No. 15-2114

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In re: ROBERT PADULA and DEBORAH PADULA,
Debtors.

VPSI, INC.,
Appellant,
– v. –
DEBORAH PADULA,
Appellee.

On Appeal from the United States District Court
For the Eastern District of Virginia

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF APPELLEE AND SEEKING AFFIRMANCE OF THE DISTRICT COURT'S DECISION

NATIONAL ASSOC. OF CONSUMER BANKRUPTCY ATTORNEYS, *AMICUS CURIAE*
BY ITS ATTORNEY
TARA TWOMEY, ESQ.
NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER
1501 The Alameda
San Jose, CA 95126
(831) 229-0256

On Brief: J. Erik Heath
January 26, 2016

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

VPSI, Inc. v. Padula, No. 15-2114

Pursuant to FRAP 26.1 and Fourth Circuit Local Rule 26.1(b), Amicus Curiae, the National Association of Consumer Bankruptcy Attorneys, makes the following disclosure:

1) Is party/amicus a publicly held corporation or other publicly held entity? **NO**

2) Does party/amicus have any parent corporations? **NO**

3) Is 10% or more of the stock of party/amicus owned by a publicly held corporation or other publicly held entity? **NO**

4) Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? **NO**

5) Does this case arise out of a bankruptcy proceeding? **YES**. If yes, identify any trustee and the members of any creditors' committee. **Thomas P. Gorman, Chapter 13 Trustee. There is no creditors' committee.**

This 26th day of January, 2016.

/s/ Tara Twomey
Tara Twomey, Esq.
Attorney for Amicus Curiae

TABLE OF CONTENTS

CERTIFICATE OF INTEREST AND CORPORATE DISCLOSURE i

TABLE OF AUTHORITIES v

STATEMENT OF INTEREST 1

CERTIFICATION OF AUTHORSHIP 2

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. **Chapter 13 Debtors Are Generally Not Required To Amend Their Schedules To Reflect Post-Petition Events**. 5

A. Bankruptcy Rules Require Amended Schedules Only In Limited Circumstances, But Generally Not When Chapter 13 Debtors Acquire Property Post-Petition 6

B. Rule 6009 Does Not Create Additional Disclosure Duties 9

C. To the Extent the Debtor Was Required to Amend Her Schedules, She Did So in a Timely Manner 11

II. **Appellant's Distinction Between Individual And "Behalf of the Estate" Claims Is Illusory**. 13

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Arizona v. United States,
132 S. Ct. 2492 (2012) 7

Batten v. Cardwell (In re Batten),
351 B.R. 256 (Bankr. S.D. Ga. 2006)..... 7

Becker v. Verizon North, Inc.,
2007 U.S. App. LEXIS 9879 (7th Cir. Apr. 25, 2007)..... 10

Botkin v. DuPont Cmty. Credit Union,
650 F.3d 396 (4th Cir. 2011) 12

Calvin v. Potter,
2009 U.S. Dist. LEXIS 73862 (N.D. Ill. Aug. 20, 2009) 11

Cowling v. Rolls Royce Corp.,
2012 U.S. Dist. LEXIS 144273 (S.D. Ind. Oct. 5, 2012) 11

Cusano v. Klein,
264 F.3d 936 (9th Cir. 2001) 6

In re Dow Corning Corp.,
263 B.R. 544 (Bankr. E.D. Mich. 2001)..... 7

Evinger v. Emery Winslow Scale Co.,
2012 U.S. Dist. LEXIS 105740 (S.D. Ind. July 30, 2012) 13

In re Grunauer,
2010 Bankr. LEXIS 1716 (Bankr. E.D. Va. 2010)..... 8

Harris v. Viegelahn,
135 S. Ct. 1829 (2015) 1, 14, 16

Henneghan v. Columbia Gas of Va., Inc. (In re Henneghan),
2005 Bankr. LEXIS 1770 (Bankr. E.D. Va. June 22, 2005) 11

Murphy v. O'Donnell (In re Murphy),
474 F.3d 143 (4th Cir. 2007) 5, 15

In re Nance,
371 B.R. 358 (Bankr. S.D. Ill. 2007);..... 8

Nat'l Am. Ins. Co. v. Ruppert Landscaping Co.,
187 F.3d 439 (4th Cir. 1999) 4

Ortiz v. Aurora Health Care, Inc. (In re Ortiz),
2012 U.S. Dist. LEXIS 117511 (E.D. Wis. Aug. 21, 2012)..... 13

Osterlich v. Sand Canyon Corp.,
2010 U.S. Dist. LEXIS 62708 (N.D. W.Va. June 23, 2010)..... 10

Rainey v. UPS,
466 F. App'x 542 (7th Cir. 2012) 12

Ranta v. Gorman,
721 F.3d 241 (4th Cir. 2013). 1

Richardson v. United Parcel Service,
195 B.R. 737 (E.D. Mo. 1996) 10, 11

Robertson v. Flowers Baking Co. of Lynchberg, LLC,
2012 U.S. Dist. LEXIS 29854 (W.D. Va. Mar. 6, 2012) 10

Royal v. R & L Carriers Shared Services, L.L.C.,
2013 U.S. Dist. LEXIS 57416 (E.D. Va. Apr. 22, 2013) 9

Rugiero v. Nationstar Mortg., LLC,
580 Fed. Appx. 376 (6th Cir. 2014) 10

Schwab v. Reilly,
560 U.S. 770 (2010) 1

Security Bank of Marshalltown v. Neiman,
1 F.3d 687 (8th Cir. 1993) 15

Stansberry v. Uhlich Children's Home,
264 F. Supp. 2d 681 (N.D. Ill. 2003) 10

Vasuez v. Adair,
253 B.R. 85 (B.A.P. 9th Cir. 2000) 6, 7

Waldron v. Brown (In re Waldron),
536 F.3d 1239 (11th Cir. 2008) 6

Wilson v. Dollar Gen. Corp.,
717 F.3d 337 (4th Cir. 2013) 4, 10, 13, 14

In re Woodson,
839 F.2d 610 (9th Cir. 1988) 7

Statutes and Rules

11 U.S.C. § 103(a), ... 7
11 U.S.C. § 103(i) 7
11 U.S.C. § 362(a)(2) – (4) 15
11 U.S.C. § 521(f) 7, 8
11 U.S.C. § 522(b) 15
11 U.S.C. § 541 ..... 7, 13
11 U.S.C. § 541(a)(1) 4
11 U.S.C. § 541(a)(5) 6, 7, 8
11 U.S.C. § 1306 ..... 7, 13, 14
11 U.S.C. § 1306(a)(1) 5
11 U.S.C. § 1306(b) 4
11 U.S.C. § 1307 16
11 U.S.C. § 1327(b)-(c) 5
11 U.S.C. § 1329(a) 8, 15
11 U.S.C. § 1329(c) 16

Fed. R. Bankr. P. 1007(h) 6, 7, 9
Fed. R. Bankr. P. 1009(a) 12
Fed. R. Bankr. P. 6009 ..... 4, 9, 10, 11

State Statutes

Virginia Code § 34-28.1 15
Virginia Code § 34-3.1 15

STATEMENT OF INTEREST OF AMICUS CURIAE

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys (NACBA) is a non–profit organization consisting of approximately 3,000 consumer bankruptcy attorneys nationwide.

NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed *amicus curiae* briefs in various cases seeking to protect the rights of consumer bankruptcy debtors. *See, e.g., Harris v. Viegelahn*, 135 S. Ct. 1829 (2015); *Schwab v. Reilly*, 560 U.S. 770 (2010); *Ranta v. Gorman*, 721 F.3d 241 (4th Cir. 2013).

NACBA and its membership have a vital interest in the outcome of this case. NACBA member attorneys represent individuals in a large portion of all chapter 13 cases filed. These debtors, and their attorneys, must be able to rely on the text of the Bankruptcy Code and rules when responding to post-petition events in a pending case. This reliance is undermined by arguments about standing, like the one at issue in this case, that muddle bankruptcy procedure in ways that ultimately hurt the bankruptcy estate, while giving defendant tortfeasors a free pass in

unrelated litigation. This Court's ruling will clarify standing requirements, while determining the ability of honest consumer debtors, including those represented by NACBA members, to be made whole for tortious acts committed against them during the bankruptcy process.

AUTHORSHIP AND FUNDING OF AMICUS BRIEF

Pursuant to Fed. R. App. P. 29(c)(5), no counsel for a party authored this brief in whole or in part, and no person or entity other than NACBA, its members, and its counsel made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The law is already well-settled that Chapter 13 debtors have standing to pursue post-petition legal claims in their own name. Appellee seeks to avoid that rule by creating an artificial test that debtors must meet before obtaining the standing already conferred to them by statute. This proposed test apparently has two parts: disclosure and benefit.

First, Appellant's proposed disclosure requirement appears nowhere in the text of the Bankruptcy Code or rules. Except with respect to certain specific kinds of assets, neither the Bankruptcy Code nor Rules require Chapter 13 debtors to amend schedules (which were accurate when filed) to reflect post-filing changes in

their financial situation. Post-petition legal claims do not fall under that narrow category of assets for which the Code mandates amendment. Despite the lack of any affirmative requirement, Appellee even amended her schedules here, as she is entitled to do before the case is closed.

Second, Appellant's proposal to base legal standing on a debtor's subjective desires as to who benefits is entirely out of whole cloth. A Chapter 13 debtor's standing occurs by operation of law, not by any particular intent on behalf of the debtor. This "benefit" test would be entirely unworkable in any event because it is not always clear who actually will benefit when a lawsuit is initiated by a Chapter 13 debtor. In fact, there are many situations, as is likely the case here, where a Chapter 13 debtor can legitimately benefit from a legal claim.

In the end, there is no basis in the Bankruptcy Code or Rules for Appellant's proposed standing requirements, and these requirements serve little purpose other than to give Appellant a free pass for its torts. This Court should affirm the bankruptcy court's decision.

ARGUMENT

This case is squarely resolved by the law in this Circuit, as even Appellant concedes it exists. (*See* Appellant's Br., 10.) As this Court has explained, "[a]ll of the [] circuit courts to have considered the question have concluded that Chapter 13 debtors have standing to bring causes of action in their own name on behalf of the

estate." *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 343 (4th Cir. 2013) (citations omitted). The Chapter 13 debtor's standing to pursue legal claims is founded on the explicit language of the Bankruptcy Code, which assigns to the debtor possession of all estate property, 11 U.S.C. § 1306(b), including legal claims, 11 U.S.C. § 541(a)(1); *see also* Fed. R. Bankr. P. 6009.[1]

Appellant's brief attempts to circumvent the *Wilson* rule and the Bankruptcy Code by conflating a number of important concepts in bankruptcy practice, and proposing an entirely new rule out of whole cloth. That argument starts from the false premise that Chapter 13 debtors are required to amend their bankruptcy schedules to reflect post-petition tort actions, and then crescendos into an illusory distinction based on the "behalf of the estate" language in Rule 6009. This argument is contrary to established bankruptcy procedure, and indeed, Appellant cites scant authority in support of this position. NACBA urges this Court to affirm the bankruptcy court, and reject Appellant's radical interpretation of bankruptcy procedure that gives it a free pass for its torts.

I. Chapter 13 Debtors Are Generally Not Required To Amend Their Schedules To Reflect Post-Petition Events.

[1] By contrast, in a Chapter 7 case the trustee is the sole "representative of the estate," who has the "capacity to sue and be sued." 11 U.S.C. § 323; s*ee also Nat'l Am. Ins. Co. v. Ruppert Landscaping Co.*, 187 F.3d 439, 441 (4th Cir. 1999).

Appellant's argument starts with the false assumption that Chapter 13 debtors have an ongoing duty to amend their schedules to reflect post-petition events. In Appellant's view, "[t]he fact that the cause of action was property of Padula's bankruptcy estate triggered Padula's duty to timely and properly disclose the cause of action through filing amended bankruptcy schedules." (Appellant's Br., 11.) This argument misstates well-established bankruptcy procedure. A post-petition cause of action may be property of the estate,[2] but even if so, it does not follow that such an acquisition mandates amended schedules. Furthermore, despite the lack of a requirement for amended schedules, the debtor here nonetheless filed such amendment while the bankruptcy case was still open.

A. Bankruptcy Rules Require Amended Schedules Only In Limited Circumstances, But Generally Not When Chapter 13 Debtors Acquire Property Post-Petition.

[2] It is not entirely clear whether such an after-acquired asset is estate property. On the one hand, estate property under Section 1306(a)(1) includes post-petition assets. On the other hand, all estate property vests "free and clear" in the debtor when the Chapter 13 plan is confirmed. 11 U.S.C. § 1327(b)-(c). This Circuit has not resolved whether this vesting provision excludes future assets from the estate. *See Murphy v. O'Donnell (In re Murphy)*, 474 F.3d 143, 154 (4th Cir. 2007) (declining to answer the question). Much of this brief will assume that a post-petition legal claim is estate property because it would otherwise be axiomatic that debtors would have standing to pursue claims owned "free and clear."

A Chapter 13 debtor does not have "a free-standing duty to disclose the acquisition of any property interest after the confirmation of his plan under Chapter 13. Neither the Bankruptcy Code nor the Bankruptcy Rules mention such a duty." *Waldron v. Brown (In re Waldron)*, 536 F.3d 1239, 1246 (11th Cir. 2008); *see also Cusano v. Klein*, 264 F.3d 936, 947 (9th Cir. 2001) ("It is true that, generally, a debtor has no duty to schedule a cause of action that did not accrue prior to bankruptcy."). This is hardly a loophole or drafting oversight. "If Congress or the Bankruptcy Rule drafters had intended to impose a broader duty of ongoing disclosure, either could have expressly so provided." *Vasuez v. Adair*, 253 B.R. 85, 90 (B.A.P. 9th Cir. 2000).

Rather than creating such a broad duty, the Bankruptcy Rules expressly define the limited circumstances when amendment is required. Specifically, amended schedules are only required when "the debtor acquires or becomes entitled to acquire any interest in property" pursuant to Section 541(a)(5) of the Code. Fed. R. Bankr. P. 1007(h). The property covered under Section 541(a)(5) is a discrete category, covering fairly unusual, one-time events -- inheritances, divorce settlements, and insurance proceeds, to which the debtor becomes entitled within 180 days of the petition's filing date. 11 U.S.C. § 541(a)(5); *In re Woodson*, 839 F.2d 610, 617 (9th Cir. 1988).

Notably, Rule 1007(h) does not require amendment to reflect property entering the estate pursuant to Section 1306, such as post-petition wages and assets.[3] *See Vasuez*, 253 B.R. at 90; *Batten v. Cardwell (In re Batten)*, 351 B.R. 256, 259 (Bankr. S.D. Ga. 2006) ("a debtor is under no obligation to disclose the post confirmation acquired asset unless the property is of the type covered by F.R.B.P. 1007(h)"). As a result, "[c]ommon sense, reflected in the canon *expressio unius est exclusio alterius*, suggests that the specification of [one provision] implies" the exclusion of others. *Arizona v. United States*, 132 S. Ct. 2492, 2520 (2012) (Scalia, J., concurring in part and dissenting in part); *see also In re Dow Corning Corp.,* 263 B.R. 544, 546 (Bankr. E.D. Mich. 2001) (applying the canon to Fed. R. Bankr. P.).

The Code itself also has a procedure that, when invoked, requires further affirmative disclosures by the debtor. Under Section 521(f), a Chapter 13 debtor may be required to produce annual income and expense statements at "the request of the court, the United States trustee, or any party in interest." 11 U.S.C. § 521(f);

---

[3] Two complementary provisions in the Bankruptcy Code define estate property in Chapter 13 cases. Section 541, which is generally applicable to chapters 7, 11, 12, and 13, 11 U.S.C. § 103(a), covers pre-petition property and the limited post-petition property enumerated in subparagraph (a), *see* 11 U.S.C. § 541. Section 1306, which is only applicable to Chapter 13 proceedings, 11 U.S.C. § 103(i), covers post-petition earnings and assets, *see* 11 U.S.C. § 1306.

see also In re Nance, 371 B.R. 358, 371 (Bankr. S.D. Ill. 2007); *In re Grunauer*, 2010 Bankr. LEXIS 1716 (Bankr. E.D. Va. 2010). This procedure "allow[s] interested parties to monitor a debtor's financial situation during the pendency of the bankruptcy case and to seek modification… if changes in that situation occur." *Nance*, 371 B.R. at 371. Even though changes in a debtor's situation could affect projected disposable income, and be relevant to the feasibility and amount of plan payments, Congress placed the burden of requesting this heightened disclosure on parties other than the debtor. 11 U.S.C. § 521(f).[4] Section 521(f) disclosures would be superfluous if debtors already had ongoing disclosure obligations.

The tort claim in this case does not fall under either of the above categories requiring amendment. As a post-petition tort, it is not 541(a)(5) property, and there was no order requiring heightened disclosures under Section 521(f). The debtor's only obligation is spelled out in an addendum to the confirmation order:

> [T]he Debtor shall furnish the Trustee any such amount(s) as are hereafter determined by the Court to be disposable income of the Debtor(s) during the pendency of this proceeding and any additional information as the Trustee may require for determination of the Debtors disposable income.

[4] It is also worth noting that plan modification itself is an entirely permissive procedure. *See* 11 U.S.C. § 1329(a).

(JA 134.) At most, this language simply requires Appellee to inform the Trustee (not necessarily by amending schedules) once the matter affects "disposable income." As the bankruptcy court noted: the Trustee "appears to be satisfied with a reporting requirement imposed upon the Debtor to disclose the results of the litigation." (JA 367-8.) Appellee met that requirement.

In sum, there are only limited circumstances when a debtor must amend schedules to reflect post-petition developments. Under Rule 1007(h), those circumstances do not include the post-petition acquisition of a legal claim. Because a debtor has no ongoing duty to amend schedules in these circumstances, Appellant's insistence that an "undisclosed cause of action" deprives a Chapter 13 debtor of standing, (*see e.g.*, Appellant's Br., 15,) is entirely without merit.

B. Rule 6009 Does Not Create Additional Disclosure Duties.

The text of Rule 6009 is clear: a Chapter 13 debtor may pursue a cause of action "[w]ith or without court approval." Fed. R. Bankr. P. 6009. Thus, by its express terms, Rule 6009 requires neither amendment nor any form of pre-litigation disclosure before a debtor in possession obtains standing to file suit. *See Royal v. R & L Carriers Shared Services, L.L.C.*, 2013 U.S. Dist. LEXIS 57416, at *14 (E.D. Va. Apr. 22, 2013). Nor does any other language in the rule indicate additional disclosure requirements.

Appellant ignores the plain language of Rule 6009, insisting that additional disclosures are required. Appellant also creates a test out of whole cloth based on these purported requirements: "the test for whether the debtor is acting on behalf of the estate is whether the debtor has properly disclosed the cause of action." (Appellant's Br., 12.) To be clear, the cases cited by Appellant create no such test.

Indeed, the majority of those cases do not even cite Rule 6009 or use the phrase "behalf of the estate," much less describe any sort of test that determines which claims are brought on "behalf of the estate" and which are not. *See Rugiero v. Nationstar Mortg., LLC*, 580 Fed. Appx. 376 (6th Cir. 2014); *Becker v. Verizon North, Inc.*, 2007 U.S. App. LEXIS 9879 (7th Cir. Apr. 25, 2007); *Robertson v. Flowers Baking Co. of Lynchberg, LLC*, 2012 U.S. Dist. LEXIS 29854 (W.D. Va. Mar. 6, 2012); *Osterlich v. Sand Canyon Corp.,* 2010 U.S. Dist. LEXIS 62708 (N.D. W.Va. June 23, 2010); *Richardson v. United Parcel Service*, 195 B.R. 737 (E.D. Mo. 1996). These five cases are also notable for their cursory analysis, built largely on quotes from Chapter 7 cases, which raise an entirely different set of standing issues. *See Wilson*, 717 F.3d at 342-3 (noting those differences). The only case among them to have been published, *Richardson*, "contains reasoning that has been rejected or questioned by several other federal courts." *Stansberry v. Uhlich Children's Home*, 264 F. Supp. 2d 681, 686 (N.D. Ill. 2003); *Henneghan v.*

Columbia Gas of Va., Inc. (In re Henneghan), 2005 Bankr. LEXIS 1770, at *20-24 (Bankr. E.D. Va. June 22, 2005).

The two remaining cases from Appellant's litany that even cite to Rule 6009 reach holdings contradictory to the plain language of the rule without much analysis, built largely on inapposite quotes from the above cases and other Chapter 7 matters. *See Cowling v. Rolls Royce Corp.*, 2012 U.S. Dist. LEXIS 144273, at *10-12 (S.D. Ind. Oct. 5, 2012); *Calvin v. Potter*, 2009 U.S. Dist. LEXIS 73862 (N.D. Ill. Aug. 20, 2009) (citing Chapter 7 cases and the widely rejected *Richardson* decision). Finally, not a single one of the cases cited by Appellant actually consults the Code or Bankruptcy Rules to determine what the debtor's disclosure obligations are in this situation.

In the end, none of the above cases creates the heightened disclosure duties pushed by Appellant. Instead, Rule 6009 expressly authorizes a debtor in possession to commence litigation "without court approval."

C. To the Extent the Debtor Was Required to Amend Her Schedules, She Did So in a Timely Manner.

Despite the absence of any affirmative duty for a debtor in Appellee's position to amend schedules, it is important to note that she did so anyway. (*See* JA 144.) The Rules expressly authorize schedules to be "amended by the debtor as a matter of course at any time before the case is closed." Fed. R. Bankr. P. 1009(a); *see also Botkin v. DuPont Cmty. Credit Union*, 650 F.3d 396, 398-9 (4th

Cir. 2011); *Rainey v. UPS*, 466 F. App'x 542, 544 (7th Cir. 2012). Thus, to the extent this voluntary amendment was required, which it was not, it was clearly timely under the only operative deadline: "before the case is closed."

Despite the clear language of Rule 1009, Appellant argues that the debtor's amendments here were somehow untimely. (*See e.g.*, Appellant's Br., 11-12.) Instead of citing any legal authority for its proposal to shorten the window of Rule 1009(a) amendments, Appellant simply attempts to distort the factual timeline of the amendments into some sort of legal concession by Appellee that the amendments were too late. (See Appellant's Br., 12 (citing the bankruptcy docket and transcript testimony as to dates to support its statement that "[t]here is no dispute that Padula did not timely disclose the state court action. Padula concedes, she failed to timely amend her schedules.").)

There is good reason that Appellant cites neither the Bankruptcy Code nor the rules in its timeliness argument, as the rules clearly defeat its position. To the extent a debtor is required to file any amended schedules, Rule 1009(a) expressly allows such amendments "at any time before the case is closed."

II. Appellant's Distinction Between Individual And "Behalf of the Estate" Claims Is Illusory.

As described above, the law in this Circuit is already clear that, "unlike a Chapter 7 debtor, a Chapter 13 debtor possesses standing [] to maintain a non-bankruptcy cause of action on behalf of the estate." *Wilson*, 717 F.3d at 343. Appellant erroneously assumes that this rule creates two classes of legal claims: those pursued on behalf of the Chapter 13 individual, and those pursued on "behalf of the estate." (*See e.g.*, Appellant's Br., 10.)

Again, Appellant cites little authority to support such a categorization, and it is an entirely illusory distinction at best. If the legal claim is property of the estate under Sections 541 or 1306, then it is automatically being pursued on "behalf of the estate" by operation of law. There are no formalities or technical requirements that must be met in order to transform the claim into one on "behalf of the estate." *See e.g., Ortiz v. Aurora Health Care, Inc. (In re Ortiz)*, 2012 U.S. Dist. LEXIS 117511, at *18 n.8 (E.D. Wis. Aug. 21, 2012) ("The Bembenek plaintiffs did not state in their complaint that they were pursuing their claims on behalf of their estates, but as Chapter 13 debtors, they would have been."). If the claim is not property of the estate under Sections 541 and 1306, then the claim is not being pursued on "behalf of the estate." Under either scenario, the debtor would have standing to pursue the case. *See Evinger v. Emery Winslow Scale Co.*, 2012 U.S. Dist. LEXIS 105740, at *10 (S.D. Ind. July 30, 2012).

Appellant's position apparently conflates the phrase "behalf of the estate" with "behalf of the creditors." Under Appellant's remarkable view, the fact that a "debtor will claim *any* recovery for him or herself [means that he or she] cannot be thought of as bringing the action on behalf of the estate." (Appellant's Br., 15 (emphasis added), *see also id*. at 10 ("her own benefit rather than for the benefit of the bankruptcy estate"), 11 ("she pursued an undisclosed cause of action exclusively for her own benefit"), 16 (misstating *Wilson* case as "stat[ing] that the right of the debtor to bring a bankruptcy estate cause of action was tied to the belief that the case would benefit the bankruptcy estate," and "she intended the state court cause of action to benefit only herself, not the bankruptcy estate").)

On the contrary, there are a number of scenarios where estate property can legitimately benefit the Chapter 13 debtor instead of the creditors. As the Supreme Court recently explained, "estate property does not become property of creditors until it is distributed to them." *Harris v. Viegelahn*, 135 S. Ct. 1829, 1839 (2015). Thus, in *Harris*, post-petition wages that were estate property pursuant to Section 1306, and that had not yet been distributed to creditors, were returned to the debtor after he converted his case to a Chapter 7 bankruptcy. *Id*. at 1838. The *Harris* Court was unconcerned with the purported benefit received by the Chapter 13 debtor, and instead, found this disposition of estate property to be an important part of Chapter 13 cases. *Id*. at 1839.

As Appellee points out, it may also be the case, as here, that the legal claim is wholly exempt from distribution. (*See* Appellee's Br., 8.) Under Virginia law, "all causes of action for personal injury... and the proceeds derived from court award or settlement shall be exempt from creditor process." Virginia Code § 34-28.1.[5] As a result, even if Appellee's legal claim is property of the estate, its liquidation may not actually ever benefit her creditors.[6]

Appellant's proposed "benefit" test is also undermined by its insistence that the standing analysis be performed at the onset of litigation. At commencement of litigation by a Chapter 13 debtor, it is rarely clear who the ultimate beneficiaries will be. A settlement could result in higher disposable income, which could justify increased plan payments, *see* 11 U.S.C. § 1329(a); *Murphy*, 474 F.3d at 152, but not necessarily. As the Virginia property exemptions above show, there could be good reason for the debtor to receive all, or most, of the proceeds from the liquidated claim. A number of other post-litigation developments could also mean

---

[5] Under Section 522(b), states are allowed to opt out of federal bankruptcy exemptions. Virginia has done so, Virginia Code § 34-3.1, thus making state law exemptions applicable.

[6] The inclusion of the legal claim in the estate, however, may serve various other purposes, most notably giving it the protection of the automatic stay. *See* 11 U.S.C. § 362(a)(2) – (4); *Security Bank of Marshalltown v. Neiman*, 1 F.3d 687, 691 (8th Cir. 1993).

that the debtor properly retains some interest in the proceeds of the litigation: the Chapter 13 case could be converted or dismissed, 11 U.S.C. § 1307; *see Harris*, 135 S. Ct. at 1839; the Chapter 13 estate could reach the mandatory five-year closing period before the claim is liquidated, 11 U.S.C. § 1329(c), or the ultimate liquidation could pay the plan in full, leaving the debtor with a surplus. All of this goes to show that who benefits, and who intends to benefit, from a cause of action is an entirely separate question that is not always ascertainable before the claim has been liquidated.

In short, Appellant's proposed "benefit" test to determine standing lacks any support in bankruptcy procedure. Because of the many nuances as to what ultimately happens to Chapter 13 estate property, it is also an entirely unworkable test that this Court should reject.

CONCLUSION

For the reasons stated above, *amicus curiae* asks this court to affirm the decision of the Bankruptcy Court of the Eastern District of Virginia below.

/s/ Tara Twomey

NATIONAL ASSOC. OF CONSUMER BANKRUPTCY ATTORNEYS, *AMICUS CURIAE*
BY ITS ATTORNEY
TARA TWOMEY, ESQ.
NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER
1501 The Alameda
San Jose, CA 95126
(831) 229-0256

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,752 words, excluding parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This filing complies with Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 point type.

3. This brief has been scanned for viruses pursuant to Rule 27(h)(2).

/s/ Tara Twomey
Tara Twomey, Esq.
Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on January 26, 2016. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Tara Twomey
Tara Twomey, Esq.
Attorney for Amicus Curiae