

TBBA

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President: James L. Pedigo, Jr.

Newsletter Chair: Ce'ann Weschler

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Greetings!

It has been an exciting year with a new judge taking the bench, a new Chapter 13 Trustee taking the reigns and an economy that is making bankruptcy law very relevant and newsworthy. In an effort to make our newsletter more relevant and newsworthy we are always interested in contributions from TBBA members whether it be legal articles, case law updates, practice pointers or just interesting information. If you would like to make a submission please forward it to: Ce'ann Weschler at cecelia.a.weschler@usdoj.gov.

Practice Notes

Savvy practitioners have asked that we alert the bar to certain duties some may have overlooked.

First, as of October 15, 2007, all divisions of the Eastern District now require chapter 13 debtors to certify and file the Debtor's(s') Certification of Compliance With 11 U.S.C. § 1328. The form is available on the Court's web site, Form [crtc1328.pdf](#). Among other things, the debtor or debtors must certify under penalty of perjury the following:

"I/We have not received a discharge in another Chapter 7, 11, or 12 bankruptcy case that was filed within 4 years prior to the filing of this Chapter 13 Bankruptcy. I/We have not received a discharge in another Chapter 13 bankruptcy case that was filed within 2 years prior to the filing of this Chapter 13 Bankruptcy."

Also, don't neglect to comply with the Order Upon Conversion of Chapter 13 to Chapter 7. The Order imposes several duties upon debtors and their counsel, including filing, within 15 days after conversion, either a schedule of unpaid debts incurred after commencement of the original bankruptcy case, and a list of creditors or a certification that no unpaid debts have been incurred since the commencement of the case; and a chapter 7 Means Test, for cases filed on or after 10/17/05. The Conversion Order requires the debtor(s) to file a Statement of Intention, if required, within 30 days after the conversion or before the date set for the meeting of creditors in the converted case, whichever is earlier.

The Conversion Order also imposes additional duties on debtors whose plans have been confirmed and on employers who have been making payroll deductions for the benefit of the chapter 13 trustee. [Find out more...](#)

APPOINTMENT TO PANEL OF CHAPTER 7 TRUSTEES

The Office of the United States Trustee is seeking resumes from persons wishing to be considered for appointment to the panel of trustees who administer cases filed under chapter 7 of the bankruptcy code.

The appointment is for cases filed in the United States Bankruptcy Court for the

Eastern District of Virginia, Norfolk/Newport News Divisions. Chapter 7 trustees receive compensation and reimbursement for expenses in each case in which they serve, pursuant to court order under 11 U.S.C. § 330 and § 326. Please note this is not a salaried position.

The minimum qualifications for appointment are set forth in Title 28 of the Code of Federal Regulations at Part 58. To be eligible for appointment, an applicant must possess strong administrative, financial and interpersonal skills. Fiduciary experience or familiarity with the bankruptcy area is desirable but not mandatory. A successful applicant will be required to undergo a background check, and must qualify to be bonded. Although chapter 7 trustees are not federal employees, appointments are made consistent with federal Equal Opportunity policies, which prohibit discrimination in employment.

Forward resumes to the Office of the United States Trustee, Debera F. Conlon, Assistant U. S. Trustee, 200 Granby Street, Suite 625, Norfolk, Virginia 23510. All resumes should be received on or before July 25, 2008. Ce'Ann Weschler, Trial Attorney Office of the United States Trustee Norfolk, Virginia (757) 441-6012 (ext. 107) [Find out more...](#)

Decisions, Decisions!

Our members received word from the Fourth Circuit in two cases we followed with interest. In *Tidewater Finance Co. v. Kenney (In re Kenney)*, --- F.3d ----, 2008 WL 2514194

(4th Cir. 2008), the Court ruled that a < 910-day purchase money automobile lender is entitled to assert an unsecured deficiency claim when the vehicle is surrendered. Joining several other circuit courts of appeal, the Fourth Circuit announced its holding in these words:

"We hold that the hanging paragraph does not operate to deprive such undersecured "910 creditors" of their deficiency claims because the parties are bound to their contractual rights and obligations under operative state law, and the Bankruptcy Code does not command otherwise."

Id. at 1. The case was on direct appeal from an order of the bankruptcy court confirming the debtor's plan. Our very own Jim Sheeran and Mark Leffler argued in the Fourth Circuit for the creditor and the debtor, respectively. The TBBA's David Greer appeared on brief for certain amici supporting the appellant.

In *In re Jordan*, 521 F.3d 430 (4th Cir. 2008), the Fourth Circuit reversed the decision of the United States District Court, which had affirmed the decision of the bankruptcy court revoking a chapter 7 debtor's discharge. The debtor refinanced her property seven days after receiving a discharge, in the face of the standard Administrative Order which directed her, inter alia, to not sell, transfer, remove, destroy, mutilate or conceal any of her property and to obey all orders of the United States Bankruptcy Court. (The trustee had also filed an asset report.)

The trustee successfully revoked the debtors discharge under 11 U.S.C. § 727(a) (6)(A), and the district court affirmed. In a split decision, the Fourth Circuit ruled that the trustee was required to establish that the debtor willfully and intentionally refused to obey the court's order and found that the debtor's violation of the Administrative Order was not willful. Among other things, because the order did not specifically prohibit "refinancing," and a typical debtor would not know that refinancing may technically be a transfer, the Court found that the debtor's failure to comply with the Administrative Order cannot be said to be willful.

In a dissenting opinion, Judge M. Blane Michael said the trustee did not have to show that the debtor knew her actions were wrongful, only that she intentionally refinanced her home.

In April, the Clerk's Office revised the Administrative Order, adding a word-"refinance-" to the list of banned transactions. Now chapter 7 debtors are expressly ordered not to sell, refinance, transfer, remove, destroy, mutilate or

conceal any of their property. Two of our own again pressed their causes in this case, Tom Smith, chapter 7 trustee, and Leonard Levine for the debtor.

Judge Stephen C. St. John issued an important opinion on proofs of claim in *In re Varona*, --- B.R. ----, 2008 WL 2150109 (Bankr.E.D.Va.. 2008). (The opinion is also available on the Court's website.) The TBBA's Tom Dickenson (go Tommy!) represented the chapter 13 debtors who objected to proofs of claim filed by the assignee of credit card debt on the ground that the Virginia statute of limitations had run on collecting of any underlying debt. The debtors sought an award of sanctions against the assignee, contending that its claims were false or fraudulent.

Judge St. John held that the bankruptcy court has the power to punish and to provide a remedy for the filing of false or fraudulent proof of claims, pursuant to its authority under 11 U.S.C. Section 105 to enter necessary or appropriate orders. The Court wrote:

"It is this Court's belief that § 105 may be used to sanction the filing of a proof of claim violative of the Bankruptcy Code and abusive of the bankruptcy process, that is, as the federal criminal code aptly describes, a claim that is false or fraudulent. The filing of a false or fraudulent claim in a bankruptcy case would unquestionably constitute an abuse of the claims process as well as an attempted fraud upon the court." *Id.* at 7.

In the particular case, however, the Court ruled that the proofs of claim were not false or fraudulent merely because they were arguably time-barred by the Virginia statute of limitations. Under Virginia law, the Judge explained, the debts continue to exist. The bar of the statute of limitations prevents enforcement of the claims, but the claims are not extinguished. As such, asserting the claims in the bankruptcy of the Varonas did not render the claims either "false" or "fraudulent." Accordingly, the Court declined to impose sanctions and permitted the assignee to withdraw the proofs of claim. In so doing, the Court noted:

"The conclusion in the instant matter does not evidence a lack of interest of this bench in the claims process, nor should any party doubt the dedication of this Court in ensuring the integrity of all of its proceedings. Rather, in this very specific instance, this Court cannot conclude that the filed claims in question were of a false or fraudulent nature demanding the imposition of sanctions." *Id.* at 19.

Reappointment of Judge Stephen S. Mitchell

Expiration of Term of Incumbent Bankruptcy Judge - Stephen S. Mitchell

The current term of United States Bankruptcy Judge Stephen S. Mitchell expires on December 11, 2008. The United States Court of Appeals for the Fourth Circuit is considering the reappointment of Bankruptcy Judge Mitchell to a new 14-year term of office. The basic jurisdiction of a bankruptcy judge is specified in Title 28, United States Code, and explained in Title 11, United States Code, as well as in 98 Stat. 344, Pub. L. 98-353, Title I, § 120. Members of the bar and concerned citizens are invited to comment on whether the incumbent bankruptcy judge should be reappointed. Written comments may be sent in confidence to Samuel W. Phillips, Circuit Executive, Fourth Circuit Court of Appeals, 1100 East Main Street, Suite 617, Richmond, VA 23219-3517 and must be received by May 14, 2008.

[Find out more...](#)

New Chapter 13 Trustee Takes the Reigns

R. Clinton Stackhouse, Jr. began his duties as standing chapter 13 trustee on July 1, 2008. Clint has served as a Chapter 7 Trustee since 1981.

Debera Conlon, Assistant United States Trustee for Norfolk and Newport News, resigned as interim standing trustee, effective June 30, 2008.

Mr. Stackhouse wishes to advise the bar that, as of, August 1, 2008, his new address will be 870 Greenbrier Circle, Suite 200, Chesapeake, VA 23320. The phone numbers will remain the same. [Find out more....](#)
