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BANKRUPTCY LAW

*Michael A. Condyles**

I. Introduction

This article is intended to advise the general practitioner of significant recent developments that have occurred in the bankruptcy area during the period April 1992 through April 1993. Virginia and federal decisions issued by the Court of Appeals for the Fourth Circuit involving bankruptcy related matters are the main focus of this article.

Several recent decisions affect the treatment of secured creditors in bankruptcy proceedings. These decisions clarify existing law and do not make substantial changes to current practice. Other decisions affect the overall administration of bankruptcy cases. Recent decisions involving the Equal Credit Opportunity Act and the Fair Debt Collection Practices Act are also addressed.

II. Treatment of Secured Claims

Several recent bankruptcy decisions impact the treatment of a secured creditor's claims in a debtor's bankruptcy case. A number of these opinions address the scope of the automatic stay imposed at the time bankruptcy is filed. Other decisions focus on such matters as (i) the modification of a creditor's lien on a debtor's principal residence in a Chapter 13 bankruptcy case; (ii) the treatment of an assignment of rents provision accompanying a secured creditor's deed of trust; (iii) the release of a judicial lien after a debtor is discharged in bankruptcy; and (iv) a landlord's removal of tenant's property from leased premises.

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A. *The Automatic Stay*

Section 362(a) of the United States Bankruptcy Code provides that an automatic stay on certain activities of creditors is imposed upon debtor filing of a bankruptcy petition.[1] The automatic stay is intended to provide the debtor with a break from the creditor's collection efforts and to allow for an orderly administration of the debtor's assets.[2] Because of the fundamental role the automatic stay plays in prohibiting creditors from recovering their collateral and further exercising their contractual rights against a debtor, its application is a central focus of bankruptcy decisions.[3]

One area that has been critically examined concerns the extent to which the automatic stay can be applied to persons and entities or their property not in bankruptcy. This issue was first addressed within the Fourth Circuit Court of Appeals in *A. H. Robins Co. v. Piccinin.*[4] In *Piccinin*, the Chapter 11 debtor sought a preliminary injunction to prevent claimants from prosecuting products liability actions against its insurer, Aetna Surety & Casualty Company, and certain officers and directors of the debtor. Because of the unusual situation presented by the case and the intertwined nature of the debtor and the co-defendants also being sued, the court of appeals held that a stay should be imposed to prohibit the claimants from proceeding against the non-debtors.[5] In reflecting on the circumstances under which a stay should be extended, the court stated that:

> [t]his "unusual situation," it would seem, arises when there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor. An illustration of such a situation would be a suit against a third-party who is entitled to absolute in-

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1. Section 362(b) of the Bankruptcy Code enumerates specific matters which are not affected by the automatic stay. 11 U.S.C. § 362(b) (1988).

2. The legislative history of section 362 provides that "[t]he automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. . . . It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved from the financial pressures that drove him into bankruptcy." H.R. REP. No. 595, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5840-41 (The House bill contained much of the text of the Senate bill and was passed in lieu of the Senate bill).

3. *See In re* Johns-Manville Corp., 26 B.R. 420 (Bankr. S.D.N.Y. 1983).

4. 788 F.2d 994 (4th Cir. 1986).

5. *Id.* at 999.

> demnity by the debtor on account of any judgment that might result against them in the case. To refuse application of the statutory stay in that case would defeat the very purpose and intent of the statute.[6]

The court of appeals re-examined this issue in *Credit Alliance Corp. v. Williams.*[7] In *Credit Alliance*, the court held that the automatic stay does not extend to protect a non-debtor guarantor of a debtor's obligation.[8] In finding that it was not necessary to stay the proceeding in order to prevent the dissipation of the debtor's assets, the court distinguished *Piccinin* by finding that the "unusual situation" required to extend the stay did not exist in this instance. Accordingly, the court ruled that simply being a guarantor of the debtor's debt without more did not create a basis for an extension of the automatic stay.[9] The court stated:

> There is nothing "unusual" about this guaranty agreement that would permit the guarantor, Williams, to invoke the statutory protection of § 362 or that would permit us to stay the enforcement of the New York judgment against him on equitable grounds. It is unnecessary to stay proceedings or void the judgment against the non-bankrupt guarantor to protect Penn Hook or to prevent the dissipation of its assets, since neither Penn Hook nor its estate is jeopardized by the judgment against Williams.[10]

The court's decision was subsequently followed by a Virginia bankruptcy court in *In re Southside Lawn & Garden/Suffolk Yard Guard.*[11]

1. *FTL, Inc. v. Crestar Bank*

In *FTL, Inc. v. Crestar Bank*,[12] a Virginia bankruptcy court found that the requisite "unusual circumstances" as required by *A.H. Robins Co., Inc. v. Piccinin*[13] were present and temporarily enjoined any action by the creditor against the non-debtor guaran-

6. *Id.*
7. 851 F.2d 119 (4th Cir. 1988).
8. *Id.* at 121.
9. *Id.*
10. *Id.* at 121-22.
11. 115 B.R. 79 (Bankr. E.D. Va. 1990).
12. 152 B.R. 61 (Bankr. E.D. Va. 1993).
13. 788 F.2d 994 (4th Cir. 1986).

tors. In *FTL, Inc.*, the debtor and the guarantors sought to temporarily enjoin Crestar Bank from foreclosing on the guarantors' personal residence. Crestar Bank was the primary creditor of the debtor and it maintained a lien against the guarantors' residence. The debtor filed an amended plan of reorganization calling for the guarantors to contribute all of the equity in their home to the reorganization.[14] To accomplish this, the guarantors obtained a $115,000 written loan commitment requiring a second deed of trust on their home.[15] In distinguishing *Credit Alliance Corp. v. Williams*[16] and *In re Southside Lawn & Garden/Suffolk Yard Guard*,[17] the court found that *FTL, Inc.* fit within the narrow exception created in *Piccinin*.[18] The court based its distinction on four points. First, the court determined that the collection activities resulted from the same obligation owed by the debtor and not separate personal obligations.[19] Second, the court found that without the guarantor's assistance, it would be virtually impossible for the debtor to confirm a plan of reorganization.[20] Third, because the proposed injunction of collection activities was only temporary, little or no harm would be caused by prohibiting the actions against the guarantors.[21] Finally, the court emphasized that all creditors would be served best by giving the debtor the opportunity to proceed with its proposed reorganization plan.[22] Based on these special circumstances, the court followed the *Piccinin* decision and extended the automatic stay to non-debtor guarantors.

2. *Willis v. Celotex Corp.*

In *Willis v. Celotex Corp.*,[23] the Court of Appeals for the Fourth Circuit considered whether the automatic stay should be extended to prohibit executions on a supersedeas bond posted to secure an appeal of asbestos related judgments. In order to obtain a surety's participation in posting the bond, the debtor was required to purchase certificates of deposit in return for the issuance of irrevo-

14. *Id.* at 62.
15. *Id.*
16. 851 F.2d 119 (4th Cir. 1988).
17. 115 B.R. 79 (Bankr. E.D. Va. 1990).
18. *FTL, Inc.*, 152 B.R. at 63.
19. *Id.* at 63-64.
20. *Id.* at 64.
21. *Id.*
22. *Id.*
23. 978 F.2d 146 (4th Cir. 1992).

cable letters of credit in favor of the surety. Immediately following an appellate ruling affirming the judgments, the debtor filed for Chapter 11 relief. Contending that it had an identity of interest with the surety and that the supersedeas bond represented an asset of its bankruptcy estate, the debtor sought to have the automatic stay extended to prevent the judgment creditor from executing on the bond.[24]

The court reflected that there was no merit to the debtor's argument that the bond constituted an asset because the unfavorable appellate decision extinguished any interest the debtor had in the bond.[25] Relying instead on language contained in *Piccinin*, the court of appeals concluded that the bankruptcy court had the inherent power to enjoin a proceeding that would have an adverse impact on the debtor's ability to formulate a Chapter 11 plan.[26] Because of this adverse impact on the debtor the court found sufficient grounds to extend the stay.[27]

3. *In re Geris*

In *In re Geris*,[28] an action was brought to avoid a secured creditor's foreclosure sale of a non-debtor's property. The real estate was subject to a deed of trust securing debt guaranteed by a Chapter 11 debtor.[29]

To avoid the foreclosure sale, the debtor argued that its right of redemption arising from the guaranty created a sufficient interest in the property to prohibit foreclosure without first obtaining relief from the automatic stay.[30] The court of appeals held that the

24. *Id.*
25. *Id.* at 149.
26. *Id.* In referencing the *Piccinin* decision, the court of appeals states that "[w]e have held that a bankruptcy court may properly exercise its authority under § 105(a) to enjoin an action against a third party when the court finds 'that failure to enjoin would effect [sic] the bankruptcy estate and would adversely or detrimentally influence and pressure the debtor through the third party.'" *Celotex*, 978 F.2d at 149 quoting A.H. Robbins Co. v. Piccinin, 788 F.2d 994, 1003 (4th Cir. 1946) (quoting Otero Mills v. Security Bank & Trust, 25 B.R. 1018, 1020 (Bankr. D. N.M. 1982)).
27. *Celotex* 978 F.2d at 150.
28. 973 F.2d 318 (4th Cir. 1992).
29. *Id.* at 320.
30. Section 362(d) of the Bankruptcy Code provides a creditor the right to obtain relief from the automatic stay in certain instances. 11 U.S.C. § 362(d) (1988). Section 362(d)(1) allows for relief from the automatic stay for "cause." Section 362(d)(2) allows for relief from stay with respect to an act against property in which the debtor does not have an equity and in which such property is not necessary to an effective reorganization. *Id.*

debtor did not maintain a sufficient interest to invoke section 362(a) of the Bankruptcy Code.[31] Although the court found that the debtor had a material interest in maximizing the value of the property, this interest was insufficient to warrant protection. Specifically, the court stated that "[t]he interest Geris has in seeing that the value of the property, when sold to satisfy the debt, is maximized, thereby limiting the exposure of the bankruptcy estate on the underlying debt, is far too attenuated to warrant extending the automatic stay protections of the Bankruptcy Code . . ." to prevent the foreclosure sale from occurring.[32]

4. *In re March*

A similar analysis of section 362(a) of the Bankruptcy Code was applied in *In re March*[33] to determine whether a creditor could foreclose on a non-debtor's real property where the debtor maintained a junior lien against the property.[34] In addressing whether a superior lienholder should be granted relief from the automatic stay, the district court examined whether the non-debtor's property became property of the bankruptcy estate as a result of the debtor's junior lien.[35] In holding that the non-debtor's real property did not constitute property of the bankruptcy estate, the court concluded that the automatic stay did not apply.[36]

5. *In re Murray*

In *In re Murray*,[37] a Virginia bankruptcy court addressed whether certain property of the debtor's late husband could be treated as property of her bankruptcy estate for the purpose of

31. *In re* Geris, 973 F.2d at 321.
32. *Id.*
33. 140 B.R. 387 (Bankr. E.D. Va. 1992), *aff'd* 988 F.2d 1498 (4th Cir. 1993).
34. *Id.* at 388-89.
35. *Id.*
36. Relying on the United States Supreme Court's decision in United States v. Whiting Pools, Inc., 462 U.S. 198 (1983), the court in *In re* March concluded that the bankruptcy estate does not include property of others in which a debtor has a minor lien interest. In quoting *Whiting Pools*, the court stated:

> Section 541(a)(1) speaks in terms of the debtor's "interest . . . in property," rather than property in which the debtor has an interest, but this choice of language was not meant to limit the expansive scope of the section. The legislative history indicates that Congress intended to exclude from the estate property of others in which the debtor had some minor interest such as a lien or bare legal title.

In re March, 140 B.R. at 389, (quoting *Whiting Pools*, 462 U.S. at 204 n.8).
37. 147 B.R. 688 (Bankr. E.D. Va. 1992).

enforcing the automatic stay.[38] The property sought to be protected by the automatic stay included assets owned solely by the debtor's late husband and property owned by corporations in which the debtor's late husband was a shareholder.[39] In determining whether the automatic stay should be extended, the court analyzed whether the assets constituted property of the estate under section 541 of the Bankruptcy Code.[40] In finding that state law must define the debtor's rights in property, the court held that the debtor maintained no interest in the assets sought to be covered by the automatic stay. As a result, the court declined to extend the automatic stay to property not directly owned by the debtor.[41]

These recent decisions clarify when the automatic stay can be extended beyond a debtor's bankruptcy estate. The rulings in *FTL, Inc.* and *Willis* extending the automatic stay to non-debtors, reversed a previous trend toward limiting the application of the stay only to debtors who had filed for bankruptcy relief. Thus, debtors are given greater certainty in their pre-bankruptcy planning.

Similarly, decisions from the United States Court of Appeals for the Fourth Circuit involving the application of the automatic stay to non-debtor property resolved issues that had not been previously addressed in significant detail. These decisions limit a debtor's ability to shield properties in which he maintains a remote interest from creditors, and will provide secured creditors with greater certainty in enforcing their lien rights.

B. *Modification of Secured Creditor's Claim under Chapter 13*

A Virginia bankruptcy court recently addressed the extent to which a debtor can modify a secured creditor's claim under a Chapter 13 plan. In *In re Wilson*,[42] the bankruptcy court held that a debtor in a Chapter 13 plan could reduce a secured creditor's contractual rate of interest to reflect the current market rate in the

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38. *Id.* at 689.
39. *Id.*
40. Property of the estate is defined in § 541 of the Bankruptcy Code to include "all legal or equitable interests of the debtor in property as of the commencement of the case," as well as property "that the debtor acquires or becomes entitled to acquire within 180 days after [the petition date] . . . by bequests, devise or inheritance. . . ." *In re* Murray, 147 B.R. at 690 (citing 11 U.S.C. § 541(a)(5)(A)).
41. *In re* Murray, 147 B.R. at 690-91.
42. 144 B.R. 318 (Bankr. W.D. Va. 1992).

area. The court's decision turned on an interpretation of section 1322(b)(2) of the Bankruptcy Code.

Under section 1322(b)(2) of the Bankruptcy Code, a creditor's claim secured by property other than a debtor's principal residence can be modified by a debtor's Chapter 13 plan.[43] Section 1325(a)(5) of the Bankruptcy Code limits the extent of the modification.[44] The manner in which a debtor can modify the claim of a secured creditor in a Chapter 13 plan was the subject of the court's analysis in *Wilson.*

In *Wilson,* the debtor sought to modify a creditor's claim which was secured by a deed of trust against the debtor's principal residence.[45] The creditor's loan documents provided for an 11.95 percent contract rate of interest. The debtor's plan provided for interest to accrue at the rate of ten percent.[46] In holding that the language of section 1322(b)(2) clearly and unequivocably allows a debtor to modify the rights of a secured creditor, the court determined that the contract rate of interest could be reduced to ten percent, the current area market rate.[47]

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43. Although *In re* Wilson addresses a situation where the debtor sought to modify a second deed of trust secured only by the debtor's principal residence, the court noted that § 1322(b)(2) of the Bankruptcy Code only excludes modification of first mortgages filed against a debtor's principal residence. *Id.* at 319.

44. Section 1325(a) of the Bankruptcy Code sets forth specific requirements which must be met in order for a Chapter 13 plan to be confirmed. With regard to the manner in which the plan treats a secured creditor, section 1325(a)(5) allows three situations under which a plan shall be confirmed. The first occurs when the secured creditor accepts the terms of the Chapter 13 plan. The second situation involves the "cram down" provisions of Chapter 13, which are applied when the debtor does not wish to surrender the collateral and the secured creditor does not consent to the plan. Under a cram down, the Chapter 13 plan must provide that the secured creditor retains its lien against the property securing its claim and the value of the property to be distributed to the creditor under the plan must not be less than the allowed amount of the secured claim. The third manner in which a secured claimant can be treated under section 1325(a)(5) allows for the debtor to surrender the collateral. 11 U.S.C. § 1325(a)(5) (1988).

45. *See supra* note 26.

46. *Wilson,* 144 B.R. at 319.

47. The legislative history of the Bankruptcy Code suggests that Congress intended to allow for the imposition of a market rate of interest under a debtor's Chapter 13 plan. *See, e.g.,* H.R. 1085, 98th Cong., 1st Sess. § 19(2)(A) (1983); H.R. 1169, 98th Cong., 1st Sess. § 19(2)(A) (1983); H.R. 4786, 97th Cong., 1st Sess. § 19(2)(A) (1981) (Congress rejecting an amendment to the Bankruptcy Code requiring the contract rate of interest to be paid). The effect of a debtor's ability to modify a secured creditor's claim has been interpreted by some courts as requiring the creditor to make a new loan in the amount of the value of the collateral. *See, e.g.,* Memphis Bank & Trust Co. v. Whitman, 692 F.2d 427 (6th Cir. 1982). In deciding the basis for determining the amount of the market rate of interest, some courts have used the treasury bill rate as a benchmark. *See, e.g., In re* Lassiter, 104 B.R. 119 (Bankr. S.D. Iowa 1989); *In re* Fisher, 8 Collier's Bankr. Cas. 2d 628 (Bankr. D. Kan. 1983).

The bankruptcy court's decision in *In re Wilson* allows a debtor more flexibility in the treatment of a secured creditor's claim. By readjusting the rate of interest to reflect the current market, debtors will receive an advantage if interest rates have decreased at the time of the bankruptcy filing. Similarly, creditors should be able to take advantage of any increase that occurs.

C. *Assignment of Rents*

In Virginia, the Uniform Commercial Code does not apply to the "creation or transfer of an interest in or lien on real estate."[48] As a result, a secured creditor's interest in rents received from real property is created by an assignment of rents clause, typically a part of a recorded deed of trust against the property. The secured creditor's interest created under the assignment of rents clause is governed by state law.[49] In order to clarify a creditor's rights under an assignment of rents clause, the Virginia General Assembly enacted section 55-220.1 of the Code of Virginia in 1992, addressing the perfection of liens or interests in rents and profits received from real estate.[50]

The interest a secured creditor maintains under an instrument creating an assignment of rents is important in a Chapter 11 bankruptcy context. The issue determines the debtor's right to use such property in connection with a Chapter 11 reorganization. While in Chapter 11, a debtor has broad authority to use property of the bankruptcy estate in connection with the operation of its business in the ordinary course.[51] However, when a creditor's collateral is

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48. VA. CODE ANN. § 8.9-104(j) (Repl. Vol. 1991).
49. Butner v. United States, 440 U.S. 48 (1979).
50. Act of Mar. 22, 1993, ch. 427, 1993 Va. Acts 500 (codified at VA. CODE ANN. § 55-220.1 (Supp. 1993). The text of the statute follows:

> The recordation pursuant to § 55-106, in the county or city in which the real property is located, of any deed, deed of trust or other instrument granting, transferring or assigning the interest of the grantor, transferor, assignor, pledgor or lessor in leases, rents or profits arising from the real property described in such deed, deed of trust or other instrument, shall fully perfect the interest of the grantee, transferee, pledgee or assignee as to the assignor and all third parties without the necessity of (i) furnishing notice to the assignor or lessee, (ii) obtaining possession of the real property, (iii) impounding the rents, (iv) securing the appointment of a receiver, or (v) taking any other affirmative action. The lessee is authorized to pay the assignor until the lessee receives written notification that rents due or to become due have been assigned and that payment is to be made to the assignee. This section shall apply to all instruments of record before, on or after July 1, 1992.

VA. CODE ANN. § 55-220.1 (1986 & Supp. 1993).
51. 11 U.S.C. § 363(c)(1) (1988).

"cash collateral,"[52] a creditor is provided special protection under the Bankruptcy Code. This protection prohibits the debtor from using cash collateral without first receiving court authority or the creditor's consent, thus preventing the creditor from becoming an involuntary lender to the Chapter 11 debtor.[53]

In *In re Hall Colttree Associates*,[54] a Virginia bankruptcy court addressed the treatment of an assignment of rents provision accompanying a deed of trust recorded against real estate. In first examining the property interest maintained by the secured creditor, the court found that a "perfected" assignment of rents existed as a result of the recording of the assignment.[55] The court then addressed whether simply maintaining a perfected interest in the assignment of rents was sufficient to constitute cash collateral or whether an immediate entitlement to the rents was required. In finding that the perfection of the assignment of rents was sufficient to satisfy the requirements of section 363 of the Bankruptcy Code, the court determined that the rents constituted cash collateral.[56]

The bankruptcy court's decision in *Hall Colttree Associates* is in accord with decisions interpreting Virginia law as it applies to assignment of rents in the context of a Chapter 11 bankruptcy proceeding.[57] The court's holding is also consistent with section 55-220.1 of the Code of Virginia which provides that an assignment of rents is perfected upon recording in the land records. As a result,

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52. Under the Bankruptcy Code, cash collateral is broadly defined as:

> Cash, negotiable instruments, documents, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offsprings, rents or profits of property subject to a security interest as provided in § 552(b), . . . whether existing before or after the commencement of a case under [the Bankruptcy Code]. . . .

11 U.S.C. § 363(a) (1988).

53. *Id.* § 363(c)(2).

54. 146 B.R. 675 (Bankr. E.D. Va. 1992).

55. *Id.* at 677. The court concluded that a perfected assignment of rents resulted from the Colttree Associates recording of the assignment. *Id.* The court's decision parallels the statutory provisions of section 55-220.1 of the Code of Virginia which provides that an assignment of an interest in rents or profits arising from real property is fully perfected when recorded. VA. CODE ANN. § 55-220.1 (Repl. Vol. 1986).

56. *Id.* at 679.

57. *See In re* Brandon Associates, 128 B.R. 729 (Bankr. W.D. Va. 1991); *In re* Hall Elm Tree Associates, 126 B.R. 73 (Bankr. D. Ariz. 1991): *In re* Vienna Park Properties, 120 B.R. 332 (Bankr. S.D. N.Y. 1990), *aff'd in part rev'd in part*, 136 B.R. 43 (Bankr. S.D. N.Y. 1992).

the court's decision should not have a substantial impact on the existing treatment of assignment of rents in Chapter 11 cases.

D. *Post-Discharge Release of Judgment Liens*

In *Leasing Service Corp. v. Justice*,[58] the Supreme Court of Virginia addressed the application of section 8.01-455 of the Code of Virginia with regard to releasing judgment liens of a debtor after receiving a discharge in bankruptcy.[59] In *Justice*, a judgment was entered against a debtor in excess of $2,000,000.[60] Prior to the debtor filing a voluntary petition in bankruptcy, the judgment creditor docketed its judgment in the Clerk's Office of the Circuit Court of Wise County, Virginia. In connection with his bankruptcy case, the debtor was discharged of any personal liability under the judgment and pursuant to Code of Virginia section 8.01-455, the debtor sought to have the docketed judgment marked "discharged in bankruptcy."[61]

The circuit court found that the judgment creditor could not identify any property owned or recorded by the debtor in Wise County. Therefore, the court held that "no judgment lien ever attached" and ordered that the judgment be released.[62] On appeal, the Supreme Court of Virginia determined that the judgment lien was not "paid off or discharged" in the debtor's bankruptcy proceeding with regard to any real property interest located in Wise County and acquired prior to the bankruptcy proceeding.[63] The court concluded that the debtor's discharge of the judgment lien would only apply to property acquired after the commencement of the bankruptcy proceeding.[64]

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58. Leasing Service Corp. v. Justice, 243 Va. 441, 416 S.E.2d 439 (1992).

59. Section 8.01-455(A) of the Code of Virginia provides that:

> [a] defendant in any judgment . . . may, on motion, after ten days' notice thereof to the plaintiff in such judgment . . . apply to the court in which the judgment was rendered, to have the same marked satisfied, and upon proof that the judgment has been paid off or discharged, such court shall order such satisfaction to be entered on the margin of the page in the book wherein such judgment was entered. . . . Upon a like motion and similar proceeding, the court may order to be marked "discharged in bankruptcy," any judgment which may be shown to have been so discharged.

VA. CODE ANN. § 8.01-455(A) (Repl. Vol. 1992).

60. *Justice*, 243 Va. at 442, 416 S.E.2d at 440.

61. *Id.*

62. *Id.* at 443, 416 S.E.2d at 440.

63. *Id.*

64. *Id.*

E. *Landlord's Seizure of Tenant's Property*

In *Soldal v. Cook County, Illinois*,[65] the defendant seized and removed the tenant's mobile home from the landlord's property in the presence of deputy sheriffs. Although the tenant was in default on his lease, the United States Supreme court held that the seizure implicated the tenant's Fourth Amendment rights because the landlord failed to comply with the appropriate eviction statutes.[66] The court concluded that an unreasonable seizure of the tenant's property occurred within the meaning of the Fourth Amendment.[67]

Although the Court noted that the matters addressed in *Soldal* did not concern a "garden variety landlord, tenant or commercial dispute," the decision may impact the willingness of sheriffs' offices to assist creditors in recovery.[68] The decision also makes clear that the presence of a sheriff does not preclude a finding that the creditor committed wrongful acts.

III. Pre-Bankruptcy Collection Efforts

Several recent decisions will impact a creditor's efforts to collect outstanding debts. These cases interpret two federal statutes known as the Fair Debt Collection Practices Act[69] (FDCPA) and the Equal Credit Opportunity Act[70] (ECOA) which were enacted to protect and further the rights of borrowers.[71] More specifically, the

65. 113 S. Ct. 538 (1992).

66. *Id.* at 543.

67. *Id.* Although the Court determined that a seizure violating the Fourth Amendment occurred, the Court was careful to note that a different question regarding the reasonableness of the seizure must be addressed by the trial court before a constitutional violation could be found. In finding that a seizure occurred, the Court reasoned that the protections of the Fourth Amendment applied not only to safeguard an individual's privacy and liberty, but also a person's possessory interest in property. *Id.*

68. *Id.* at 549.

69. 15 U.S.C. §§ 1692 to 1692*o* (1988 & Supp. III 1991). The purpose of the FDCPA is to eliminate abusive, deceptive and unfair debt collection practices. *Id.* at § 1692(e).

70. 15 U.S.C. §§ 1691 to 1692f (1988 & Supp. III 1991). The purpose of the Equal Credit Opportunity Act is to eradicate discriminatory lending practices. CMF Virginia Land, L.P. v. Brinson, 806 F. Supp. 90, 94 (E.D. Va. 1992). *See also* Anderson v. United Fin. Co., 666 F.2d 1274, 1277 (9th Cir. 1982); Markham v. Colonial Mortgage Serv. Co., 605 F.2d 566, 569 (D.C. Cir. 1979). The Equal Credit Opportunity Act states that "[i]t shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction . . . on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract)." 15 U.S.C. § 1691(a)(1) (1988 & Supp. III 1991).

71. *See supra* notes 46-47.

purpose of the FDCPA is to protect consumers from unscrupulous and abusive debt collection practices,[72] while the ECOA was enacted in order to eliminate discrimination associated with the extension of credit.[73]

A. *ECOA Claims*

In *CMF Virginia Land, L.P. v. Brinson*,[74] the United States District Court for the Eastern District of Virginia examined the defendants' assertions of an ECOA violation, in an effort to prohibit the plaintiff from collecting under the defendants' guaranty agreements. In accordance with the provisions of the ECOA,[75] regulation b, promulgated by the Federal Reserve Board states that "a creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of credit worthiness for the amount and terms of the credit requested."[76] The defendants, who were husband and wife, contended that the creditor's conditioning of the loan on obtaining the spousal guaranties violated the regulation. The defendants argued that the violations relieved them of any liability arising in connection with the guaranties.[77]

In addressing the application of the ECOA, the court noted that regulation b was promulgated for the purpose of preventing credit discrimination against married women who had traditionally been refused individual credit.[78] The court stated that:

> It is well-documented that, prior to the ECOA, it was customary for lenders to require the guarantee signatures of husbands whose wives sought credit, even when a credit check would have revealed that the wife was credit worthy on her own. The ECOA was implemented to prevent this discriminatory practice of forcing women to have their spouses guarantee any loan they wished to receive. In this case,

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72. *See supra* note 46.
73. *See supra* note 47.
74. 806 F. Supp. at 90.
75. *See* 15 U.S.C. § 1691b(a) (1988 & Supp. III 1991).
76. 12 C.F.R. § 202.7(d)(1)(1992).
77. The defendants' basis for avoiding liability under their guaranties in *Brinson* has been recognized as a valid application of the ECOA by other courts. *See* Douglas County Nat'l Bank v. Pfeiff, 809 P.2d 1100 (Colo. App. 1991); *In Re* Remington, 19 B.R. 718, (Bankr. D. Colo. 1982); NationsBank v. Sarelson, VA. L. WKLY. 092-8-427 (Fairfax Co. Cir. Ct. 1992); First American Bank v. McCarty, VA. L. WKLY. 092-8-428 (Fairfax Co. Cir. Ct. 1992).
78. *Brinson*, 806 F. Supp. at 96.

> however, as in many recent cases brought under the ECOA, male borrowers attempt to invoke the ECOA when a lender requires their wives signatures as co-guarantors on a loan instrument.[79]

Although the court recognized that the plain language of the ECOA forbids discrimination "against any applicant," it expressed reservations about rendering void a guaranty which violates the ECOA in a manner not expressly intended by the statute.[80] However, the court ruled that the defendants' claims should be decided at trial and not on summary judgment. Accordingly, the court recognized that the defendants could potentially maintain a valid claim under the ECOA which would extinguish all or a part of their liability arising in connection with their guaranties.

Similarly, in *NationsBank v. Sarelson*[81] and *First American Bank v. McCarty*,[82] the Fairfax County Circuit Court addressed whether the ECOA could be used as a basis for defeating a creditor's claim under a guaranty. In both cases, violations of the ECOA were asserted as a basis for setting aside confessed judgments entered against the defendants under section 8.01-433 of the Code of Virginia.[83] In finding that the asserted ECOA violations created an "adequate defense" under section 8.01-433, the court ruled that both judgments should be set aside and remanded the cases for trial on the merits of the asserted ECOA violations.[84]

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79. *Id.* at 96 n.4.

80. In *Brinson* the court states that:

> [w]hile the [c]ourt agrees that the plain language of the ECOA forbids discrimination "against any applicant, with respect to any aspect of a credit transaction, which is based on marital status," . . . the [c]ourt is especially averse to rendering void a Guaranty whose execution violated the ECOA in a manner not expressly targeted by the statute.

Id. (quoting *Markham*, 605 F.2d at 569).

81. NationsBank v. Sarelson, VA. L. WKLY. 092-8-427.

82. First American Bank v. McCarty, VA. L. WKLY. 092-8-428.

83. The Code of Virginia provides that a confessed judgment can be set aside where a defendant raises "any ground which would have been an adequate defense or setoff in an action at law instituted upon the judgment creditor's note, bond or other evidence of debt upon which such judgment was confessed." VA. CODE ANN. § 8.01-433 (Repl. Vol. 1992) In both *Sarelson* and *McCarty*, the court indicated that the decisive issue that must be addressed is whether the defendants raised an "adequate defense" by asserting a violation of the ECOA. In addressing whether the confessed judgment could be set aside, the court noted that it did not have to decide the validity and effectiveness of the defenses. Instead, the court determined that a trial on the merits was required to resolve the factual issues raised by the alleged ECOA violations. *Sarelson*, VA. L. WKLY. 092-8-427; *McCarty*, VA. L. WKLY. 092-8-428.

84. *Sarelson*,

Alleging violations of the ECOA as a defense to individual liability under a guaranty agreement has become an increasingly popular response to collection actions. Although the reviewed decisions did not issue final rulings, the cases provide defendants with sufficient authority to raise the claim in good faith. As a result, it is likely that the use of ECOA in responding to creditor suits will increase and provide debtors with an additional defense.

B. *FDCPA Claims*

In an attempt to restrict abusive practices, the FDCPA was enacted to impose limitations on the actions of "debt collectors."[85] In *Scott v. Jones*,[86] the Court of Appeals for the Fourth Circuit addressed whether the FDCPA applied to an attorney initiating lawsuits to collect delinquent credit card accounts. In *Scott*, the defendant argued that the FDCPA did not apply because he was engaged in the practice of law and not the collection of debts.

Agreeing with the lower court's conclusion that the "principal purpose" of the defendant's business was the collection of debts, the court of appeals ruled that the FDCPA applied to the attorney's activities.[87] The court noted that seventy to eighty percent of the defendant's legal fees were generated from debt collection legal work.[88] The court concluded that because the attorney filed approximately four thousand warrants in debt per year between 1983 and 1987, the defendant regularly collected or attempted to collect debts.[89] As a result, the court determined that the defendant's activities clearly fell within the scope of the FDCPA.[90]

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85. The FDCPA has defined the term "debt collector" to mean "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6)(1988).

86. 964 F.2d 314 (4th Cir. 1992).

87. *Id.*

88. *Id.* at 316.

89. *Id.*

90. In *Scott*, the defendant argued that attorneys and law firms were excluded from the FDCPA's definition of "debt collectors." In support of this argument, the debtor referred to legislative history and to the Federal Trade Commission's interpretation of the meaning of "collection of debt." *See* H.R. REP. No. 405, 99th Cong., 1st Sess. 1-7, *reprinted in* 1986 U.S.C.C.A.N. 1752; 132 CONG. REC. H10031 (1986); Federal Trade Commission's Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097, 50,100-02 (1988). The court found that the legislative history was not ambiguous and that the administrative interpretations of the statute did not disturb Congress' intent but only clarified the type of legal activity which would fall within the

Based on *Scott*, an attorney may qualify as a "debt collector" under the FDCPA in two ways. The first involves a situation where any "instrumentality of interstate commerce or the mails" is used in connection with a business whose "principal purpose" is the collection of debts. The second is where the attorney "regularly collects or attempts to collect" debts in connection with the practice of law.[91] A determination of whether an attorney will be treated as a "debt collector" will be decided on a case by case basis in accordance with the specific facts relative to each attorney's practice.[92]

In *Carroll v. Wolpoff & Abramson*,[93] the Court of Appeals for the Fourth Circuit further interpreted the FDCPA as it applied to a law firm's follow-up collection notice sent to a debtor. Specifically, the court reviewed section 1692(e) of the FDCPA which provides in pertinent part that:

> [a] debt collector may not use any false, deceptive or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section: . . . the failure to disclose clearly in all communications made to collect a debt or to obtain information about a consumer, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose.[94]

The defendant law firm asserted that a distinction existed in the statute between initial and subsequent communications by arguing that section 1692 did not apply to a follow-up notice.[95] The court found that the statute clearly states that "all communications" must comply with the disclosure requirements, and the law firm violated the FDCPA by failing to include the necessary disclosure in its correspondence.[96]

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ambit of "debt collection." Thus, the Court disregarded the defendant's arguments. *Scott*, 964 F.2d at 316-17.

91. 15 U.S.C. § 1692a(6)( ).

92. *See Scott*, 964 F.2d at 316-17.

93. 961 F.2d 459 (4th Cir. 1992).

94. 15 U.S.C. § 1692(e)(11)(1993).

95. Although the defendant did not dispute the clarity of the language of the FDCPA requiring disclosure in "all communications made to collect a debt," it argued that Congress' intent to avoid debtor abuse would not be furthered by requiring the disclosure requirements in follow-up letters. *Carroll*, 961 F.2d at 461.

96. *Id.*

IV. Property Exemptions

Section 522 of the Bankruptcy Code allows individual debtors to exempt certain property from becoming an asset of their bankruptcy estates.[97] The Bankruptcy Code allows a state to elect not to apply the federal bankruptcy exemptions,[98] rather adopting their own separate exemptions.[99] Although Virginia's exemption statutes apply to both debtors and non-debtors alike, the majority of opinions interpreting Virginia's exemption laws are rendered in connection with bankruptcy cases. This stems from the importance exemptions play in the administration of bankruptcy cases.

A. *Objection to Exemptions*

Several recent decisions have addressed the validity of objections raised to a debtor's claim of exemptions. Section 522(l) of the Bankruptcy Code provides that "[u]nless a party in interest objects, the property claimed as exempt . . . is exempt." Rule 4003(b) of the Rules of Bankruptcy Procedure requires that objections must be raised by the trustee or any creditor within thirty days of the creditors meeting.[100] The objection period may be extended upon a timely motion.[101]

1. *Taylor v. Freeland & Kronz*

In *Taylor v. Freeland & Kronz,*[102] the United States Supreme Court addressed the validity of an exemption that was not objected to within the thirty-day period. In *Taylor* the debtor filed bankruptcy while pursuing an employment discrimination claim in state court.[103] In her bankruptcy schedules, the debtor exempted the damage award she expected to receive. The value of the award was listed as "unknown."[104]

After conducting an initial examination, the Chapter 7 trustee appointed to administer the debtor's estate did not object, even though the statute creating the exemption only allowed a small

97. 11 U.S.C. § 522 (1988).
98. *Id.* § 522(b)(1).
99. *See* Va. Code Ann. § 34-3.1 (Repl. Vol. 1990).
100. Fed. R. Bankr. 4003(b).
101. *Id.*
102. 112 S. Ct. 1644 (1992).
103. *Id.* at 1646.
104. *Id.*

portion of the potential recovery to be claimed exempt. After the debtor received a $110,000.00 settlement, the trustee sought to recover the funds on the grounds that the money was property of the bankruptcy estate.[105] In finding that no statutory basis existed for claiming the exemption, the bankruptcy court ordered the monies be turned over to the trustee.[106] The district court affirmed the bankruptcy court's decision and the Court of Appeals for the Third Circuit reversed.[107] The court of appeals determined that because the funds were claimed as exempt and the trustee failed to object to the claimed exemption in a timely manner, the debtor was not required to turn over the funds. The decision was subsequently affirmed on appeal to the United States Supreme Court.[108]

In concluding that the property was in fact exempt, the Supreme Court relied on the clear language of section 522(l) and Rule 4003(b) of the Bankruptcy Code. The Court stated that under section 522(l) the property claimed as exempt is exempt unless a party in interest objects.[109] Further, the court noted that:

> Rule 4003(b) gives the trustee and creditors 30-days from the initial creditors' meeting to object. By negative implication, the Rule indicates that creditors may not object after 30-days "unless, within such period, further time is granted by the Court." The Bankruptcy Court did not extend the 30-day period. Section 522(l) therefore has made the property exempt. Taylor cannot contest the exemption at this time, whether or not Davis had a colorable statutory basis for claiming it.[110]

Accordingly, the Court found that the trustee's failure to object qualified the property as exempt regardless of the validity of the exemption.[111]

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105. *See generally In re* Murray, 147 B.R. 688, 690-91 (Bankr. E.D. Va. 1992).
106. *Taylor*, 112 S. Ct. at 1647.
107. *Id.* at 1647.
108. *Id.* at 1649.
109. *Taylor*, 112 S. Ct. at 1648 (quoting 11 U.S.C. § 522).
110. *Id.* at 1648.
111. The Supreme Court's decision in *Taylor* impacts the court of appeals ruling in Wissman v. Pittsburgh National Bank, 942 F.2d 867 (4th Cir. 1991). In *Wissman*, the debtor claimed as exempt a cause of action against a creditor bank arising out of the bank's foreclosure on certain collateral. A timely objection to the debtor's exemption was not filed and the debtor proceeded in federal district court to enforce its claim. Although the debtor properly claimed the exemption, the debtor did not assert the interest's value. Because of a statutory limit to the amount that could be exempt, the court stated that the debtor's exemption could not exceed the limit. *Wissman*, 942 F.2d at 872.

2. *In re Grablowsky*

In *In re Grablowsky*,[112] a Virginia bankruptcy court distinguished the application of *Taylor v. Freeland & Kronz*[113] in a case with a similar fact pattern. The debtor in *Grablowsky* assigned a value of one dollar to his interests in two partnerships.[114] The debtor exempted the partnership interests and no objection was filed within the thirty-day period.[115] Subsequently, a third party sought authority from the court to purchase the debtor's non-exempt interest in the partnerships from the trustee.[116] Because no objection was filed, the debtor contended that its claimed exemptions, in the amount of one dollar each, constituted a complete exemption of the partnership interests.[117] The potential purchaser argued that the debtor was only entitled to an exemption of one dollar for each partnership interest, and the remaining value of the assets became the property of the bankruptcy estate.

The court distinguished the facts of *Grablowsky* from *Taylor* on the grounds that the exemptions were claimed for precise amounts. Specifically, the court stated that:

> In *Taylor* the value of the exempted property was listed as "unknown" and in this case the value of the exempted property is listed as "\$1.00." This distinction is pivotal in that the Supreme Court's decision in *Taylor* arguably supports a conclusion in this case opposite the one asserted by the debtor. If the debtor is entitled to exemption by declaration, then the debtor is (sic) bound by his declaration. In this case the debtor declared exempt \$1.00 of his interest in each partnership, and that is all that has been exempted.[118]

Here, the court failed to address the commonly accepted view that the entire asset is exempt where the debtor claims an exemption in an amount equal to the property value listed in the schedules.[119]

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112. 149 B.R. 402 (Bankr. E.D. Va. 1993).
113. *Taylor*, 112 S. Ct. 1644.
114. *Grablowsky*, 149 B.R. at 403.
115. *Id.*
116. *Id.* at 404.
117. *Id.*
118. *Id.* at 405.
119. One commentator has stated that "[o]nly when a debtor's schedules specifically value the debtor's interest in the property at an amount higher than the amount claimed as exempt can it be argued that a part of the debtor's interest in property has not been exempted." 8 COLLIER ON BANKRUPTCY ¶ 4003.04, at 4002-13 (Lawrence P. King ed., 1993). Collier's further states that:

3. *In re Leydet*

In *In re Leydet*,[120] a Virginia bankruptcy court addressed whether a new thirty-day period for objecting to exemptions arose when a debtor's Chapter 11 case is converted to a Chapter 7 case.[121] The debtor in *Leydet* claimed corporate stock as exempt in his Chapter 11 bankruptcy petition.[122] The debtor valued the stock at one dollar. A meeting of creditors was held in the Chapter 11 case and no objection to the exemption was filed within thirty days.[123] Subsequently, the case was converted to a Chapter 7 case and a creditor's meeting was held.[124] Within thirty days following the Chapter 7 meeting of creditors, the trustee objected to the exemption, claiming that the stock had value substantially above the one dollar declared exempt.[125]

The court addressed whether a new period for objecting to exemptions arose as a result of the conversion of the bankruptcy case. Because the time for filing objections begins with the creditors meeting,[126] the court analyzed whether a subsequent meeting of creditors would result in a new objection period.[127] In holding that a new thirty-day period for objecting to exemptions began after the Chapter 7 meeting of creditors, the court found that the objections were timely filed.[128]

> [n]ormally, if the debtor lists property as exempt, that listing is interpreted as a claim for exemption of the debtor's entire interest in the property, with the debtor's valuation of that interest as the amount of the exemption claimed. Were it otherwise, with the claim of exemption construed to claim as exempt only that portion of the property having the value stated, the provisions finalizing exemptions if no objections are filed would be rendered meaningless. The trustee or creditors could always claim that the debtor's interest in the property was greater than the value claimed as exempt and effectively still object to the debtor exempting his or her entire interest in the property after the deadline for objections had passed.

Id. at ¶ 4003.03.

120. 150 B.R. 641 (Bankr. E.D. Va. 1993).

121. *Id.* at 642.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *See supra* text accompanying notes 72-73.

127. *Leydet*, 150 B.R. at 642-44. The court stated: "[u]nfortunately Bankruptcy Rule 4003(b) does not address whether in a converted case the 'meeting of creditors' referred to is only the initial meeting of creditors, or whether the second meeting of creditors triggers a new 30-day period for objections to exemptions." *Id.* at 643.

128. *Leydet* appears to conflict with *In re* Freedlander, 93 B.R. 446 (Bankr. E.D. Va. 1988). In *Freedlander*, an objection was raised to a homestead exemption filed in a Chapter 7 case which had been converted from Chapter 11. The basis of the objection was that the

B. *Poor Debtors Exemption*

Section 34-26 of the Code of Virginia sets forth certain "poor debtor" exemptions.[129] These exemptions are intended to provide an individual and his family with the bare necessities required to sustain daily life.[130]

In *Davis v. Maloney*[131] the Supreme Court of Virginia addressed whether a person must be a Virginia resident to qualify for the poor debtor exemptions. In analyzing the application of section 34-26 of the Code of Virginia, the court noted that the poor debtor exemptions are available to "every householder."[132] Since the term "every householder", is defined by section 34-1 of the Code of Virginia as "any resident of Virginia," the court concluded that only a Virginia resident could claim the poor debtor exemptions.[133]

C. *Exemption for Personal Injury Claims*

Section 34-28.1 of the Code of Virginia provides an exemption for personal injury claims.[134] This exemption is available without any limitation as to amount. The code section was enacted by the 1990 General Assembly in response to the Fourth Circuit's decision in *Tignor v. Parkinson*[135] which held that personal injury claims

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meeting of creditors held in the Chapter 11 case controlled the time within which the homestead deed must be filed and therefore the homestead exemption was not timely claimed pursuant to section 34-17 of the Code of Virginia. This section requires that any person who files a voluntary petition in bankruptcy may [file a homestead deed] on or before the 5th day after the date initially set for the meeting held pursuant to 11 U.S.C. § 341, but not thereafter . . . ." VA. CODE ANN. § 34-17 (Repl. Vol. 1990). In finding that "[n]either the [c]ode nor the [r]ules mandate that another meeting of creditors be held subsequent to a conversion," the [c]ourt held that the subsequent meeting of creditors was of no consequence. *Freedlander*, 93 B.R. at 449. In contrast, the bankruptcy court in *Leydet* found that based on a reading of sections 341(a) and 348(a) of the Bankruptcy Code "a new meeting of creditors is required upon conversion from [C]hapter 11 to [C]hapter 7." *Leydet*, 150 B.R. at 642. The bankruptcy court in *Leydet* went on to state that "[t]his new meeting of creditors is not a continuation or extension of the meeting of creditors in the previous [C]hapter 11 proceeding, but is a separate and distinct meeting in which a new trustee must be selected." *Leydet*, 150 B.R. at 642.

129. VA. CODE ANN. § 34-26 (Cum. Supp. 1993).

130. Report of the Joint Subcommittee Studying Virginia's Exemption Statutes to the Governor and the General Assembly of Virginia, H. Doc. No. 77 at 10 (1990).

131. 243 Va. 500, 416 S.E.2d 232 (1992).

132. VA. CODE ANN. § 34-26 (Repl. Vol. 1990).

133. VA. CODE ANN. § 34-1 (Repl. Vol. 1990).

134. VA. CODE ANN. § 34-28.1 (Cum. Supp. 1991).

135. 729 F.2d 977 (4th Cir. 1984) (interpreting VA. CODE ANN. § 8.01-26 (Repl. Vol. 1984)).

were not exempt based on Virginia's statutory prohibition on the assignment of tort claims.[136]

In *In re Cassell*,[137] a Virginia bankruptcy court addressed whether section 34-28.1 applied to proceeds received by a debtor in connection with a wrongful death action. In holding that the Virginia General Assembly did not intend to include wrongful death causes of action within the scope of this statute, the court concluded that the proceeds were not exempt.

136. *Id.*
137. 151 B.R. 78 (Bankr. W.D. Va. 1993).