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Stranger Things in Chapter 13

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Has the Death Knell Been Rung for Forced Vesting and, If So, What Options Remain to Debtors?

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I. Dwindling Options for Debtors in a Post Mortgage Crisis World.

A confluence of circumstances has resulted in the ironic twist that Chapter 13 of the United States Bankruptcy Code, historically viewed as the "preferred chapter for debtors wishing to retain their homes," is the same vehicle through which debtors have recently attempted to "free themselves from the expense and burdens of 'underwater' real estate." *In re Weller,* 548 B.R. 392 (Bankr. Mass. 2016). In *Weller,* Judge Boroff noted the foregoing irony as "a sad commentary on the times." *Id.,* at 393.

Nearly simultaneously with the mortgage crisis circa 2007 and 2008 that sent property values plummeting, BAPCPA[1] implemented changes in the Code that effectively reduced the options available to a debtor attempting to treat debt secured by one or more mortgages on property now worth less than the total of all liens encumbering such property[2]. So-called balloon payment plans principally designed to enable the debtor to amortize secured debt in a cram-down case by allowing the debtor to make reduced monthly mortgage payments over the term of the plan followed by a lump-sum payment in the final month of the plan effectively met their demise with the enactment of the equal-payment provision found in 11 U.S.C. § 1325(a)(5)(B)(iii)(I). [3] In the wake of the Savings and Loan Crisis in the late 1980's and early 1990's, balloon payment plans were fairly effective in enabling debtors to retain investment properties not subject to the anti-modification provisions of

[1] Referring to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub.L. 109-8, 119 Stat. 23, enacted April 20, 2005).
[2] Referred to colloquially as property that is "underwater".
[3] See *In re Hamilton,* 401 B.R. 539, 546 (1st Cir. BAP 2009) ("That this constraint may put chapter 13 reorganization beyond the reach of some debtors is unfortunate, but does not change the outcome.").

11 U.S.C. § 1322(b)(2) particularly against the backdrop of an appreciating real estate market in the last half of the 1990's.

A third factor introduced into the equation was increased regulation of the mortgage servicing industry at the federal level and new laws passed by states and municipalities in an attempt to extenuate the foreclosure process and allow formalized procedures for exploration of alternatives to foreclosure. In Massachusetts, examples include G. L. c. 244, § 35A (effective May 1, 2008 and providing, initially, for a pre-foreclosure notice with a 90-day cure period; subsequently amended to provide for a 150-day cure period through December 31, 2015; further amended to revert back to a 90-day cure period effective January 1, 2016); G.L. c. 244, § 35B (right to request a modified mortgage loan) and local ordinances passed in communities such as Springfield, Lawrence, Worcester and Lynn purporting to require foreclosing mortgagees to engage in pre-foreclosure mediation with a private mediator selected by the municipality before proceeding to foreclose. [4] Rhode Island, faced with a growing patch-work of mediation ordinances at the local level requiring mortgagees to engage in pre-foreclosure mediation with the mortgagor, passed R.I. Gen. Laws §34-27-3.2, essentially requiring pre-foreclosure mediation or a good faith attempt at such, on a state-wide level.[5] Finally, the Consumer Financial Protection Bureau adopted its Mortgage Servicing Rules, including 12 C.F.R. § 1024.41 implementing Loss Mitigation Rules requiring a mortgagee to stop foreclosure at specified intervals if the mortgagor sends the servicer a "completed" application for loss mitigation.

[4] In the case of *Easthampton Savings Bank v. City of Springfield,* 470 Mass. 284, 21 N.E.3d 922 (2014) the Massachusetts Supreme Judicial Court ruled that the Springfield mediation ordinance was wholly preempted by state law, namely the statutory scheme governing the foreclosure of mortgages codified at G.L. c. 244, § 1, et seq. Other municipalities with similar ordinances subsequently repealed their ordinances or effectively discontinued enforcement of same.

[5] Cranston, East Providence, Providence, Warwick and Warren all had adopted local meeting "conciliation" ordinances prior the enactment of the R.I. Gen. Laws §34-27-3.2 in May of 2013.

All of the foregoing regulations, ordinances and state statutory amendments to the foreclosure process worked to significantly slow, and in some cases temporarily arrest, the foreclosure process not only because of the new or extenuated processes implemented by these laws themselves but also, and more importantly, because of the time it took for the lending and mortgage servicing industry to adjust their processes to comply with these new laws.

Finally, couple all of the foregoing with properties that continued to fall into greater disrepair or suffer additional encumbrances for unpaid condominium and/or HOA fees and real estate taxes and you have the recipe for the perfect storm that has and continues to plague many debtors today: properties that the debtors want to dispose of (and in many cases have already vacated) but on which the mortgagee cannot or will not foreclose at all or, as is more likely the case, at least will not foreclose as quickly as the debtors would like.

II. **Sweet Surrender Why Won't the Lender Just Foreclose?**

A review of the underlying facts in several recent opinions addressing the issue of forced vesting explains why exasperated debtors have turned to 11 U.S.C. § 1322(b)(9) in an effort to rid themselves of property that is significantly underwater in circumstances where the mortgagee appears less than anxious to foreclose.[6]

In *In re Brown,* 2016 Bankr. LEXIS 4557, Case No. 14-12357 (Bankr. D. Mass. 2016) ("*Brown I*"), vacated and remanded by *Selene Fin. L.P. v. Brown,* 563 B.R. 451 (D. Mass. 2017) ("*Brown II*"), Selene's predecessor in interest had obtained relief from stay to foreclose 18 months prior to the issuance of Judge Feeney's Memorandum of decision but as of the time of the decision had not taken any steps to foreclose. *Brown I*, pgs. 23-24.

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[6] Section 1322(b) provides that a plan "may," subject to subsections (a) and (c) of the statute, "(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."

In *Weller,* supra, the debtors filed a plan that was confirmed in June of 2012 which provided that they were surrendering their homestead to the mortgagee; in fact they had vacated the property shortly after filing their petition in February of 2012. Three (3) years post-confirmation, the mortgagee had not even moved for relief from the automatic stay much less taken any steps to foreclose the mortgage.

Finally, in *In re Tosi,* 546 B.R. 487 (Bankr. D. Mass. 2016) the mortgagee had obtained relief from stay just over a year before the Court issued its decision sustaining the mortgagee's objection to the debtor's proposed forced-vesting plan but of as of such issuance date the Court had received no indication that the foreclosure had been completed.

III. **Case Law Battleground – (a) Are the Terms "Surrender" and "Vesting" Mutually Exclusive? and (b) Are the Permissive Plan Provisions of § 1322(b) Subordinate to the Confirmation Criteria Set Forth in § 1322(a)(5)(A)-(C)?**

The answer to this question is that while some courts have opined that the terms "surrender" and "vesting" as found in 11 U.S.C. §§ 1325(a)(5)(C) and 1322(b)(9) respectively are not mutually exclusive, most courts which have ruled on the issue to date have determined that they are mutually exclusive. Neither term is specifically defined in the Bankruptcy Code.

There is general agreement on both sides of the debate over forced vesting that "surrender" means to "make the collateral available to the secured creditor – *viz.,* - to cede his possessory rights in the collateral." [1] *In re Sagendorph,* 2015 Bankr. LEXIS 2055, Case No. 14-41675 (Bankr. D. Mass. 2015) (*Sagendorph I)*, reversed and remanded by *Wells Fargo Bank, N.A. v. Sagendorph,* 562 B.R. 545 (D. Mass. 2017) (*Sagendorph II)*; citing *Pratt v. Gen. Motors Acceptance Corp. (In re Pratt)*, 462 F.3d 14, 19 (1st Cir. 2006)

Vesting, on the other hand, involves placing title to the collateral in the transferee. As Judge Hoffman explained in *Sagendorph II,* "surrender is a less consequential event than vesting. Surrender means to make the property available to be taken; vesting means transferring title."

The consensus among the vesting and anti-vesting camps ends here, however, as both camps fundamentally disagree on the interplay between the permissive confirmation provisions found in § 1322(b), including § 1322(b)(9), on the one hand and the mandatory confirmation requirements found in § 1325(a)(5), including § 1325(a)(5)(C), on the other. In *Sagendorph I,* Chief Judge Hoffman reasoned that "[s]urrendering or 'ceding property rights *Pratt,* 462 F.3d at 19, is a preliminary step in the process of transferring title; accordingly, the provision for surrender in § 1325(a)(5)(C) is *not* in conflict with the concept of vesting found in § 1322(b)(9) ("[a]ny argument that Congress intended § 1325(a)(5)(C) to trump §1322(b)(9) and so 'vest' must be read to mean 'surrender' is implausible." The court in *Sagendorph I* determined that applying § 1322(b)(9) "consistently with its plain meaning" advanced the "paramount federal interest" embodied in the fresh start policy of the Bankruptcy Code. The court also found that that the vesting provisions found in § 1322(b)(9) preempt conflicting provisions of applicable Massachusetts law which clearly do not require the mortgagee to take title to collateral against its will.

In *Brown I,* Judge Feeney observed that "Congress did not include the requirement of consent in either §§ 1322(b)(9) or 1325(a)(5)(C)." Echoing *Sagendorph I,* the court in *Brown I* noted that to the extent that state law requires a putative grantee to consent or accept conveyance of title, these state law restrictions "must yield to the preemptive provisions of the Bankruptcy Code which clearly allow vesting of property of the estate on confirmation of a plan in the debtor or in any other entity without the necessity of consent." Both *Sagendorph I* and *Brown I* further note that forced vesting is also supported by the provisions of § 1322(b)(8) which states that a plan may "provide for the payment of all or part of a claim against the debtor from property of the estate or property of the debtor." *Brown I* construed the provisions of § 1322(b)(8) to include "transfer of collateral" particularly where the property at issue had no known damage or environmental issues and was appreciating in value. Judge Feeney concluded that a reading of §§ 1322(b)(8), 1322(b)(9) and 1325(a)(5)(C) together "permit a deployment of both surrender and vesting in a plan." "To determine otherwise 'essentially eliminates the usefulness of 1322(b)(9)." *Brown I,* citing *In re Zair,* 535 B.R. 15 (Bankr.E.D. N.Y. 2015) (*"Zair I")*, reversed and remanded by *HSBC Bank USA,* N.A. *v. Zair,* 550 B.R. 188 (E.D. N.Y. 2016) (*"Zair II").*

Countering the pro-vesting camp's position that surrender was not incompatible with, and did not preclude, a debtor's vesting of collateral in the mortgagee without the mortgagee's consent, Judge Bailey observed in *In re Tosi,* 546 B.R. 487 (Bankr. Mass. 2016) that such reasoning "understates the meaning of surrender, which is not merely to cede possessory rights, but to permit the creditor to exercise its preexisting property rights as to the collateral." Judge Bailey's further remarks in *Tosi* offer a good summary of the anti-vesting camp's position:

> "The vesting of title goes well beyond surrender of collateral by altering the mortgagee's rights as the holder of a mortgage. . . . Upon the debtor's vesting of his interest in the secured creditor and by the doctrine of merger, the mortgage would merge into and be superceded by the transferred title . . . No longer would the secured creditor have the substantial prerogatives of a mortgagee. Among other things it could not sell the property at foreclosure. In a foreclosure sale, unsatisfied junior liens are automatically discharged, but the vesting of title in the mortgagee would leave junior liens in place, meaning the value of the mortgagee's interest would be diminished by the value of any such liens . . . it is undisputed that the act of vesting alters the creditor's form of ownership and hence its preexisting rights in the collateral. In doing so, vesting precludes surrender: a debtor cannot permit a mortgagee to exercise its preexisting rights where, by vesting the mortgaged property in the mortgagee, it has altered those rights out of existence. *Surrender of collateral to a mortgagee and vesting of the same collateral in the mortgagee are thus mutually exclusive (emphasis added).* A plan cannot do both while giving full and proper meaning to each term; and a plan that purports to do both at once must be denied confirmation as internally inconsistent."

Judge Bailey rejected the notion that finding that § 1322(b)(9) could not be used to compel vesting of title in the mortgagee had the effect of rendering that provision meaningless. He cited that with a sale plan, § 1322(b)(9) permits the plan itself to be the operative vehicle by which title is vested in the purchaser. Citing *Weller,* supra, he also echoed Judge Boroff's observation that §

1322(b)(9) could still be utilized to vest title in the mortgagee where such mortgagee either consents to such vesting or, alternatively, fails to timely object to a plan proposing forced vesting.

The District Courts that have considered the forced vesting issue on appeal have determined, contrary to *Brown I's* conclusion that neither section 1322(b)(9) or section 1325(a)(5)(C) is subordinate to the other, that a plan may not be confirmed unless it meets one of the three requirements set forth in § 1325(a)(5)(A)-(C), i.e., the creditor has consented; the creditor's secured claim is crammed down and the creditor is paid the present value of its secured claim over the life of the plan or the debtor surrenders the collateral to the creditor. See *Bank of New York Mellon v. Watt,* 2015 WL 1879680 (D. Or. 2015) ("the parties are in agreement that: (1) 11 U.S.C. § 1325(a)(5) exclusively controls whether a plan is confirmable"); *Brown II,* supra, ("under 11 U.S.C. § 1325(a)(5), a Chapter 13 debtor's proposed plan must treat secured creditors in one of three ways" . . . "vesting compromises the very rights that surrender permits the mortgagee to exercise."); *Sagendorph II,* supra, (the use of "may" in § 1322(b) "creates no entitlement to vesting of collateral property in a creditor. Nor does it establish the sufficiency of 1322(b)'s permissive provisions in independently satisfying the confirmation requirements of 1325(a)(5)"); *Zair II,* supra 505 B.R. at 202 citing Watt, *supra,* at *5 ("nothing in the language of the statute indicates that including one of [1322(b)'s] optional features *guarantees* the confirmability of the overall plan").

Thus the pro-vesting and anti-vesting camps fundamentally disagree on whether the concepts of "surrender" and "vesting" are mutually exclusive and on whether the permissive provisions of § 1322(b) are subordinate to what the majority view characterizes as the mandatory confirmation provisions of § 1325(a)(5).

IV. The Weight of Persuasive Authority Rejects Forced Vesting under § 1322(b)(9).

While no controlling authority exists on the issue of forced vesting in any Circuit to date the overwhelming weight of persuasive authority to date has rejected forced vesting pursuant to § 1322(b)(9).

Cases permitting forced vesting include four bankruptcy court decisions that have been overturned by federal district courts on appeal (including *Brown I, Sagendorph I, Zair I and Watt I)* and two other bankruptcy court decisions where the mortgagees did not object to the forced-vesting plans (*In re Rosa,* 495 B.R. 522 (Bankr. D. Haw. 2013) and *In re Stewart,* 536 B.R. 273 (Bankr. D. Minn. 2015)). One other bankruptcy court decision, *In re Rosen,* 2015 Bankr. LEXIS 4448 (Bankr. D. Kan. 2016) has allowed forced vesting over the creditor's objection. Even here, however, as was the case in Massachusetts, at least one contrary decision exists in the same district. See *In re Williams,* 542 B.R. 545 (Bankr. D. Kan. 2015).

On the other side of the ledger, all four (4) federal district court decisions which have considered the issue on appeal from the bankruptcy court have rejected the concept of forced vesting and reversed (*Brown II, Sagendorph II, Zair II, Watt II*). Bankruptcy court decisions rejecting forced vesting include *Tosi, Weller, Williams, In re. Malave,* No. 13-13348 (ALG) (Bankr. S.D.N.Y. 2014) and *In re Sherwood,* No. 15-10637 (JLG) (S.D. N.Y. 2016).

V. What Next for Underwater Debtors – Does *Sagendorph II* offer a Glimmer of Hope?

In *Weller,* supra, a case which flatly rejected the idea of forced vesting under § 1322(b)(9), the court noted that it was "troubled" by the consequences of its decision for the debtors in the case as well as similarly situated debtors and communities which continue to suffer "as a result of abandoned properties in the aftermath of the real estate downturn." Yet, Judge Boroff was equally concerned that allowing forced vesting might eventually lead to increased borrowing costs for homeowners and reluctance on the part of at least some lenders to make home mortgage loans altogether. Still, the *Weller* court observed that the "weighing of such competing considerations is the province of the legislative bodies and not judicial bodies."

Despite plainly rejecting forced vesting in the case before it, *Sagendorph II* contains language suggesting that the door is not completely closed on the forced-vesting strategy. Noting the bankruptcy courts' "broad equitable prerogative" the court offered that it doubted whether "bankruptcy courts are wholly lacking in authority and ability to balance the equities in a situation that includes forced vesting under Chapter 13."

In a recent article styled *A Future for Forced Vesting? Case Law in Massachusetts and an Alternative Approach*[7], the author queried whether a cram-down satisfying the requirements of § 1325(b)(5)(B) might be accomplished by paying the secured creditor the present value of its collateral in kind through vesting of the collateral in such creditor pursuant to §§ 1322(b)(8) and 1322(b)(9) [Noting that "[n]othing in the plain language of §§ 1322 or 1325 requires the 'value' distributed through the plan to be in currency." Further noting that "[s]ince the amount of [sic. the] creditor's secured claim is determined by the value of the collateral, it is difficult to see how transferring the collateral to the creditor could be anything less than a distribution through the plan of value at least equal to the claim, as required by § 1325(a)(5)(B)(ii)").

Might this have been what the court in *Sagendorph II* was alluding to when it "observe[d] that certain Code provisions might be further considered on the issue of confirmation of a forced vesting plan" [further posing the question "might the Code permit the forced vesting of property not a debtor's principal residence under section 1322(b)(2)?[8] Notably, the *Sagendorph II* court observed that while the Bankruptcy Court had characterized the property at issue as "income-producing" and

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[7] Written by Kate E. Nicholson, Nicholson Herrick LLP, for the Boston Bar Association's 27th Annual Bankruptcy Bench Meets Bar Conference, May, 2017.

[8] 11 U.S.C. § 1322(b)(2) provides that a plan may "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."

as "multifamily property" there was no explicit finding by the lower court in the record that determined that the property was not "the debtors' principal residence." One is left to wonder why the reference to "multifamily property" would not have been enough for the court in *Sagendorph II* to conclude, at the very least, that the claim was modifiable under the holding in *Lomas Mortg., Inc. v. Louis,* 82 F.3d 1, 6 (1st Cir. 1996) (claim modifiable under § 1322(b)(2) notwithstanding the fact that one of the units served as the debtor's principal residence).

Or what is more likely, the court in *Sagendorph II* may have been reluctant to speculate any further on the application of § 1322(b)(2) to modifiable secured claims as a means of implementing forced vesting when that analysis had not been first parsed by the lower court. Specifically, the court concluded in a footnote that "the Bankruptcy Court did not distinguish between forced vesting as applied to non-primary or non-residential property versus primary residences." The court found "this distinction potentially relevant to, and perhaps demanding of, a more granular analysis of whether situations might exist in which forced vesting is permissible under Chapter 13." Invoking the observation made in the aforementioned article, the court in *Sagendorph II* asked "[o]r might there be circumstances in which a debtor may substitute in-kind payment for serial cash remittances?"

The foregoing leaves the door more than slightly ajar for the possibility of forced vesting where the record clearly reflects that the secured claim at issue is not protected by the anti-modification provision of § 1322(b)(2) and the debtor's plan proposes a cram-down with a like-kind payment of the claim's present value in the form of forced-vesting of the collateral in the mortgagee.

Debtors wishing to rid themselves of underwater property might also resort to other Code provisions that alone, or in tandem, may put them on a path to accomplishing this objective. Where the debtor has claimed and properly perfected (either by operation of law or by a pre-filing recorded declaration) a homestead exemption, 11 U.S.C. § 522(f) can be used to void judicial liens that impair the exemption. Judicial liens impairing a homestead can be avoided in both chapter 7 and chapter 13 cases.

In addition, wholly unsecured second mortgages encumbering a primary residence can be avoided in chapter 13 cases pursuant to 11 U.S.C. §§ 506(a) and 506(d) under the holding in *In re Mann,* 249 B.R. 831 (1st Cir. 2000).[9]

Utilization of lien avoidance under §§ 522 (f) and/or 506(a) and 506(d) may not result in the debtor's immediate divestiture of unwanted property but may position the debtor later on in the same case or in a subsequent case (notwithstanding that a discharge may not be available in a subsequent case) to either negotiate a short-sale with the first mortgage holder (without the added burden of negotiating short-payoffs to junior lienholders in exchange for a discharge or release of lien) or pay-down the first mortgage to the point where a sale free and clear of liens is feasible under §363(f).

Below median debtors might accomplish a divesture on a more expedited time-frame through (a) first filing a chapter 7 case to obtain a discharge of unsecured debt and then (b) filing a chapter 13 case to avoid judicial liens impairing the debtor's homestead exemption and avoiding wholly unsecured junior mortgages. Presumably under such circumstances, a plan contemplating an expedited sale of the collateral pursuant to § 363(f) could be proposed with the plan being deemed to have been completed upon delivery of the deed to the purchaser.[10]

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[9] This cannot be accomplished in a Chapter 7 case under the Supreme Court's holding in *Bank of America, N.A. v. Caulkett,* 135 S.Ct. 1995, 192 L.Ed. 2d 52 (2015).

[10] While beyond the scope of this article avoidance of wholly unsecured junior mortgages has been allowed in a so-called "Chapter 20" scenario (that is a chapter 7 case in which a discharge issues followed by a subsequent chapter 13 case filed within four (4) years of the issuance of the chapter 7 discharge) in three circuits thus far. See *Branigan v. Davis (In re Davis),* 716 F.3d 331 (4th Cir. 2013); *Wells Fargo Bank, N.A. v. Scantling,* 754 F.3d 1323 (11th Cir. 2014); *HSBC Bank USA, Nat'l Ass'n v. Blendheim (In re Blendheim*, 803 F.3d 477 (9th Cir. 2015); see also *In re Cain,* 513 B.R. 316 (B.A.P. 6th Cir. 2014).

Therefore, although the weight of persuasive authority rejects forced vesting under § 1322(b)(9), potential solutions exist for debtors who wish to relinquish their property.

Separate Classification of Student Loan Debt

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Absent a finding of undue hardship under section 523(a)(8), debtors in chapter 13 cases remain obligated to pay upon completion of their chapter 13 case the amount owed on student loan debt that has not been paid during the plan. This includes any unpaid interest on the debt that has accrued during the plan.[1] Thus, it is often in the debtor's interest to pay off as much of the student loan debt in the chapter 13 plan as is permissible.

One way to pay more on the student loan than on other unsecured debts is to separately classify the student loan for payments at a higher percentage than other unsecured debts pursuant to 11 U.S.C. § 1322(b)(1). This section states, ". . . the [chapter 13] plan may . . . designate a class or classes of unsecured claims . . . , *but may not discriminate unfairly against any class so designated.*" Recent cases have been divided, both in the means of analysis and the result, as to whether students can separately classify student loans. Debtors are permitted to discriminate among similar classes of creditors in a plan. The issue is whether a separate classification for one creditor discriminates unfairly against other creditors within the same class.

The courts have developed a number of tests that purport to help determine whether a discriminatory classification that favors one creditor is fair. These tend to be multi-factor tests that allow the courts considerable discretion. The test developed by the Eighth Circuit in *In re Leser*[2] has been applied by many courts. This four-part test considers whether:

(1) the discrimination has a rational basis;
(2) classification is necessary to debtor's rehabilitation under chapter 13;
(3) the discrimination is proposed in good faith; and
(4) there is meaningful payment to class discriminated against.

Noting that the *Leser* test has been criticized for "numerous shortcomings," the First Circuit B.A.P. in *In re Bentley*[3] adopted a test that considers whether:

(1) unsecured creditors shared equally in any dividend;
(2) subject debts were priority debts;
(3) debtors devoted the minimum or more than minimum to their plan;
(4) unsecured creditors shared in mandatory contribution on a pro rata basis; and
(5) debtor's interest in a "fresh start" trumped creditors' claim to a pro rata sharing.

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[1] If the student loan debt is nondischargeable, postpetition interest will not be discharged. *See In re* Kielisch, 258 F.3d 315 (4th Cir. 2001); *In re* Pardee, 218 B.R. 916 (B.A.P. 9th Cir. 1998), *aff'd*, 187 F.3d 648 (9th Cir. 1999); *In re* Jordan, 146 B.R. 31 (D. Colo. 1992).
[2] 939 F.3d 669 (8th Cir. 1991).
[3] 266 B.R. 229 (B.A.P. 1st Cir. 2001). *See also In re* Salazar, 543 B.R. 669 (Bankr. D.Kan. 2015) (adopting the *Bentley* test for determining whether a plan discriminates unfairly).

While not rejecting a five-part test that had previously been used, one court recently concluded that one of the factors, the difference between what the creditors discriminated against will receive under the plan versus the amount they would receive if there was no separate classification, has been "unduly emphasized in prior cases."[4] The court therefore adopted a "streamlined test" that considers:

(1) is there a good faith, rational basis for the separate classification;
(2) is the separate classification necessary to the debtor's rehabilitation under Chapter 13; and
(3) is there a meaningful payment to the discriminated class.[5]

Another court recently noted that there are at least nine different tests used, which the court described as follows: Strict Approach, Flexible Approach, Balance Approach, Reasonableness Approach, Bright Line Approach, Percentage of Repayment Approach, Interest of Debtor Approach, Multifactor Approach and the Bentley Baseline Test.[6] The court ultimately concluded that "none of the tests should stand as a rigid barrier to confirmation of the Debtors Plan."[7] After reviewing many of the multi-pronged tests, one court of appeals rejected them in favor of a recommendation that courts simply use their best judgment on a case-by-case basis when reviewing unfair discrimination claims in chapter 13.[8]

Application the Fairness Requirement in Section 1322(b)(1)

Courts have found that the following arguments support the debtor's separate classification of student loan debt:

- Debtor would lose discharge under Public Loan Forgiveness program and discrimination advances the public policy objective of paying off student loan debts;[9]

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4 *In re* Belton, 2016 WL 7011570, at *7 (Bankr. D.S.C. Oct. 13, 2016).
5 *Id.* at *7.
6 *In re* Engen, 561 B.R. 523 (Bankr. D. Kan. 2016).
7 *Id*. at 538.
8 *In re* Crawford, 324 F.3d 539 (7th Cir. 2003); *see also In re* Osorio, 522 B.R. 70, 77 (Bankr. D. N.J. 2014) (the competing unfair discrimination tests come down to case-by-case evaluations in which no single factor controls); *In re* Knowles, 501 B.R. 409, 415 (Bankr. D. Kan. 2013) (courts have "wide discretion" in determining whether proposed discrimination in favor of student loan creditor is unfair).
9 *In re* Pracht, 464 B.R. 486 (Bankr. M.D. Ga. 2012) (separate classification and higher payment rate for student loan debt not unfairly discriminate because it allowed debtor to participate in the Public Loan Forgiveness program and gave her the chance to write off approximately $50,000 of student loan debt; such discrimination advanced the goal of a fresh start for the debtor and the public policy objective of payment of student loan debts; cost of this discrimination to unsecured creditors was 5%, or a total of only $5,000).

- Discrimination is not unfair when there is no harm to the unsecured creditors;[10]
- There is a reasonable basis for the discrimination and/or a less discriminatory approach would leave the debtor or creditors worse off;[11]
- Payment of student loans, ahead of other unsecured debt, is not unfair discrimination;[12]

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[10] *In re* Potgieter, 436 B.R. 739 (Bankr. M.D. Fla. 2010) (chapter 13 plan that separately classified student loan obligation and proposed to pay it at the contract rate outside of the plan did not unfairly discriminate because the plan provided for full repayment of all general unsecured claims; the student loan obligation was non-dischargeable such that the debt would be fully repaid at some point; and the debtor had the right, under § 1322(b)(4), "to provide for payments on any unsecured claim to be made concurrently with payments on any secured claim").

[11] *In re* Belton, 2016 WL 7011570, at *7 (Bankr. D.S.C. Oct. 13, 2016) ("Debtor testified that she cannot obtain either a state or federal job as a paralegal or administrative assistant while her student loans are in default because as a paralegal, this default status is perceived by employers to impact her reliability in the handling of funds"); *In re* Mason, 456 B.R. 245 (Bankr. N.D. W. Va. 2011) (separate classification to allow student loan creditor to receive a higher percentage payment than other unsecured creditors may be allowed if the debtor can articulate a non-arbitrary reason why the discrimination is necessary and demonstrate that a less discriminatory approach is not advisable); *In re* Boscaccy, 442 B.R. 501 (Bankr. N.D. Miss. 2010) (separate classification for long-term student loan debt to allow for cure and maintenance not unfairly discriminatory when such classification reduced payments to other unsecured creditors by 21% and 26% because failure to maintain payments on student loan debts would leave debtors in a much worse position than they were in prior to filing); *In re* Kalfayan, 415 B.R. 907 (Bankr. S.D. Fla. 2009) (separate classification not unfairly discriminatory because it benefited the very creditors who were being discriminated against; debtor risked losing her optometry license, under state law, if she fell behind on her student loan payments which would jeopardize her ability to pay other unsecured creditors); *In re* Webb, 370 B.R. 418 (Bankr. N.D. Ga. 2007) (direct payments to student loan creditors in accordance with contract terms is not unfair discrimination because general unsecured creditors would realize only an additional .2% dividend in the absence of such discrimination while debtors would otherwise suffer accrual of interest and penalties and may face the consequences of default upon completion of the chapter 13 plan); *In re* Freshly, 69 B.R. 96 (Bankr. N.D. Ga. 1987) (discrimination not unfair where separate classification of student loan from other unsecured debt was necessary for the debtor's rehabilitation under chapter 13, i.e. it would allow him to return to university and earn a degree and in light of the public policy goal of insuring repayment of student loans; plan proposed to full pay student loan debt of $2,258.00 while paying 1% of $5,314.53 of remaining unsecured debt).

[12] *In re* Foreman, 136 B.R. 532 (Bankr. S.D. Iowa 1992) (debtor's plan, which proposed concurrent payment of student loans and a secured claim, to be followed by full payment of the remaining unsecured claims did not unfairly discriminate under the test set forth in Matter of Tucker because the plan provided for full repayment of all unsecured claims; the student loan

- Funds used are in excess of projected disposable income;[13]

- Discrimination is not unfair so long as unsecured creditors receive at least as much as they would in a chapter 7 proceeding.[14]

The following arguments support the view that separate classification of student loan debt is not permitted:

- Nondischargeability, by itself, does not justify discrimination;[15]

- Student loans co-signed by parents for children do not fall into the consumer debt exception and thus must meet the unfair discrimination requirement;[16]

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obligations were non-dischargeable; and the debtor had a right to under § 1322(b)(4) to propose this repayment structure).

[13] *In re* Stull, 2013 WL 1279069 (Bankr. D. Kan. Mar. 27, 2013) (above-median debtor's chapter 13 plan to separately classify and pay a non-dischargeable obligation from income earned in excess of the projected disposable income committed to pay unsecured debt does not unfairly discriminate; plan in this case ultimately rejected because it proposed to pay interest on the student loan, which is prohibited by § 1322(b)(10) absent provision to pay all allowed claims in full).

[14] *In re* Tucker, 159 B.R. 325 (Bankr. D. Mont. 1993) (plan that proposed to pay nondischargeable student loan debt in full while only paying 29% dividend to other unsecured creditors did not unfairly discriminate because creditors would otherwise receive little or no payment under a chapter 7 filing); *In re* Boggan, 125 B.R. 533 (Bankr. N.D. Ill. 1991) ("chapter 13 plan may provide for a greater percentage payment to an educational lender than to other unsecured creditors, but not by reducing the payments to those other creditors to a level below what they would get in a Chapter 7 liquidation of the debtor's assets"; plan that proposed to pay student loan debts in full but only 15% of other unsecured debts approved).

[15] *In re* Groves, 39 F.3d 212 (8th Cir. 1994) (nondischargeability of student loans does not, by itself, justify "substantial" discrimination against general unsecured debt; additionally, a debtor's interest in a fresh start does not justify separately classifying student loans for the sole purpose of paying those debts in a manner that prejudices other unsecured claims); *In re* Sperna, 173 B.R. 654 (B.A.P. 9th Cir. 1994) (nondischargeability, on its own, is not a reasonable basis for preferential treatment of student loans and does not demonstrate that such discrimination is necessary; at issue were two chapter 13 plans that proposed to pay student loans in full while paying other unsecured debt lesser amounts, i.e. 1.4% and 12.21%); McCullough v. Brown, 162 B.R. 506 (N.D. Ill. 1993)(chapter 13 plans that proposed to pay nondischargeable student loans in full and other unsecured claims between 10% and 20% could not be confirmed on the basis of nondischargeability; court holds that for a plan to pass the unfair discrimination test "debtor must place something material onto the scales to show a correlative benefit to the other unsecured creditors").

[16] *In re* Santana, 480 B.R. 222 (Bankr. D.P.R. 2012) (limiting the application of the § 1322(b)(1) consumer debt exception to co-signed debt acquired for the benefit of the debtor rather than a co-

- Fresh start and/or public policy in favor payment of student loans is not reasonable justification for discrimination;[17]
- Avoiding harm to the debtor is not a reasonable basis for discrimination;[18]
- Discrimination is unfair in the absence of proof that it is necessary or reasonable.[19]

Curing and Maintaining Long-Term Student Loan Debt

Another way to pay more on the student loan than on other unsecured debts is to provide in the plan that the debtor will maintain direct ongoing monthly payments to a student loan creditor under section 1322(b)(5). This section permits the chapter 13 debtor to "cure a default and maintain payments on long term debts on which the final payment is due after the final

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signer, court holds that a student loan co-signed by debtor father for his son did not fall within the exception because students loans generally benefit the co-signer and not the debtor).

[17] *In re* Birts, 2012 WL 3150384 at 4 (E.D. Va. Aug. 1, 2012) (debtor's status as a single mother with three children, her generic interest in a "fresh start" and a strong public policy in favor of the federal student loan program were insufficient to justify discrimination in favor of the nondischargeable student loan debt); *In re* Bentley, 266 B.R. 229 (B.A.P. 1st Cir. 2001) (chapter 13 plan to pay debtors' student loan debt in full but a 3.6% dividend to other unsecured creditors was unfair discrimination; debtors' interest in a fresh start did not justify discrimination in a plan that proposed to pay only the minimum required into the plan, i.e. projected disposable income over three years).

[18] *In re* Kubeczko, 2012 WL 2685115 (Bankr. D. Colo. July 6, 2012) (fact that separate classification and payment of the student loan would have prevented debtor's default on student loans and the accrual of substantial interest was not enough to justify the discrimination); *In re* Knecht, 410 B.R. 650 (Bankr. D. Mont. 2009) (debtor's sole basis for the discrimination was not knowing if he would live or work long enough to repay his student loan debt because of health issues but he failed to link his health issues to his life span or his ability to earn a respectable wage after completion of the plan).

[19] *In re* Thibodeau, 248 B.R. 699 (Bankr. D. Mass. 2000) (debtor failed, under Leser test, to demonstrate that plan to separately classify and fully pay student loan arrearages, maintain student loan payments outside of plan and pay a 27% dividend on other general unsecured claims, while devoting less than the full amount of debtor's net disposable income to payments under the plan, did not unfairly discriminate); *In re* Gonzalez, 206 B.R. 239 (Bankr. S.D. Fla. 1997) (chapter 13 plan that proposed to pay student loan debt in full and a 6% dividend to unsecured creditors could not be confirmed because debtor's offered no proof of the discrimination being "fair" or "necessary"); *In re* Renteria, 2012 WL 1439104 (Bankr. D. Colo. Apr. 26, 2012) (below median income debtors' chapter 13 plan to separately classify student loans to allow for 64% repayment of those claims over 60 month period versus a 1% repayment of all other unsecured claims constituted unfair discrimination).

payment of the plan." A number of courts have permitted chapter 13 debtors to direct ongoing monthly payments to a student loan creditor under section 1322(b)(5).[20]

However, many courts refuse to give effect to section 1322(b)(5) as a distinct Code provision and have required debtors proposing to pay ongoing student loan payments directly from current income to satisfy the unfair discrimination test under section 1322(b)(1).[21] If the court does not find that this separate classification will fairly discriminate and therefore requires the debtor to make pro-rata distributions rather than ongoing contractual payments to student loan creditors, a debtor who is current on student loan payments when the bankruptcy is filed will be thrown into default. This undermines the goal of paying back the government debt to help the federal treasury (which was one of the other purposes of the nondischargeability provision and its extension). It also causes various other consequences to the debtor, such as loss of current status for administrative repayment and loan forgiveness programs.[22]

Another obstacle in using section 1322(b)(5) to maintain ongoing student loan payments during the plan is a provision added to the Code by the 2005 amendments. Section 1322(b)(10) states that if a chapter 13 plan provides for the payment of ongoing postpetition interest on a nondischargeable debt, the 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."[23] In other words, the debtor would have to propose to pay all unsecured creditors' claims in full during the chapter 13 case if the debtor wanted to continue making student loan payments that include interest. A few courts have accepted this broad view of section

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[20] *In re* Johnson, 446 B.R. 921 (Bankr. E.D. Wis. 2011); *In re* Machado, 378 B.R. 14, 17 (Bankr. D. Mass. 2007) (in providing for cure and maintenance of payments, chapter 13 plan can allow for current payments to be paid by debtor directly to creditor, while only payments to cure prebankruptcy arrearage need be paid through trustee and subject to trustee's commission); *In re* Webb, 370 B.R. 418 (Bankr. N.D. Ga. 2007) (debtor may pay general unsecured creditors a 1% dividend through plan payments while making regularly scheduled student loan payments directly to student loan creditor pursuant to 11 U.S.C. § 1322(b)(5)); *In re* Knight, 370 B.R. 429 (Bankr. N.D. Ga. 2007); *In re* Williams, 253 B.R. 220, 227–28 (Bankr. W.D. Tenn. 2000); *In re* Chandler, 210 B.R. 898 (Bankr. D.N.H. 1997); *In re* Sullivan, 195 B.R. 649, 658 (Bankr. W.D. Tex. 1996); *In re* Cox, 186 B.R. 744, 746–47 (Bankr. N.D. Fla. 1995); *In re* Benner, 156 B.R. 631, 634 (Bankr. D. Minn. 1993) (using cure and maintain provisions of § 1322(b)(5) is a form of separate classification that meets the fairness standard of § 1322(b)(1)); *In re* Christophe, 151 B.R. 475 (Bankr. N.D. Ill. 1993); *In re* Saulter, 133 B.R. 148 (Bankr. W.D. Mo. 1991).
[21] *In re* Labib-Kiyarash, 271 B.R. 189 (B.A.P. 9th Cir. 2001) (use of section 1322(b)(5) is subject to debtor showing that classification is fair under section 1322(b)(1)); *In re* Boscaccy, 442 B.R. 501 (Bankr. D. Miss. 2010); *In re* Harding, 423 B.R. 568 (Bankr. S.D. Fla. 2010); *In re* Kruse, 406 B.R. 833 (Bankr. N.D. Iowa 2009); *In re* Pora, 353 B.R. 247 (Bankr. N.D. Cal. 2006).
[22] *E.g, In re* Pracht, 464 B.R. 486, 490 (Bankr. M.D. Ga. 2012) (if school teacher was not permitted to make ongoing student loan payments during her chapter 13 plan, she would be in default and no longer eligible for approximately $50,000 in loan forgiveness under the Public Service Loan Forgiveness program).
[23] 11 U.S.C. § 1322(b)(10).

1322(b)(10).[24] Other courts take the view that section 1322(b)(5) is a specific provision that can be read consistently with the more general language of section 1322(b)(10).[25]

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[24] *In re* Stull, 489 B.R. 217, 223/-/24 (Bankr. D. Kan. 2013) (§ 1322(b)(10) prohibits payment of interest on nondischargeable student loan claim in chapter 13 unless all unsecured claims paid in full); *In re* Precise, 501 B.R. 67, 72 (Bankr. E.D. Pa. 2013) (agreeing with *Stull* in dicta); *In re* Kubeczko, 2012 WL 2685115 *7 (Bankr. D. Colo. July 6, 2012)(in enacting § 1322(b)(10) Congress intended broad restriction on cure and maintenance of payments under § 1322(b)(5) for unsecured debts); *In re* Edmonds, 444 B.R. 898 (Bankr. E.D. Wis. 2010).

[25] *In re* Brown, 500 B.R. 255, 266 (Bankr. S.D. Ga. 2013) (§ 1322(b)(5) specifically applies to a cure in chapter 13 and is not subject to the limits on payment of post-petition interest found in § 1322(b)(10)); *In re* Webb, 370 B.R. 418, 422 (Bankr. N.D. Ga. 2007) (§ 1322(b)(5) is a specific provision applicable to cure of a default in a long term debt and is not controlled by the more general terms of § 1322(b)(10)); *In re* Freeman, 2006 WL 6589023 (Bankr. N.D. Ga. 2006) (§ 1322(b)(10) not applicable when debtor implementing cure and maintain provision of § 1322(b)(5)); *In re* Williams, 253 B.R. 220, 227 (Bankr. W.D. Tenn. 2000) (pre-BAPCPA decision, "The maintenance of ongoing payments necessarily involves the payment of post-petition interest.").

Treatment of Postpetition Assets in Chapter 13 Cases

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Continuing Use of Property

One of the principal advantages of chapter 13 is that the debtor has the right to possession of all property of the estate. Unlike in chapter 7, the chapter 13 debtor remains in possession of all property of the estate. Section 1306 specifically provides that "the debtor shall remain in possession of all property of the estate."

With respect to causes of action, the debtor has the right to fully control any litigation.[1] Therefore most courts have held that a chapter 13 debtor has standing to pursue prepetition causes of action.[2] The debtor should also have the right to dictate the terms of any settlement of a claim, though the bankruptcy court must normally approve the settlement.[3] However, the most effective way to deal with these issues is through a plan provision and, if necessary pending confirmation, an interim order. Provisions of the plan or an order can deal with the procedures and requirements related to the effective prosecution of litigation, including trustee vetting of proposed counsel if debtor is to prosecute the litigation, settlement, and disposition of the proceeds. Depending upon the terms of the confirmed chapter 13 plan and allowed exemptions, the recovery may be distributed in full or in part to creditors.[4]

The chapter 13 bankruptcy estate, unlike the chapter 7 counterpart, may include property

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[1] 11 U.S.C. §§ 1303, 1306(b); Foronda v. Wells Fargo Home Mortgage, Inc., 2014 WL 6706815 * 4 (N.D. Cal. Nov. 26, 2014) (summarizing decisions). *See also* Wilson v. Dollar Gen. Corp., 717 F.3d 337 (4th Cir. 2013).

[2] Wilson v. Dollar Gen. Corp., 717 F.3d 337 (4th Cir. 2013) (debtor has standing to bring prepetition claim for violation of Americans with Disabilities Act in the district court while his chapter 13 case is pending); Smith v. Rockett, 522 F.3d 1080 (10th Cir. 2008) (chapter 13 debtor can pursue prepetition debt collection case in own name on behalf of estate); Crosby v. Monroe County, 394 F.3d 1328 (11th Cir. 2004); Cable v. Ivy Tech State College, 200 F.3d 467 (7th Cir. 1999) (after conversion to chapter 13, chapter 7 trustee automatically dropped out of discrimination case and debtor became real party in interest with standing to prosecute case on behalf of the bankruptcy estate); Olick v. Parker & Parsley Petroleum Co., 145 F.3d 513 (2d Cir. 1998); Barker v. Asset Acceptance, L.L.C., 874 F. Supp. 2d 1062, 1065 (D. Kan. 2012) (debtor can pursue scheduled prepetition FDCPA action "in his capacity as a Chapter 13 bankruptcy debtor rather than in his individual capacity"); Looney v. Hyundai Motor Mfg. Ala., L.L.C., 330 F. Supp. 2d 1289 (M.D. Ala. 2004) (chapter 13 debtor had standing to litigate employment discrimination action which was property of bankruptcy estate); *In re* Simmerman, 463 B.R. 47 (Bankr. S.D. Ohio 2011) (chapter 13 debtors have standing to bring various consumer claims, including FDCPA claims, on behalf of bankruptcy estate; but FDCPA claims time-barred).

[3] *See* Fed. R. Bankr. P. 9019.

[4] *See* 11 U.S.C. §§ 1306(a), 1325(c), 1329.

the debtor acquires after filing the initial petition for relief.[5] The plan itself may stipulate otherwise, but the Code provides that upon confirmation of the plan the estate's property vests in the debtor.[6] Thus, the debtor should also have standing to pursue legal claims that arise during the three-to-five years that a confirmed chapter 13 plan is in effect. As discussed below, however, some courts have held that a chapter 13 debtor's failure to amend the schedules to disclose postpetition assets may prevent the debtor from pursuing such claims on judicial estoppel grounds.

Disclosure of Postpetition Assests

The extent of the debtor's duty to amend schedules to include legal claims or other assets acquired while a chapter 13 case is pending is not clear. Bankruptcy Rule 1007(h) requires amended schedules only when "the debtor acquires or becomes entitled to acquire any interest in property" pursuant to section 541(a)(5), which covers inheritances, divorce settlements and insurance proceeds that the debtor becomes entitled to within 180 days of the petition filing date. Bankruptcy Rule 1007(h) does not require the scheduling of property that enters the estate pursuant to section 1306.[7] However, some courts have held that the debtor is required to amend the schedule of assets to include any legal claim that arises after the filing of the chapter 13 petition and during the pendency of the case.[8] At least as to significant assets, the safest course is to disclose the claim to the trustee and amend the schedules. The ability to amend schedules after the completion of a chapter 13 case is questionable.[9]

In chapter 13, as with chapter 7, resolving standing issues does not preclude courts' application of equitable remedies, such as judicial estoppel, when the omission of a claim from schedules was the product of a bad faith intent to conceal. Judicial estoppel has been applied to bar claims not disclosed during the pendency of a chapter 13 case, regardless of whether the

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[5] 11 U.S.C. § 1306(a).

[6] 11 U.S.C. § 1327(b); *In re* Jones, 420 B.R. 506 (B.A.P. 9th Cir. 2009), *aff'd* 657 F.3d 921 (9th Cir. 2011).

[7] *In re* Adair, 253 B.R. 85, 90 (B.A.P. 9th Cir. 2000) ("If Congress or the Bankruptcy Rule drafters had intended to impose a broader duty of ongoing disclosure, either could have expressly so provided.").

[8] *See* Van Horn v. Martin, 812 F.3d 1180 (8th Cir. 2016) (relying upon *Bob Evans* and finding that chapter 13 debtor had duty to disclose employment discrimination claim); Jones v. Bob Evans Farms, Inc., 811 F.3d 1030, 1033 (8th Cir. 2016) (chapter 13 debtor had duty under confirmation order entered in his case to amend his schedules to report postpetition cause of action; "a Chapter 13 debtor who does not amend his bankruptcy schedules to reflect a post petition cause of action adopts inconsistent positions in the bankruptcy court and the court where that cause of action is pending"); *In re* Flugence, 738 F.3d 126, 127 (5th Cir. 2013) *(per curiam)*; *In re* Waldron, 536 F.3d 1239 (11th Cir. 2008) (bankruptcy judge had discretion to require chapter 13 debtors to amend their schedule of assets to disclose settlement of uninsured motorist claims).

[9] *In re* D'Antignac, 2013 WL 1084214 (Bankr. S.D. Ga. Feb. 19, 2013) (chapter 13 case cannot be reopened to administer an asset (a lawsuit) because § 1329(d) limits period of plan administration to five years, and seven years passed since commencement of plan).

claims arose before the filing of the petition or during the pendency of the case.[10]

Modification of Plan Based Upon Postpetition Assets

The Code provides a mechanism to deal with unanticipated changes in the debtor's income or expenses. Section 1329(a) permits a debtor, unsecured creditor, or trustee to seek modification of the plan, raising or lowering payments. Sections 1322(a), 1322(b), 1323(c), and 1325(a) apply to any request to modify the plan. Thus, when there has been a substantial and unanticipated change for the better in the debtor's financial condition after confirmation, the trustee or an unsecured creditor may move for a modification that increases the debtor's payments.[11]

While most cases deal with a change of income or expenses, the issue of whether plan modification is permitted or required also arises when there has been a postpetition acquisition of assets. This often occurs when the debtor becomes entitled to receive insurance proceeds or an inheritance. An initial question is whether the postpetition asset is property of the estate.

In addition to property specified in section 541, property of the estate under section 1306(a)(1) includes property of the kind specified in section 541 acquired after the petition date but before the case is closed, dismissed, or converted. Most courts have held that despite the limitation in section 541(a)(5), inheritances acquired more than 180 days after the petition date but before a chapter 13 case is closed, dismissed, or converted are property of the estate.[12]

If the asset is property of the estate, the next issue that arises is whether the liquidation analysis under section 1325(a)(4) should be applied to plan modifications using property of the estate on the petition date (or original plan confirmation date) or on the date of plan modification. The court in *In re McAllister*, however, held that the more appropriate approach is to apply the best interest of creditors test as if the chapter 13 case has been converted to chapter 7 as of the modification date:

> Under the general rule of § 348(f)(1)(A), the estate in a hypothetical chapter 7 liquidation that occurs at the time of modification of a chapter 13 plan cannot include any asset that the debtor acquired after the filing of the case. Property that the debtor acquires after confirmation is property of the estate only if the debtor converts the case in bad faith. Nothing in the statute permits a court to assume a bad

[10] *E.g.*, Jones v. Bob Evans Farms, Inc., 811 F.3d 1030 (8th Cir. 2016).
[11] Germeraad v. Powers, 826 F.3d 962 (7th Cir. 2016); Carroll v. Logan, 735 F.3d 147 (4th Cir. 2013) (right to inherit $100,000 based on death occurring several years after petition was property of estate under section 1306(a), and possible basis for modification); *In re* Murphy, 474 F.3d 143 (4th Cir. 2007) (refinancing that exchanged debt for cash by debtors with reduced income not a substantial change, but sale of property for amount in excess of what could be anticipated at confirmation was a substantial change); Barbosa v. Solomon, 235 F.3d 31 (1st Cir. 2000) (plan may be modified without showing change of circumstances).
[12] Carroll v. Logan, 735 F.3d 147 (4th Cir. 2013); *In re* Lybrook, 951 F.2d 136 (7th Cir. 1991); *In re* Mizula, 525 B.R. 569 (Bankr. D.N.H.2015); *In re* Gilbert, 526 B.R. 414 (Bankr. N.D.Ga. 2015).

> faith conversion in the modification context, so the general rule must apply. Moreover, because the entire idea behind the best interest test is to compare what unsecured creditors receive under the plan with what they would get in a chapter 7 case, it is appropriate to consider what creditors would receive if they pursue the alternative course of conversion. Under that view, the bad faith exception cannot apply because the debtor is not seeking conversion of the case.
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> So it does not matter whether the life insurance proceeds are nonexempt property of the estate or when the best interest of creditors calculation under § 1325(a)(4) occurs. The result under § 348(f) is the same: the proceeds are not property of the estate in the converted case. Because Mr. McAllister has no other nonexempt assets, administration of his hypothetical chapter 7 estate will not result in unsecured creditors receiving anything.[13]

The majority position on this issue appears to be that the appropriate date for calculation of the best interest of creditors test is the modification date.[14] In a recent decision, Judge Feeney held that: "holding that the liquidation analysis for a modified plan is the petition date would render § 1306 superfluous and enable the Debtor to both discharge her substantial unsecured debt and simultaneously receive a windfall."[15]

The next issue is whether the projected disposable income test of section 1325(b) applies to plan modification and would require the debtor to pay the postpetition proceeds from an inheritance or life insurance into the plan. It is not at all clear that section 1325(b) applies to modifications under section 1329. Section 1325(b) is not mentioned in section 1329(b)(1), which requires modifications to comply with other provisions of section 1325, leading some courts to find section 1325(b) inapplicable to modifications.[16] The fact that a reference to section 1325(b) was added to section 1329 in 2005, but only for use in determining the maximum length of a modified plan, further suggests that section 1325(b) is not otherwise applicable.[17] In fact,

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[13] *In re* McAllister, 510 B.R. 409, 412 (Bankr. N.D. Ga. 2014), aff'd, No. 4:14–CV–00106–HLM (N.D.Ga. Oct. 14, 2014).
[14] *In re* Nachon-Torres, 520 B.R. 306 (Bankr. S.D.Fla. 2014); *In re* Auernheimer, 437 B.R. 405 (Bankr. D.Kan. 2010); *In re* Morgan, 299 B.R. 118 (Bankr. D.Md. 2003); *In re* Nott, 269 B.R. 250 (Bankr. M.D.Fla. 2000); *In re* Barbosa, 236 B.R. 540 (Bankr. D.Mass. 1999), *aff'd*, 235 F.3d 31 (1st Cir. 2000).
[15] *In re* Lombardi, 551 B.R. 84, 93 (Bankr. D. Mass. 2016).
[16] *See, e.g.*, *In re* Sunahara, 326 B.R. 768 (B.A.P. 9th Cir. 2005); Neidich v. Lorenzo, 2014 WL 1877408 (S.D. Fla. May 9, 2014); King v. Robenhorst, 2011 WL 5877081 (E.D. Wis. Nov. 22, 2011); *In re* Tibbs, 478 B.R. 458 (Bankr. S.D. Fla. 2012); *In re* Davis, 439 B.R. 863 (Bankr. N.D. Ill. 2010); *In re* Walker, 2010 WL 4259274 (Bankr. C.D. Ill. Oct. 21, 2010).
[17] *See In re* Moglia, 2014 WL 7405443 (Bankr. D. Or. Dec. 30, 2014) (because § 1325(b) not applicable to modifications, debtors could not be forced to change plan period to 60 months when income increased to above applicable median income); *In re* Barnes, 506 B.R. 777 (Bankr. E.D. Wis. 2014) (debtors not bound by original applicable commitment period when income fell); *In re* McCully, 398 B.R. 590 (Bankr. N.D. Ohio 2008) (same); In re Ewers, 366 B.R. 139 (Bankr. D. Nev. 2007) (because section 1325(b) does not apply to modification, debtor could

some courts have that the BAPCPA amendments make clear that a debtor's receipt of a postpetition asset cannot possibly be disposable income because the debtor did not receive it during the six months preceding the filing of the petition.[18] However, other courts find that section 1329(b) applies because the requirement in section 1325(a)(1) that a plan comply with the provisions of chapter 13, which does apply to modifications, incorporates the requirements of the projected disposable income test of section 1325(b).[19]

The final issue that the parties may raise is whether the plan modification is proposed in good faith. Section 1325(a)(3) requires that a plan be "proposed in good faith and not by any means forbidden by law." Section 1329(b) makes this requirement applicable to a modification.

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modify to reduce term of plan to less than five-year commitment period when income dropped); *In re* Robert, 366 B.R. 27 (Bankr. W.D. Ark. 2007).

[18] *E.g.*, *In re* McAllister, 510 B.R. 409, 412 (Bankr. N.D. Ga. 2014), aff'd, No. 4:14–CV–00106–HLM (N.D.Ga. Oct. 14, 2014).

[19] *E.g., In re* Cormier, 478 B.R. 88 (Bankr. D.Mass. 2012); *In re* Stretcher, 466 B.R. 891 (Bankr. W.D.Tex. 2011); *In re* Heideker, 455 B.R. 263 (Bankr. M.D.Fla. 2011); *In re* Buck, 443 B.R. 463 (Bankr. N.D.Ga. 2010); *In re* King, 439 B.R. 129 (Bankr. S.D.Ill. 2010); *In re* Braune, 385 B.R. 167 (Bankr. N.D.Tex. 2008).