AMERICAN BANKRUPTCY INSTITUTE

Consumer Practice Extravaganza

Post-Petition Issues in Consumer Cases: Life Goes On

Thomas H. Hooper
Standing Chapter 13 Trustee | Chicago

Hon. Meredith A. Jury
U.S. Bankruptcy Court (C.D. Cal.) | Riverside

Michael A. Miller
The Semrad Law Firm, LLC | Chicago

Kristi S. Williams
Lefkoff, Rubin, Gleason, Russo & Williams, P.C. | Atlanta

CONCURRENT SESSION

2023

Post-Petition Issues in Consumer Cases: Life Goes On

CPEX – 2023

Hon. MEREDITH JURY
U.S. BANKRUPTCY COURT (C.D. CAL.); RIVERSIDE

THOMAS H. HOOPER
STANDING CHAPTER 13 TRUSTEE
CHICAGO, IL

KRISTI S. WILLIAMS
LEKOFF, RUBIN, GLEASON, RUSSO & WILLIAMS P.C
ATLANTA, GA

MIKE MILLER
SEMRAD LAW FIRM, LLC
CHICAGO, ILLINOIS

AFTER ACQUIRED PROPERTY ISSUES IN CHAPTER 13-Meredith Jury

I. Sections 1306 and 1327: What is Property of the Estate After Confirmation

A. Section 1306 adds to section 541 property available on the petition date similar property acquired by the debtor, plus earnings from services performed, after commencement of the case and before the case is closed, dismissed, or converted.

B. Section 1327 revests property of the estate in the debtor upon confirmation, unless the court orders otherwise (which is usually done, if at all, by local rule or in the plan confirmation order or both).

C. The dichotomy between these seemingly antithetical sections has led courts to five different approaches in considering post confirmation property of the estate. *In re Elassal*, 2023 WL 5537061, 2023 Bankr. LEXIS 426 (Bankr. E.D. Mich. 2023); *In re Marsh*, 647 B.R. 725 (Bankr. W.D. Mo 2023).

1. Estate Termination approach – no estate at all after revesting
2. Estate Transformation approach **-** estate consists of property and future earnings needed for plan fulfillment
3. Estate Preservation approach – estate continues after confirmation with all pre-confirmation property and after-acquired property
4. Conditional Vesting approach – property belongs to both estate and debtor with complete vesting conditioned on plan completion
5. Estate Replenishment approach – pre-confirmation property becomes property of the debtor but post-confirmation newly acquired property replenishes the estate.

D. Both *Elassal* and *Marsh* follow Estate Replenishment but have opposite results regarding proceeds from sale of real property which appreciated post confirmation. *Elassal* says proceeds were based on pre-confirmation asset and belong to debtor. *Marsh* says the appreciation and resulting sale proceeds were a new asset and belong to the estate for distribution to unsecured creditors.

II. Post Confirmation Personal Injury Claims – Mixed Results

A. *In re Hill*, 652 B.R. 212 (Bankr. S.D. Ala. 2023). Found nonexempt settlement proceeds were property of chapter 13 estate to be distributed to creditors but only up to the confirmed percentage. No increase in percentage paid to creditors. Proceeds are an asset, not income.

B. *In re Villegas*, 573 B.R. 844 (Bankr. W.D. Wash. 2017). Settlement proceeds included in estate under section 1306. Must evaluate asset on modification date and redo best interest of creditors test. Result was likely increase in percentage to unsecureds.

III. Consideration of Sections 1325(a)(4) and 348(f)

A. Section 1325(a)(4) is the best interest of creditors test for confirmation and says unsecured creditors must receive as much as they would receive in a chapter 7 liquidation. Controversy exists over whether that test is redone upon a motion to modify based on the addition of an after-acquired asset, essentially resetting the effective date of the plan to the modification date. Cases over the years have come down on both sides of issue, with the majority saying relevant date is the modification date. *In re Barbosa*, 236 B.R. 540 (Bankr. D. Mass. 1999); *In re Villegas.*

B. Section 348(f) defines property of the estate when a chapter 13 converts to a chapter 7 as "property of the estate on the petition date still in the possession of the debtor." This section has an impact on the recalculation of the best interest test based on an after-acquired asset because it defines what the chapter 7 estate consists of for liquidation purposes.

C. Recent cases addressing the dichotomy

1. *Villegas*, supra, ignores section 348(f), says relevant date for best interest test is modification date, and personal injury settlement goes to the creditors. Does not consider what creditors would actually get in a chapter 7 on the date of the modification, which would not include the post petition settlement under the section 348(f) definition.
2. *In re Taylor*, 651 B.R. 346 (Bankr. D. Kan. 2021). Another post petition personal injury settlement case which agrees that the effective date of plan for redoing section 1325(a)(4) test is the modification date but that post-petition acquired assets are

excluded from the calculation because they would not be in the chapter 7 estate based on section 348(f).

3. *In re Madrid*, 2023 WL 3563019, 2023 Bankr. LEXIS 1321 (Bankr. W.D. Wash. 2023). Follows *Taylor*; agrees that the date for liquidation test is modification date but finds that a post petition inheritance would not be property of a chapter 7 liquidation under 348(f) because it was received more than 180 days after the petition date. It therefore would not be included in the calculation. Initial result is no increase in payments to unsecureds, but case has a good faith element because the debtor belatedly disclosed the inheritance. Plus, court has discretion to consider a "substantial change in the debtor's financial condition", so it still might increase payment. [See discussion below in IV.]

IV. Some Cases Apply "Substantial and Unanticipated Change in Debtor's Financial Circumstance" Test to Increase Plan Payments

A. *In re Hunsucker*, 652 B.R. 658 (Bankr. E.D. N.C.2023). Case is in the Fourth Circuit which alone has adopted this test. Funds here were from a trust created by a will and came more than 180 days after the petition date. Following Fourth Circuit case law from 1989 and 2007, the bankruptcy court felt compelled to increase plan payment because of the unanticipated change by adding this property to the estate under section 1306. No discussion of the liquidation test or of section 348(f).

B. Notwithstanding its recognition of the section 348(f) exclusion of the inheritance from the liquidation analysis, the *Madrid* court said it had discretion to consider the "substantial increase in the debtor's financial condition" when it decides whether to increase the percentage payments to the unsecured. Court relied on *In re Mattson*, 468 B.R. 361 (9th Cir. BAP 2012), where the BAP primarily held that a substantial and unanticipated changed in a debtor's financial condition was *not* required for a plan modification but in passing said a court had discretion to consider it.

V. Debtor Remedy Cases When After-Acquired Asset Might Increase Plan Payments

A. *In re Lopez*, 897 F. 3d 663 (5th Cir. 2018). After Trustee moved to modify debtors' confirmed chapter 13 plan to compel debtors to turn over proceeds from postpetition sale of their home to pay unsecureds, debtors moved to voluntarily dismiss the chapter 13. Court of

Appeals allowed the dismissal and turn over of the funds to the debtors, finding no bad faith.

B. *In re Lokan*, 2023 WL 4014086, 2023 Bankr. LEXIS 1556 (9th Cir. BAP 2023). Debtors received post-petition inheritance more than 180 days after the petition date in a chapter 13. Debtors, on advice of counsel, converted the case to chapter 7 and disclosed the inheritance. Chapter 7 trustee moved for turnover of the money, asserting the inheritance was property of the estate and that the conversion was in bad faith. The bankruptcy court held an evidentiary hearing and concluded the conversion was in good faith, denying the trustee's motion. The BAP affirmed. No bad faith. Debtors were entitled to keep the inheritance, which was not property of the chapter 7 estate because it did not exist on the petition date and was received more than 180 days post-filing.

UNDISCLOSED PRE-PETITION ASSETS-Thomas Hooper
Possibility of Reopening Cases to Administer – Chapter 7

Generally, 11 U.S.C. 554(d) creates a perpetual chapter 7 estate that operates to capture any undisclosed assets. This permits a chapter 7 trustee to reopen previously discharged and closed cases to administer undisclosed assets. Section 350(b) expressly permits the reopening of cases under chapters 7, 12, or 13 for the purpose of administering assets.

Parker v. Wendy's Int'l, Inc. 365 F.3d 1268 (11th Cir. 2004)
Chapter 7 may be reopened for a chapter 7 trustee to pursue and administer previously undisclosed claims. Judicial estoppel does not apply to the chapter 7 trustee, as the trustee did not make the inconsistent statement by failing to disclose.

In re Lopez 283 B.R. 22 (9th Cir. BAP 2002)
Chapter 7 debtor sought to reopen the case and disclose a claim to defeat an estoppel argument. The bankruptcy court denied the motion based on debtor's bad faith. The BAP reversed, holding that disclosing an asset is a valid basis to reopen a chapter 7 case, and the expiration of the time within which to revoke a discharge is not a basis to preclude reopening. Alleged bad faith is "never a sufficient basis by itself to deny a motion to reopen to schedule an asset that has the potential to benefit creditors." "The court has the duty to reopen an estate whenever prima facie proof is made that it has not been fully administered." Herzig 96 Br. At 266.

In re McMellon 448 B.R. 887 (S.D. WV 2011)
A debtor's motion to reopen to disclose an asset should be denied when the apparent purpose is thwarting an estoppel argument. However, the result may be different if the motion were brought by the trustee.

Possibility of Reopening Cases to Administer – Chapter 13

The interplay between sections 1327, 1328, 1329 and 1330 creates a barrier, and perhaps complete bar, to the attempt to administer previously undisclosed assets which are discovered after the order of discharge is entered. A plan may not be modified to be administered by the chapter 13 trustee, and conversion to chapter 7 may be prohibited. However, with such a strict reading of the Code, an extensive loophole for fraud is created that can be manipulated by debtors acting in bad faith.

In re Kelly 358 B.R. 443 (Bankr. M.D. Fla. 2006)

After the entry of a discharge order and closure of the case, the United States Trustee learned of debtor's interest in an undisclosed probate estate. The UST successfully reopened the case and moved to convert to a chapter 7 to permit administration of the asset. The UST's motion was denied. While sections 554(d) and 350 contemplate a case being reopened to administer undisclosed assets, section 1327 prevails and the asset vested in the debtor. Principals of finality trump a debtor's malfeasance. But see *In re Curtis* 2015 WL 4065260 (Bankr. M.D. Fla. 2015) holding that, notwithstanding property vesting under section 1327, subsequent conversion implicates 348(f), which would make the assets property of the chapter 7 estate, despite prior vesting in the debtor.

In re Webb 2018 WL 11206026 (Bankr. M.D. Fla. 2018)

Reopening a chapter 13 to convert for purposes of administering an undisclosed asset is not permitted. The court reasoned that administration of the claim under chapter 7 would amount to a plan modification time-barred by 1329 (the debtor had completed all payments under the confirmed plan) and because conversion would "represent an untimely revocation of the Debtor's discharge and confirmation order under sections 1328(e) and 1330(a)." But see *In re Curtis* 2015 WL 4065260 (Bankr M.D. Fla. 2015), holding that conversion is not a revocation of a confirmation order.

In re Maldonado 646 B.R. 917 (Bankr. D. Utah 2022)

Inappropriate for Debtor to reopen a discharged case to disclose a claim for the purposes of thwarting defendant's estoppel argument. The asset cannot be administered and merely reopening to amend schedules is not an expressly permissible cause to reopen under section 350. See also In re Thompson 344 B.R. 461 (Bankr. W.D.Va. 2004) and *In re D'Antignac* 2013 WL 1084214 (Bankr. S.D.Ga. 2013) (holding that the asset could not be administered because it violates section 1322's mandate of payments being made within five years and modification was not permitted under section 1329 because payments under the plan were complete).

Race to Completion of Payments Under the Plan

In re Frank 638 B.R. 463 (Bankr. D. Colo. 2022)
Chapter 13 Trustee learned of an undisclosed pre-petition claim after completion of payments under the plan, but prior to entry of the order of discharge. Trustee brought a motion to dismiss for cause, arguing that the failure to disclose warranted dismissal. The court analyzed the plan language of section 1328 and determined that it "shall" enter the discharge order after completion of payments. As a case can only end in dismissal, conversion, or discharge, the Trustee's motion to dismiss was denied. But see *In re Reppert* 643 B.R. 828 (Bankr. W.D. Penn. 2022) holding that the loophole for fraud by failure to disclose created by Congress through the statutory scheme is so blatant that it could not have been the intent and dismissal under such circumstances is appropriate to avoid a race to the final plan payment. See also *In re Sugar*, 2023 WL 19361078 (Bankr. EDNC 2023), holding that racing to the completion of payments under the plan to obtain a discharge must be balanced against the debtor's behavior and dismissal may be appropriate under section 1307 even if payments under the plan are complete.

In re Cram 406 B.R. 17 (Bankr. W.D.N.Y. 2009)

Debtor failed to properly disclose a pre-petition claim until after the plan was confirmed. The case progressed with no party modifying the plan and a discharge order ultimately entered. A creditor notified the chapter 13 trustee that the claim had been settled during the case, without notice to the trustee or the court. The Trustee moved to modify the plan and to vacate discharge. The court relied on its section 105 powers to vacate both the discharge order and the confirmation order. The ultimate result was an order instructing debtor to tender to the trustee an amount sufficient to pay 100% dividend to allowed general unsecured claims within a time certain, the failure of which would result in dismissal.

Sample Plan Provisions Governing Undisclosed Assets

VESTING OF PROPERTY OF THE ESTATE

Only property of the estate listed on an original or amended Schedule A/B as of the date of confirmation shall revest in the Debtor upon confirmation of the Debtor's Plan. All undisclosed, pre-petition property shall vest in the Trustee and become property of the estate. Property acquired by the Debtor post-petition shall vest in the Trustee and become property of the estate as contemplated by 11 U.S.C. Section 1306, subject to the dollar limitations and procedures set forth in Paragraph 20, **Assets Acquired Post-Petition**, below. (This includes, for example, property previously disclosed, such as a personal injury claim, worker's compensation claim, inheritance or class action, but liquidated and/or acquired post-petition.) Furthermore, the Debtor shall promptly notify the Trustee of the acquisition of any right and/or interest in such property.

ASSETS ACQUIRED POST-PETITION

Should the debtor(s) acquire or receive any interest in property, outside of their previously disclosed normal financial affairs, with a fair market value exceeding $2,000.00, AND/OR any interest in property with an undetermined, unliquidated, or unknown value, they shall immediately file the appropriate amended schedule(s) to disclose the acquisition or receipt of the same. Examples of such property include, but are not limited to, any financial recovery

to which debtor(s) is or becomes entitled to receive during the pendency of the Chapter 13 plan, claims for personal injury, worker's compensation employment/back-pay, worker's compensation claims, inheritance, life insurance proceeds, bonuses, or gifts. Upon the filing of said amended schedules, the Chapter 13 Trustee or other party in interest shall have sixty (60) days to file a motion for turnover of the value of the property at issue. Debtor(s), in turn, may file an objection to such motion within twenty-one (21) days seeking leave to retain the value of such property. In the absence of such motion, or if the motion is denied, the value of the property will be deemed to have been abandoned by the bankruptcy estate. The value of any interest in property acquired by Debtor(s) that is subject to this Paragraph, whether or not disclosed on amended schedule(s), shall constitute a payment under the plan due upon Debtor(s)' interest accruing unless or until the interest is abandoned by the Trustee pursuant to the procedures established by this Paragraph. The value of any property ordered to be turned over to the Trustee shall be paid into the debtor(s)' plan as a payment under the plan, inclusive of trustee fees. The Trustee is hereby authorized to increase the plan base and minimum required distribution to the Debtor(s)' allowed general unsecured creditors as set forth in Paragraph 10 consistent with the provisions of this Paragraph. The Trustee shall thereafter disburse the value of property received under this Paragraph in accordance with the provisions of Paragraph 1, **Order of Distribution.**

JUDICIAL ESTOPPEL-Kristi Williams

I. What is it?
   a. Judicial estoppel is a doctrine which courts rely upon to prevent a litigant from making a claim that is inconsistent with a position taken by the litigant either in a prior legal proceeding or in an earlier phase of the same legal proceeding.
      i. In a bankruptcy context, this doctrine prevents a Debtor from benefiting from an asset (a claim) post-discharge when that claim was not disclosed or was not completely disclosed as an asset or potential asset in the bankruptcy case.
   b. Equitable – invoked by a court at its discretion
   c. 2 baseline factors for application:
      i. Party's position must be clearly inconsistent with earlier position.
         1. If the positions are not **clearly** inconsistent, the doctrine should not be applied. *In re Groves*, 652 B.R. 104, (9th Cir. BAP 2023).
      ii. Party must have succeeded in persuading a court to accept earlier position.
         1. If the court was not misled, the doctrine should not be applied. *In re Groves*, 652 B.R. 104, (9th Cir. BAP 2023).
   d. Additional considerations (non-exhaustive):
      i. Whether the party seeking to assert inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.
   e. "Exception" to judicial estoppel available in some circuits:
      i. Parties who fail to identity a legal claim in bankruptcy schedules may escape application of doctrine if they can show that they either:
         1. Lacked knowledge of the undisclosed claims OR
         2. Had no motive for their concealment.
            a. Doctrine not traditionally applied when a party's prior position was taken because of a good-faith mistake rather than as part of a scheme to mislead and manipulate the court.

ii. But some circuits find deliberate dishonesty NOT a prerequisite for application of judicial estoppel. *In re Buscone* 61 F.4th 10 (1st Cir. 2023).

II. Complete Failure to Disclose an Asset in Either a Chapter 7 or 13 Can Cause Dismissal of Debtor's Action in State Court (or in Bankruptcy Court if Removed There)

a. *In re WVSV Holdings, LLC*, 2023 WL 5548975 (9th Cir. 2023). Though a Chapter 11 case, the holding would still apply. In examining causes of action as property, look to state law to establish the elements of a claim and when it accrues. Then, look to federal (bankruptcy) law to determine if the claim is property of the estate. The definition of property of the estate has been broadly construed to encompass a debtor's contingent interest…, even if that interest is reliant on future contingencies that have not occurred as of the filing date. The question is whether such claims are "sufficiently rooted in pre-bankruptcy past."

i. Court here applied judicial estoppel in dismissing Debtor's suit (filed in state court and removed to bankruptcy court).

III. What About the Effect of Incomplete Disclosure?

a. *Williams v. Northwell Health, Inc.,* 2023 WL 6214160 (E.D. NY 2023). Court found that Plaintiff's schedules were sufficient to, and did, put the bankruptcy trustee on inquiry notice of Plaintiff's claims against Defendants, and because of this finding, the Court further found the doctrine of judicial estoppel inapplicable.

Faculty

Thomas H. Hooper is a chapter 13 standing trustee for the Northern District of Illinois in Chicago, appointed on Oct. 1, 2021. He began his bankruptcy career in North Carolina, where he represented debtors in chapter 7 and 13 cases. Following his experience as debtors' counsel, Mr. Hooper served as a staff attorney to both Russell Simon, chapter 13 standing trustee for the Southern District of Illinois, and Joseph Bledsoe, chapter 13 standing trustee for the Eastern District of North Carolina. He has been a frequent speaker on issues affecting chapter 13 administration at bankruptcy seminars and workshops. Mr. Hooper received his B.B.A. from Ohio University and his J.D. from Ohio Northern University.

Hon. Meredith A. Jury is a retired U.S. Bankruptcy Judge for the Central District of California in Riverside, appointed from 1997-2018 by the Ninth Circuit Court of Appeals. She also served on the Ninth Circuit Bankruptcy Appellate Panel (BAP) from 2007-17. Since her retirement, she has been writing *pro bono* appellate briefs for consumer debtors or amicus for NACBA. Prior to her appointment to the bench, Judge Jury had spent her entire attorney career as a civil, municipal and bankruptcy litigator for the law firm of Best, Best & Krieger in Riverside, joining as the first woman associate in 1976 and becoming its first woman partner in 1982. She has participated in innumerable panels about various aspects of bankruptcy law at local and Ninth Circuit programs. As a member of the BAP, Judge Jury was lead author of *In re Vallejo*, 408 B.R. 280 (B.A.P. 9th Cir. 2009), primarily concerning the eligibility of a city to file chapter 9. She received her B.A. *cum laude* from the University of Colorado, where she was elected Phi Beta Kappa, and her J.D. from UCLA. She also received Masters degrees in economics and English/education from the University of Wisconsin.

Michael A. Miller is a supervising attorney at the Semrad Law Firm, LLC in Chicago, where he focuses on consumer bankruptcy. He also founded and runs the firm's *pro bono* appellate practice, and has argued three times in front of the Seventh Circuit. Mr. Miller is currently an adjunct professor at The University of Illinois Chicago Law School. He is a former co-chair of the Bankruptcy Court Liaison Committee for the Northern District of Illinois, and he is currently the Seventh Circuit Leader for the National Association of Consumer Bankruptcy Attorneys. Mr. Miller received his undergraduate degree with honors from Roosevelt University and his J.D. from The John Marshall Law School, during which time he was an extern for the U.S. Trustee's Office.

Kristi S. Williams is a partner at Lefkoff, Rubin, Gleason, Russo & Williams, P.C. in Atlanta, where she specializes in creditors' rights law. For 11 years, she has represented creditors in bankruptcy, real and personal property foreclosures, collection matters and real estate closings. Before representing creditors, Ms. Williams represented consumer debtors. She is a member of the bankruptcy and creditors' rights sections of the State Bar of Georgia and the Atlanta Bar Association. Ms. Williams is an advisory board member of ABI's Southeast Bankruptcy Workshop and is an active member of the International Women's Insolvency & Restructuring Confederation and the National Creditors Bar Association. She received her B.B.A. in accounting with honors from Georgia Southern University and her J.D. with honors from Georgia State University College of Law.