AMERICAN BANKRUPTCY INSTITUTE

Southeast Bankruptcy Workshop

Consumer Track

Post-Petition Issues in Consumer Cases: Life Goes On

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Post-Petition Issues in Consumer Cases: Life Goes On

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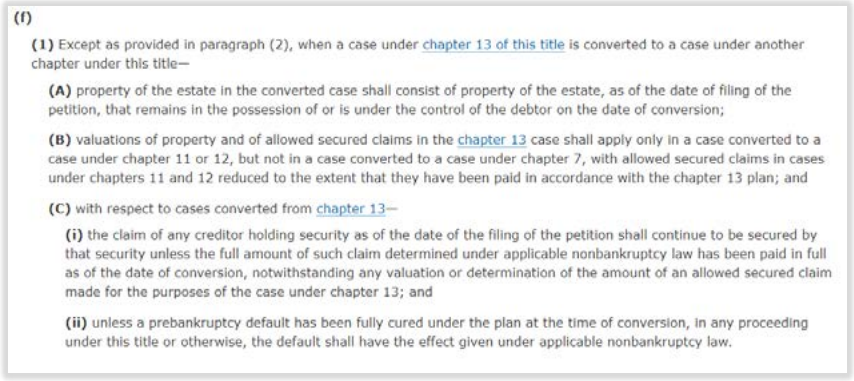
I. What assets are included in the chapter 7 estate upon conversion from a Chapter 13?

A. Section 348(f)



(f)

(1) Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title—

(A) property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion;

(B) valuations of property and of allowed secured claims in the chapter 13 case shall apply only in a case converted to a case under chapter 11 or 12, but not in a case converted to a case under chapter 7, with allowed secured claims in cases under chapters 11 and 12 reduced to the extent that they have been paid in accordance with the chapter 13 plan; and

(C) with respect to cases converted from chapter 13—

(i) the claim of any creditor holding security as of the date of the filing of the petition shall continue to be secured by that security unless the full amount of such claim determined under applicable nonbankruptcy law has been paid in full as of the date of conversion, notwithstanding any valuation or determination of the amount of an allowed secured claim made for the purposes of the case under chapter 13; and

(ii) unless a prebankruptcy default has been fully cured under the plan at the time of conversion, in any proceeding under this title or otherwise, the default shall have the effect given under applicable nonbankruptcy law.

B. General Rule

Section 348(f)(1)(A) provides upon conversion from a 13 to another chapter, "property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion."

C. Legislative History

The House Report on the amendment explained that the Committee was concerned that the contrary rule would create a serious disincentive to chapter 13 filings because debtors would fear that property attained after filing, including equity created by payment of secured debts, could be lost if the case were converted.

D. Bad Faith Exception

1. Section 348(f)(2) provides that if conversion is in bad faith, property of the chapter 7 estate is the property of the estate as of the date of conversion.

2. Is it bad faith to convert a case upon receipt of a postpetition windfall?.

Compare:

a. Simply taking advantage of the statute's provisions excluding property acquired during the chapter 13 case from the chapter 7 estate after conversion is not bad faith. 3 *Collier on Bankruptcy* ¶ 348.07 (16th 2022).

With:

b. In the Fifth Circuit, courts look to the totality of the circumstances in deciding if a chapter 13 case is converted to chapter 7 in bad faith. A court may consider whether the conversion was motivated by an inability to make required payments to the chapter 13 trustee or "whether the debtors have been forthcoming regarding the existence of any post-petition change in circumstances that might affect their ability to make payments to their creditors and whether the conversion would create a windfall for the debtors (other than a decrease in liabilities) to which they would not have been entitled but for the existence of their pending Chapter 13 case." *Moser v. Mullican (In re Mullican)*, 417 B.R. 389, 402 (Bankr. E.D. Tex. 2008). In *Moser v. Mullican*, the court found that the debtors had converted in bad faith where one of the debtors had lost his job but also inherited assets that could have been used to pay off their plan in full. The court determined that based on the totality of the circumstances, the conversion of the case was meant to keep the inherited assets out of the hands of their creditors and would create a windfall to the debtors.

E. Disclosure Rule

1. Remember Rule 1019(5)(C)(i) –

> When a chapter 11, chapter 12, or chapter 13 case has been converted or reconverted to a chapter 7 case --
> …
> (C) Conversion After Confirmation of a Plan. Unless the court orders otherwise, if a chapter 11, chapter 12, or chapter 13 case is converted to chapter 7 after confirmation of a plan, the debtor shall file:
> (i) a schedule of property not listed in the final report and account acquired after the filing of the petition but before

conversion, except if the case is converted from chapter 13 to chapter 7 and § 348(f)(2) does not apply;

2. The exception in the above limits this requirement to only those conversions in "bad faith" under § 348(f)(2).

II. May a chapter 13 debtor keep postpetition windfalls?

A. Statutes to Consider

1. Section 1329(b)(1) requires satisfaction of the § 1325(a) confirmation standards to confirm an amended plan.

2. The § 1325(a)(4) best interests test requires that "the value, as of the effective date of the plan, [of property to be distributed to unsecured creditors] is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date."

3. Section 1306(a) provides that estate property in chapter 13 includes property acquired after filing but before the case is closed, dismissed or converted.

4. Section 348(f)(1)(A) provides that property of the estate in a chapter 7 case that was converted from chapter 13 includes "property of the estate, as of the date of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion."

B. Windfalls received postpetition

1. Minority position: chapter 13 debtors to retain windfalls acquired after filing. Example case: *In re Taylor*, 16-40873 (Bankr. D. Kan. July 21, 2021).

   a. About three years into the plan, the debtor was in an accident, resulting in a $295,000 settlement in her favor. The net available to the debtor was about $140,000.

   b. Trustee argued that the plan should be amended to designate approximately $20,000 of the personal injury settlement proceeds for payment to creditors. Trustee asserted that the settlement proceeds were property of the estate under § 1306(a) and § 541 and further that § 1329(a) permits, upon request of the Chapter 13 Trustee, amendment of a confirmed plan to increase payments and incorporates § 1325(a)(4), the best interest of creditors test.

   c. "[T]he Court agrees with the Trustee that the best interest test applies to a modified plan and the effective date of the plan for calculation of the

distribution to unsecured creditors in a hypothetical liquidation is the date of the amendment. However, in reliance on § 348(f), the Court holds that the postpetition personal injury claim is not included in the calculation. The best interest test does not provide authority for turnover of the proceeds for payment to unsecured creditors under an amended plan."

d. Decision arguably applicable to any post-petition inheritances, lottery winnings and other windfalls that have no connection to prepetition assets. All Kansas judges joined in the opinion.

2. Majority position. Windfalls are property of the estate in chapter 13 and the value of the same must be included the debtor's plan if modified. Example case: *In re Powell*, 2022 Bankr. LEXIS 937 (Bankr. C.D. Ill Apr. 7 2022)

   a. Debtors opposed chapter 13 Trustee's motion to modify the confirmed plan under § 1329(a)(1) to increase the distribution to unsecured creditors due to property inherited by the Debtors more than 180 days after the date of filing.

   b. Debtors argued both that the temporal limitation of § 541(a)(5) in determining property of the estate and that the vesting provisions of their plan and § 1327(b) prevented the Trustee from seeking such a post-confirmation plan modification.

   c. The question presented was whether a chapter 13 Trustee can modify a debtor's confirmed plan post-confirmation to account for the value of a post-petition inheritance received over 180 days after the filing.

   d. The Court allowed the modification of the plan and adopted the majority view that the 180-day post-petition time limit for § 541(a)(5) property does not limit what becomes property of the estate in a chapter 13 case.

   e. The Court also concluded that the "vesting" of the estate property in the debtor upon confirmation under § 1327(b) does not render inoperative the requirement of § 1306(a) that property acquired after confirmation becomes property of the estate. Having become part of the post-confirmation estate, those property interests are a proper basis for plan modification under § 1329.

3. Fourth Circuit Authority

   a. *Carroll v. Logan*, 735 F.3d 147, 151-152 (4th Cir. 2013)(citations omitted)(finding that an inheritance received more than 180 days post-petition is property of the chapter 13 estate and must be paid over to creditors upon the Trustee's motion to modify. "The repayment plan remains subject to modification for reasons including a debtor's decreased ability to pay

according to plan, as well as the debtor's increased ability to pay. See § 1329. As we have stated before, "[w]hen a [Chapter 13] debtor's financial fortunes improve, the creditors should share some of the wealth" … The Supreme Court has eschewed interpreting the Bankruptcy Code such that it "would deny creditors payments that the debtor could easily make … The plain language of § 1306(a) blocks the Carrolls from depriving their creditors a part of their windfall acquired before their Chapter 13 case was closed, dismissed, or converted.")

b. *Pliler v. Stearns*, 747 F.3d 260, 264-66 (4th Cir. 2014)(holding that above-median debtors with negative disposable income on B22 must remain in Chapter 13 for the full 60 months if their unsecured creditors have not been paid in full because "an 'applicable commitment period' is a temporal requirement." The court observed that "the lack of projected disposable income at the time a plan is confirmed does not necessarily mean that additional funds with which to satisfy claims will not later surface. *Indeed, as we recently saw in Carroll v. Logan, Chapter 13 debtors can and do benefit from windfalls such as inheritances or other unforeseeable income after plan confirmation but before their Chapter 13 proceedings are closed*").

III. What are the requirements to modify what is paid in a chapter 13 plan?

A. Section 1329 (a), (b) and (c):

(a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to—

(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;

(2) extend or reduce the time for such payments;

(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan; or

(4) reduce amounts to be paid under the plan by the actual amount expended by the debtor to purchase health insurance for the debtor (and for any dependent of the debtor if such dependent does not otherwise have health insurance coverage) if the debtor documents the cost of such insurance and demonstrates that—

(A) such expenses are reasonable and necessary;

(B)

(i) if the debtor previously paid for health insurance, the amount is not materially larger than the cost the debtor previously paid or the cost necessary to maintain the lapsed policy; or

(ii) if the debtor did not have health insurance, the amount is not materially larger than the reasonable cost that would be incurred by a debtor who purchases health insurance, who has similar income, expenses, age, and health status, and who lives in the same geographical location with the same number of dependents who do not otherwise have health insurance coverage; and

(C) the amount is not otherwise allowed for purposes of determining disposable income under section 1325(b) of this title;

and upon request of any party in interest, files proof that a health insurance policy was purchased.

(b)

(1) Sections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section.

(2) The plan as modified becomes the plan unless, after notice and a hearing, such modification is disapproved.

(c) A plan modified under this section may not provide for payments over a period that expires after the applicable commitment period under section 1325(b)(1)(B) after the time that the first payment under the original confirmed plan was due, unless the court, for cause, approves a longer period, but the court may not approve a period that expires after five years after such time.

B. Circuits Split. There is substantial disagreement among the courts as to whether a change in circumstances (usually described as an unanticipated and substantial change in circumstances) is a prerequisite for modification under Code § 1329.

1. In three circuits, the Court of Appeals has held that an unanticipated and substantial change is not required, as the doctrine of res judicata does not apply to plan modification under Code § 1329:

   First Circuit: *Barbosa v. Soloman*, 235 F.3d 31 (1st Cir. 2000)

   Fifth Circuit: *In re Meza*, 467 F.3d 874 (5th Circuit 2006)

   Seventh Circuit: *Matter of Witkowski*, 16 F.3d 739 (7th Circuit 1994)

2. In the Fourth Circuit, the Court of Appeals has held that an unanticipated and substantial change is required by virtue of the *res judicata* effect of plan confirmation:

   Fourth Circuit: *In re Murphy*, 474 F.3d 143 (4th Cir. 2007); *In re Arnold*, 869 F.2d 240 (4th Cir. 1989)

3. In the Eleventh Circuit, no change of circumstances is required to be shown.

   Eleventh Circuit: *Whaley v. Guillen (In re Guillen)*, 972 F.3d 1221 (11th Cir. 2020)

4. Substantial Unanticipated Change Required

   a. *Murphy v. O'Donnell (In re Murphy)* and *O'Donnell v. Goralski* (*In re Goralski*), 474 F3d 143 (4th Cir. 2007)(Upon determining that a debtor experienced a change in his post-confirmation financial condition that is both substantial and unanticipated, it can inquire whether the proposed modification is limited to the circumstances provided in § 1329(a). If it meets one of those circumstances, Court can turn to whether the modification complies with § 1329(b)(1).

   b. *In re Arnold*, 869 F.2d 240, 243 (4th Cir. 1989) (finding that the Bankruptcy Court did not abuse its discretion by increasing a debtor's monthly payment from $800 to $1,500 because the Debtor's salary went from $80K/yr to $200K/yr. *Res judicata* prevents modification of a confirmed plan via § 1329(a)(1) or (2) unless the party seeking modification demonstrates "that the debtor has experienced a 'substantial' and "unanticipated' ["could not have been reasonably anticipated at the time the plan was confirmed"] post-confirmation change in his financial condition.")

5. Plan Modification Requirements.

   a. Confirmation of a plan under Chapter 13 occurs only once. *In re Davis*, 439 B.R. 863, 866 (Bankr. N.D. Ill. 2010). After confirmation, a plan may be modified pursuant to § 1329.

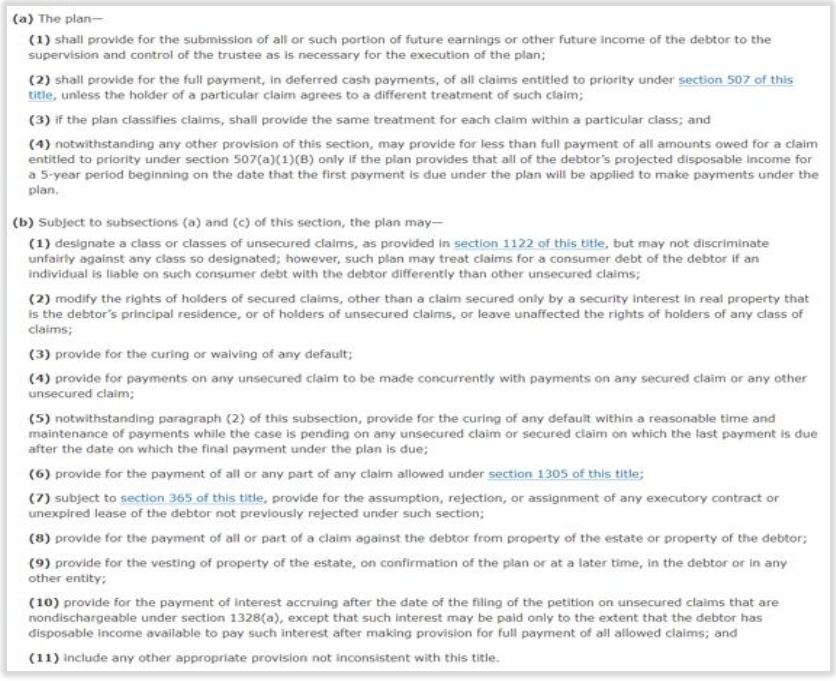
   b. Section 1329(b) expressly applies only § 1322(a) 1322(b), 1323(c) and the requirements of § 1325(a) – but omits § 1325(b).

   c. Courts have split over whether § 1325(b) applies to chapter 13 plan modifications but the majority position is that § 1325(b) does not apply to § 1329 plan modifications. *In re Swain*, 509 B.R. 22, 28-32 (Bankr. E.D. Va. 2014). See also 8 *Collier on Bankruptcy* ¶ 1329.03 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) ("[S]ection 1325(b) is inapplicable to plan modifications . . . .").

   d. Plan modification is not the same as plan confirmation and, by its plain language, § 1325(b) applies to confirmation, not modification.

   e. Other code provisions available to prevent improper plan modifications and specifically noted that the good faith requirement of § 1325(a)(3) applies to plan modifications.

   f. Sections 1322(a), (b) and (c):



(a) The plan—

(1) shall provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan;

(2) shall provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim;

(3) if the plan classifies claims, shall provide the same treatment for each claim within a particular class; and

(4) notwithstanding any other provision of this section, may provide for less than full payment of all amounts owed for a claim entitled to priority under section 507(a)(1)(B) only if the plan provides that all of the debtor's projected disposable income for a 5-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

(b) Subject to subsections (a) and (c) of this section, the plan may—

(1) designate a class or classes of unsecured claims, as provided in section 1122 of this title, but may not discriminate unfairly against any class so designated; however, such plan may treat claims for a consumer debt of the debtor if an individual is liable on such consumer debt with the debtor differently than other unsecured claims;

(2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;

(3) provide for the curing or waiving of any default;

(4) provide for payments on any unsecured claim to be made concurrently with payments on any secured claim or any other unsecured claim;

(5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;

(6) provide for the payment of all or any part of any claim allowed under section 1305 of this title;

(7) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(8) provide for the payment of all or part of a claim against the debtor from property of the estate or property of the debtor;

(9) provide for the vesting of property of the estate, on confirmation of the plan or at a later time, in the debtor or in any other entity;

(10) provide for the payment of interest accruing after the date of the filing of the petition on unsecured claims that are nondischargeable under section 1328(a), except that such interest may be paid only to the extent that the debtor has disposable income available to pay such interest after making provision for full payment of all allowed claims; and

(11) include any other appropriate provision not inconsistent with this title.

(c) Notwithstanding subsection (b)(2) and applicable nonbankruptcy law—

(1) a default with respect to, or that gave rise to, a lien on the debtor's principal residence may be cured under paragraph (3) or (5) of subsection (b) until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law; and

(2) in a case in which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor's principal residence is due before the date on which the final payment under the plan is due, the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title.

g. Section 1325(a):

(a) Except as provided in subsection (b), the court shall confirm a plan if—

(1) The plan complies with the provisions of this chapter and with the other applicable provisions of this title;

(2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;

(3) the plan has been proposed in good faith and not by any means forbidden by law;

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;

(5) with respect to each allowed secured claim provided for by the plan—

(A) the holder of such claim has accepted the plan;

(B)

(i) the plan provides that—

(I) the holder of such claim retain the lien securing such claim until the earlier of—

(aa) the payment of the underlying debt determined under nonbankruptcy law; or

(bb) discharge under section 1328; and

(II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law;

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; and

(iii) if—

(I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts; and

(II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan; or

(C) the debtor surrenders the property securing such claim to such holder;

(6) the debtor will be able to make all payments under the plan and to comply with the plan;

(7) the action of the debtor in filing the petition was in good faith;

(8) the debtor has paid all amounts that are required to be paid under a domestic support obligation and that first become payable after the date of the filing of the petition if the debtor is required by a judicial or administrative order, or by statute, to pay such domestic support obligation; and

(9) the debtor has filed all applicable Federal, State, and local tax returns as required by section 1308.

For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day period preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.

IV. Does a debtor have a duty to disclose a post-petition asset such as a cause of action or inheritance?

A. Relevant Statutes & Rules

1. Section 541 "creates an estate" which is "comprised of all the following property, wherever located and by whomever held … all legal or equitable interests of the debtor in property as of the commencement of the case …"

2. Section 1306 expands § 541 in Chapter 13 cases by including all property listed in § 541 "that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted … whichever occurs first"

3. Section 521(a)(1)(B)(i) requires the Debtor to file schedules listing all of the Debtor's assets and all of the Debtor's liabilities.

4. Rule 1007 mandates that the Debtor must use the official forms to comply with § 521. Official form 6B (Schedule B) is to be used for reporting all of the Debtor's interests in personal property.

5. Rule 1007(h) imposes a duty upon the Debtor to disclose property acquired by inheritance, property settlement agreement, or life insurance: "If, as provided by § 541(a)(5) of the Code, the debtor acquires or becomes entitled to acquire any interest in property, the debtor shall within 14 days after the information comes to the debtor's knowledge … file a supplemental schedule …"

6. Rule 1009(a) – schedules "may be amended by the debtor as a matter of course at any time before the case is closed" - with notice to the Trustee and any affected entity

B. Code & Rules Do Not Mandate Disclosure. *In re Boyd*, 618 B.R. 133 (Bankr. D.S.C. Ohio

1. FACTS:

   a. In July 2018, while still in Chapter 13, the Debtor suffered injuries from an alleged drunk driving incident. In September of 2018 he filed a personal injury suit in state court; two months later he received his Chapter 13 discharge. He did not amend his schedules to disclose this potential asset prior to his case being closed, and the state court defendants were never noticed of the Chapter 13 case.

   b. In February 2020, the state court defendants moved to dismiss the personal injury suit on the grounds of judicial estoppel, because the Debtor had

never disclosed this potential asset in his bankruptcy case. The next month the Debtor successfully moved to reopen his closed Chapter 13 case so that he could amend his claimed exemptions to add this asset.

c. The Chapter 13 Trustee testified that (i) had the schedules been amended during the case, the asset would have been fully exempt, (ii) she would not have objected to the exemption, (iii) the case paid a 90% dividend (all but $792) to unsecured creditors, and (iv) she was not opposing the reopening of the case or the amendment of the Debtor's schedules.

2. ISSUE: Do chapter 13 debtors have a duty to disclose assets acquired post-petition?

3. HELD: Neither the Bankruptcy Rules nor the confirmed plan "placed an ongoing duty" on the Debtor in this case to "amend schedules or otherwise disclose" the lawsuit.

4. Section1306(a) expands property of the estate to include post-petition property and earnings generally, so that this lawsuit is property of the estate, but the Debtor's disclosure requirements contained in § 521 don't provide the timing of those disclosures. Rule 1007(h) only provides for the filing of supplemental schedules for property acquired by the Debtor as provided by § 541(a)(5). There is nothing in Rule 4002 that imposes a duty on the Debtor to schedule assets acquired post-petition that become part of the estate as a result of § 1306(a).

5. Postscript: On 10/28/21, Judge Waites issued Order 21-04 for the District of South Carolina requiring in part II. b.3., the disclosure of post-petition lawsuits.

C. Disclosure Mandate Rooted in Caselaw.

1. Neither the Code nor the Rules require that a chapter 13 debtor disclose additional property acquired after filing a chapter 13 case, unless such property falls under § 541(a)(5) of the Code—property acquired within 180 days after filing the petition by inheritance, a property settlement agreement, or as beneficiary of a life insurance policy. See Rule 1007(h).

2. Nonetheless, courts have held that chapter 13 debtors have a continuing duty to disclose, and to disclose assets acquired post-confirmation, even if there is a colorable theory that the acquired assets are not property of the estate. *Woodard v. Taco Bueno Restaurants, Inc*., No. 05-cv-804, 2006 U.S. Dist. LEXIS 89135, 2006 WL 3542693, at *10 (N.D. Tex. Dec. 8, 2006) ("[T]he debtor has a continuing obligation to be truthful and forthcoming about all of his assets—from commencement to discharge—so that the bankruptcy court, the trustee, and the allowed creditors can track any change in the debtor's ability to pay his debts.

Thus, 'for chapter 13 to work, ... the chapter 13 debtor has a continuing duty to disclose property and earnings acquired after the commencement of the case.'"); see also, *Howard v. Fina Oil & Chemical Co*. (*In re Howard*), No. 15-cv-48, 2016 U.S. Dist. LEXIS 4280, 2016 WL 164320, at *4 (S.D. Miss. Jan. 13, 2016) ("Chapter 13 debtors have a duty to disclose post-confirmation assets notwithstanding uncertainty as to whether the asset may be ultimately adjudged to be property of the bankruptcy estate or vested in the debtor.").

D. Consequences of Failure to Disclose.

1. *In re Adamcik*, 2021 W.L. 3868251 (Bankr. N.D. Tex, 2021). Failure to Disclose Asset Acquired Post-Petition Did Not Cost Debtor His Discharge on Conversion but concealment of income issues (large post-180 day severance received at the time of conversion) and lack of candor about certain assets at 341 amounted to converting the case in bad faith – so the property of the estate became the property he had at conversion (leading to the loss of the severance).

2. *In re DelConte*, 2012 WL 1739788 (Bankr. E.D. Va. 2012). Court found that the debtor's failure to disclose the post-petition inheritance and the transfer of such property "violate the court's order of confirmation" and debtor must amend to pay 100%, or convert, or the case will be dismissed.

b. *Beskin v. Knupp* (*In re Knupp*), 461 B.R. 351 (Bankr. W.D. Va. 2011). The failure to disclose post-petition inheritance resulted in revocation of discharge.

V. Who gets the benefit of equity in a debtor's home if it is sold and has appreciated since filing?

A. Debtor wins.

1. Example case: *In re Larzelere*, 633 B.R. 677, 678 (Bankr. D.N.J. 2021)

2. The debtor owned a home with a scheduled equity of about $23,000 above his exemption but 3 years into the plan, the debtor filed a motion to sell his home for a price that was almost $130,000 more than the estimated value at filing. The debtor proposed to pay off the $14,000 remaining on the plan in one lump sum. The trustee objected, contending that the appreciation in value was an estate asset requiring the debtor to pay his unsecured creditors in full.

3. The Court relied on §§ 1306, 1327(b) and 1327(c).

a. Section 1306 says that property of the estate in chapter 13 includes property that the debtor acquires before the case is closed, dismissed or converted.

b. Section 1327(b) says that unless the plan or the confirmation order provides otherwise, property of the estate revests in the debtor on confirmation.

c. Section 1327(c) says that unless the plan or the confirmation order provides otherwise, property revested in the debtor on confirmation is free and clear of any claim or interest provided for in the plan.

4. The Court found that the increase in the value of the home was not property of the estate because the home had revested in the debtor at confirmation, free and clear of claims. Court allowed the chapter 13 debtor to retain a $100,000 increase in nonexempt value when he sold his home.

B. Trustee wins.

1. Example case: *Black v. Leavitt* (*In re Black*), 609 B.R. 518 (B.A.P. 9th Cir. Dec. 31, 2019). The 9th Circ BAP allowed a chapter 13 debtor to retain the post-petition increase in value of a nonexempt asset.

2. Also consider: *Murphy v. O'Donnell* (*In re Murphy*) and *O'Donnell v. Goralski* (*In re Goralski*), 474 F3d 143 (4th Cir. 2007). The debtors had a 51.6% increase in 11 months in the value of their home, which they sold. The money received by him represented a "substantial improvement in … his financial condition" upon receipt of this income. Trustee sought to modify the plan from 37% to 100%. Court rejected the debtor's argument that the fact that his property had vested in him upon confirmation prevented the Trustee from seeking to modify his plan. Although the 4th Circ ruled in this case in favor of the debtor, the issue turned only on the "amount" of the increase in value, which was not substantial enough to permit the modification of the plan particularly since as part of the "cash out" refinancing the debtors obtained a loan in exchange for the realization of their equity/cash. "Under the doctrine of res judicata, there being no substantial change to the Goralskis' financial condition, the cash-out refinancing cannot provide a basis for modifying the Goralskis' confirmed plan pursuant to §§ 1329(a)(1) or (a)(2)."

VI. Is a chapter 13 trustee entitled to be paid if a case is dismissed before confirmation?

A. Relevant Statutes

1. 28 U.S.C. § 586(e) says that a standing trustee "shall collect such percentage fee from all payments . . . under [chapter 13] plans. . . ."

2. Section 1326(a)(1) requires a chapter 13 debtor to commence making payments to the trustee within 30 days of filing.

3. Section 1326(a)(2) provides that payments made by the debtor "shall be retained by the trustee until confirmation or denial of confirmation. . . . If a plan is not confirmed, the trustee shall return any such payments not previously paid . . . to creditors . . . , after deducting any unpaid claim allowed under § 503(b)."

B. Courts are split.

Compare:

1. Trustee wins.

   a. Example case: *McCallister v. Evans*, 637 B.R. 144, 146 (D. Idaho 2022). After bankruptcy court had decided that the statutes were ambiguous and concluded that a chapter 13 trustee is paid only if a plan is confirmed (*In re Evans*, 615 B.R. 290 (Bankr. D. Idaho Feb. 13, 2020)), the District Court reversed.

   b. Same result: *Soussis v. Macco*, No. 20-CV-05673 (JMA), 2022 U.S. Dist. LEXIS 12386, at *1 (E.D.N.Y. Jan. 24, 2022)

With:

2. Debtor wins.

   a. Example case: *Doll v. Goodman* (*In re Doll*), Civil Action No. 21-cv-00731-RBJ, 2021 WL 5768991, 2021 U.S. Dist. LEXIS 232612, at *1 (D. Colo. Dec. 6, 2021)

   b. Section 1326(a)(2) provides, "[i]f a plan is not confirmed, the trustee shall return any such payments not previously paid out and not yet due and owing to creditors."

   c. If the payments must be returned, then pursuant to the ruling, it follows that fees collected from such payments must be returned.

   d. Contrast with Chapter 12 which specifically provides for the trustee return the trustee fees to the debtor if the plan is not confirmed after deducting the percentage fee fixed for such standing trustee.

Faculty

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Melissa J. Davey is a standing chapter 13 trustee in the Northern District of Georgia for the Atlanta and Newnan divisions based in Atlanta, effective Oct. 1, 2017. Her office administers approximately thousands of chapter 13 cases assigned to Hon. Paul M. Baisier and Hon. Lisa Ritchey Craig. Prior to her appointment, Ms. Davey was in private practice in Atlanta as a member of Stites & Harbison, PLLC in its Creditors' Rights and Bankruptcy Group, where she focused primarily on representing institutional lenders and other creditors in bankruptcy and consumer and commercial litigation. Prior to joining Stites and Harbison, she was a staff attorney for a chapter 13 trustee in the Northern District of Georgia for more than six years. She has also previously represented debtors in bankruptcy. Ms. Davey is currently a board member at large for the National Association of Chapter 13 Trustees and serves on the Bench and Bar Committee for the U.S. Bankruptcy Court for the Northern District of Georgia, which she previously chaired. She also serves on the advisory board for ABI's Southeast Bankruptcy Workshop and is a Barrister in the W. Homer Drake, Jr. Georgia Bankruptcy American Inn of Court. In the past, Ms. Davey served as president/officer for the Bankruptcy Section of the Atlanta Bar Association, as co-chair of the Georgia Network of the International Women's Insolvency & Restructuring Confederation, and as president of the Metro Atlanta Consumer Bankruptcy Attorney Group. She received her B.A. in political science and French *magna cum laude* with honors and her J.D. from the Emory University School of Law in 2003. During her junior year of undergrad, she studied at the Sorbonne and the Institut Catholique in Paris.

Hon. John E. Waites is a U.S. Bankruptcy Judge for the District of South Carolina in Columbia, appointed on June 27, 1994, and served as chief judge from March 1, 2006 until March 1, 2013. He served as president of the National Conference of Bankruptcy Judges (NCBJ) from 2018-19, having also previously served as a four-year member of the board of governors and as co-chair of its Legislative Committee, secretary and president-elect of that organization. Judge Waites was appointed by Chief Justice Roberts as a member of the Judicial Conference Committee on the Administration of the Bankruptcy System in 2013, serving until 2019. He also served as member of the Administrative Office's Bankruptcy Judges Advisory Group from 2008-11 and as chair from 2011-13. Judge Waites was inducted as a Fellow in the American College of Bankruptcy in 2018. He also chaired ABI's Southeast Bankruptcy Workshop from 2016-18 and was awarded the Order of the Palmetto by Henry McMaster, Governor of South Carolina, in May 2022. Prior to his appointment to the bench, Judge Waites was a partner at Nexsen, Pruet, Jacobs & Pollard. He also served as the first U.S. Trustee for the Region Four, Fourth Circuit and District of Columbia from 1987-92, and as the

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