected the lien.

***In re Perdomo*, 2020 Bankr. LEXIS 3339 (Bankr. E.D. Va. Nov. 25, 2020) (Kenney, J.)**

Background: Individual debtor filed for chapter 7 relief. The chapter 7 trustee sought to employ counsel, who represented a creditor of the debtor and the debtor's related entities, which employment was approved. That creditor, Ally, objected to the entry of a discharge in the debtor's case. The trustee, through counsel, also filed an adversary proceeding against several companies related to the debtor or the debtor's company. As part of that suit, the trustee sought a temporary restraining order and a preliminary injunction, which gave the trustee some control over the debtor's companies and imposed strict reporting requirements and limited the use of funds. Prior to the trial, the trustee, along with Ally, filed a joint motion to approve a settlement. The settlement agreement between the debtor, the trustee, Ally, and the debtor's company, proposed that the debtor and his company would pay $1.45

million by the end of 2021 and pledge certain collateral and that after approval of the settlement, the adversary proceeding would be dismissed with prejudice. The Court conducted a hearing on the motion to approve the proposed settlement and denied approval because the Court concluded that it violated the public policy in that it called for/allowed the debtor to buy a discharge. The trustee filed a motion for reconsideration.

Holding: Motion denied. The Court concluded that there was no manifest injustice in denying the motion, since neither the U.S. Trustee nor any creditors were given a chance to be substituted as a party as the plaintiff in the § 727 action.

***Gillespie-Brooks v. Midland Funding, LLC (In re Thomas),* 2020 Bankr. LEXIS 3019 (Bankr. E.D. Va. Oct. 28, 2020) (Connelly, C.J.)**

Background: In a chapter 13 bankruptcy case, the debtor initiated an adversary proceeding to challenge claims, filed by certain creditors, pursuant to FDCPA, arguing that the creditor filed claims falsely reporting that the amount claimed was entirely principal although it included interest, fees, and costs, in an effort to avoid having to disclose them pursuant to Fed. R. Bankr. P. 3001. After a challenge to the sufficiency of the complaint as filed, the Court ruled that the first count did sufficiently plead a cause of action but that the second count was not specific as to the relief requested pursuant to Fed. R. Bankr. P. 3001 and failed to state a claim. Leave was granted to amend.

The debtor amended the complaint and the defendants moved to dismiss and to compel arbitration. The Court granted the motion as to one count, denied it as to other counts, and denied the motion to compel. In the answer filed, they deny the allegations contained in the complaint, but then also noted they had filed amended claims and that those complied with Fed. R. Bankr. P. 3001 and further argued that any violations of the rule as to the original claims did not subject them to sanctions or consequences. Defendants moved for partial summary judgment.

Holding: Motion denied. The creditor was not entitled to summary judgment and while determinations of allowed amount of a claim were addressed through Fed. R. Bankr. P. 3001, actions to address deliberate false representations made in connection with collection in bankruptcy did not fall under this Rule and therefore it could not provide the exclusive method to remedy any misconduct and could violate FDPCA. Finally, the Court held that the claims of the debtor were not precluded by the claims-administration process.

***In re Reed,* 2020 Bankr. LEXIS 3440 (Bankr. E.D. Va. Dec. 9, 2020) (Santoro, C.J.)**

Background: Prior to filing for chapter 13 relief, the debtor owned two pieces of real estate, but given her financial situation, she determined she would need to sell one property and reside at the other. She received an offer on the property initially listed for sale, but then reconsidered the sale and decided to relocate to the property that was initially listed for sale and instead pursue a sale of her residence. At this time, she met with her brother, Mr. Reed, the owner of Planet Plumbing, LLC ("Planet"), with respect to completing renovations on the property and asked that they be done quickly so the residence could be put on the market. Through texts and emails, it was clear that the debtor decided she would renovate the rental property and place the residence for sale. In those emails, she made it clear that she intended to pay for the work. Her sister-in-law, the bookkeeper for Planet, explained that the work could be extensive and expensive and that the work would cost more than what Planet had in its account. The debtor indicated she wanted the place to just be "livable" and that the renovations would not take long. The debtor believed she had sufficient equity in the residence that could be realized through its sale and those funds would be used to pay Planet. Unfortunately for

all involved, the work was more than originally contemplated and cost substantially more than the debtor would pay. After the work was completed, the debtor did not pay, and Planet filed suit against her. She filed for bankruptcy relief while the state court matter was pending.

In her chapter 13 case, debtor filed an objection to claim and an objection to the amended claim filed by Planet, arguing that the attachments to the claims did not provide any substantive information as to the basis for the debt and that the amended claim did not provide any information on how interest was determined or the legal basis for allowing it. The Court conducted a trial on the objections and received evidence through testimony and exhibits. Following trial, the Court ordered post-trial briefs.

Holding: Objection sustained in part, denied in part. Given that there was no written contract, the Court was left to consider whether the various emails and texts evidenced an offer and an acceptance of that offer. The Court concluded that Planet failed to prove, by a preponderance of the evidence, that the claim should be allowed on the basis of breach of an express contract. However, the Court found that Planet had a right to payment under a quantum meruit theory. The Court noted that even if a contract implied in fact did not exist, which it did, then it would be able to imply a contract on the basis of unjust enrichment. While parties may use these concepts interchangeably, each theory has a different remedy and a different method for measuring recovery. The Court allowed the claim up to the amount expended on the job but did not permit pre-judgment interest to be included on the claim.

***In re Le Tote, Inc.*, 2020 Bankr. LEXIS 3044 (Bankr. E.D. Va. Oct. 30, 2020) (Phillips, J.)**

Background: Wilmington Trust, National Association (the "Lender") sought entry of an order compelling payment of rent and to assertion of related rights under, and with respect to, a master lease, as it was the holder of a commercial mortgage-backed securities loan made to, among others, various landlords of the debtors. In the motion, the Lender argued that it had standing as a third-party beneficiary, to compel the debtors to pay rents and other sums due to the various landlords under the Master lease, which was the collateral for its loan. The landlords and the debtors opposed the motion.

Holding: Motion denied. The master lease did not refer to the Lender, its predecessor, or any other potential third-party beneficiary, and therefore, the Lender did not have standing to pursue the relief it requested.

***In re Shannon*, 2021 Bankr. LEXIS 267 (Bankr. W.D. Va. Feb. 4, 2021) (Connelly, C.J.)**

Background: While state court litigation was pending, the debtor initiated a bankruptcy case under chapter 7 and immediately thereafter the other party to the state court litigation sought to have the case dismissed as a bad faith filing, or in the alternative, to allow the state court litigation to continue. The Bankruptcy Court granted relief from the stay to continue with the litigation. A judgment was entered against the debtor, and the creditor initiated an adversary proceeding against the debtor, asking the Bankruptcy Court to find that the debt owed to him was nondischargeable pursuant to § 523(a)(2), (4), and (a)(6). The plaintiff argued that the state court decided all issues material to determining the dischargeability of the debt owed to him by the debtor and asked the Court to enter judgment against the debtor because he was collaterally estopped from contesting the basis of the liability. The debtor did not dispute that the underlying state court litigation resulted in a judgment against him based on fraud, negligent representation, constructive fraud, and breach of fiduciary duty but argued that the jury verdict did not specify which facts gave rise to the findings and thus he is not estopped from litigating the matter before the Bankruptcy Court. The plaintiff moved for summary

judgment and the defendant contested such relief.

Holding: Motion granted. The elements for collateral estoppel were met given that: (a) the debtor was afforded an opportunity to obtain a full and fair adjudication of the issues in the state court litigation; (b) the debtor was a party to the state court litigation; (c) final judgment on the merits was issued in the state court litigation; and (d) the § 523 issues before the Bankruptcy Court were identical to those decided by the state court.

***In re Sultan*, 2021 Bankr. LEXIS 20 (Bankr. E.D. Va. Jan. 7, 2021 (Kenney, J.)**

Background: The Bankruptcy Court issued an order to show cause as to why the chapter 7 debtor's bankruptcy case should not be dismissed for his failure to timely complete the required credit counseling course. While his petition certified that he had completed the course before the filing of the case, the credit counseling certificate showed that the course was completed after the case was filed.

Holding: Case dismissed because of the failure to complete the credit counseling pre-petition and while the debtor argued that certain amendments to §109(h)(1) in 2010 may have changed the requirement, the Bankruptcy Court rejected that argument. The case was dismissed without prejudice.

***In re Wetter*, 620 B.R. 243 (Bankr. W.D. Va. 2020) (Black, J.)**

Background: The debtor filed for chapter 7 relief, after becoming personally liable on several of his dentistry practice's debts that he had guaranteed, which liability stemmed from his practice's filing for chapter 11 relief. While he indicated that his case was a "no asset" chapter 7 case on his petition, he had various assets, including an interest in a limited liability company, which the debtor valued at almost $2 million, held with his wife as tenants by the entirety. Following issuance of the discharge, the chapter 7 trustee initiated an adversary proceeding against the debtor, concerning the transfer of his sole interest, in the limited liability company, to him and his wife, as tenants by the entirety. The U.S. Trustee also filed an adversary proceeding, requesting revocation of the discharge. As part of that matter, the debtor ultimately admitted a key fact as to the transfer, and later amended his bankruptcy schedules to reflect the transfer. The Chapter 7 debtor then sought to convert case to one under chapter 11 in order to elect Subchapter V status. The chapter 7 trustee filed an objection, joined by two creditors. The Court conducted evidentiary hearings on the motion and objections.

Holding: Motion denied; objections sustained. Given the debtor's past actions and behavior, the request to convert was denied. The Court noted that if the case were to be converted to a chapter 11, it would not extend the time for the debtor to file a plan as required by § 1189(b), given the debtor's conduct based on the evidence presented at trial.

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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 http://www.vsb.org/site/sections/bankruptcy. 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, **Hannah Hutman**, at **540-433-2444** or any of the Board of Governors.

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 **Hannah Hutman** at **540-433-2444**.

MEMBER BENEFITS: CHECK OUT THE CASE NOTES UPDATES ON THE WEBSITE

As a member of the Bankruptcy Section of the Virginia State Bar, you are provided with summaries of the recent written opinions of the Judges in the Eastern District and Western District of Virginia. You can access these summaries at the Case Notes tab of the Bankruptcy Section page of the Virginia State Bar website or by clicking on the following link: http://www.vsb.org/site/sections/bankruptcy/case-notes. The Case Notes section will be updated regularly.

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Virginia State Bar Bankruptcy Law Section 2020-2021 Board of Governors

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