

SEQ CHAPTER \h \r 1

ISSUES RELATED TO
CONVERSION OF BANKRUPTCY CASES

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I. What Amount Must a Debtor Pay to Redeem Collateral Following Conversion from Chapter 13 to Chapter 7? TC \11 "I. What Amount Must a Debtor Pay to Redeem Collateral Following Conversion from Chapter 13 to Chapter 7?

A. Bankruptcy Code

11 U.S.C. §722 provides:

An individual debtor may . . . redeem tangible personal property intended primarily for personal, family, or household use, from a lien securing a dischargeable consumer debt, if such property is exempt under section 522 of this title or has been abandoned under section 554 of this title, by paying the holder of such lien the amount of the allowed secured claim of such holder that is secured by such lien.

11 U.S.C. § 348(f) provides:

(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 –

* * *

(B) valuation of property and of allowed secured claims in the chapter 13 case shall apply in the converted case, with allowed secured claims reduced to the extent that they have been paid in accordance with the chapter 13 plan.

B. Caselaw

When a creditor's secured claim is determined in a chapter 13 case that is subsequently converted to chapter 7, the debtor need only pay the remaining balance of the chapter 13 secured claim to redeem, regardless of the collateral's current value. *In re Rodgers*, 273 B.R. 186, 193 (Bankr. C.D. Ill. 2002); *In re Archie*, 240 B.R. 425, 429 (Bankr. S.D. Ala. 1999); *In re Dean*, 281 B.R. 912 (Bankr. W.D. Tenn. 2002); *In re Hall*, 2000 WL 33943204 (Bankr. S.D. Ga. 2000); *In re Hawkins*, 2000 WL 33673761

(Bankr. M.D N.C. 2000).

A confirmed plan may establish the value the property. *In re Davis*, 300 B.R. 898, 901 (Bankr. N.D. Ill. 2003), citing *Warren v. Peterson*, 298 B.R. 322 (N.D. Ill. 2003), *In re Slack*, 290 B.R. 282 (Bankr. D.N.J. 2003), and *In re Page*, 250 B.R. 465 (Bankr. D.N.H. 2000).

Under 11 U.S.C. §1325(a)(5), where collateral is valued and paid over time in a chapter 13 plan, the secured creditor is entitled to the present value of its allowed secured claim. Thus the plan must propose interest on the secured claim and the “allowed secured claim” includes the value plus interest.

Example 1: Collateral is valued at \$6,000 in the chapter 13 case. The plan provides for payment of the secured claim, together with interest at 10% over 36 months. The total amount of the payments to the secured creditor over 36 months under the chapter 13 plan would be \$6,970. The plan is confirmed, and the secured creditor receives \$2,000 during the chapter 13 case before it converts to chapter 7. At the time of conversion to chapter 7, the collateral is worth \$5,500. The redemption price is \$4,970 (\$6,970 - \$2,000), regardless of changes in value.

Example 2: The collateral was valued at \$6,000 in the chapter 13 case. The plan provided to pay this value at 10% interest over 36 months. After confirmation and during the chapter 13 case, the secured creditor received \$6,970 (representing the value and all interest due on the secured claim). The secured creditor did not receive any distribution on its unsecured claim. When the case converted to chapter 7, the debtor moved to redeem the collateral for \$0, and argued that the allowed secured claim had been paid in the chapter 13 case. These are the facts in *In re Hawkins*, 2000 WL 33673761 (Bankr. M.D. N.C. 2000). Citing §348(f), the court in *Hawkins* found that the secured creditor had been paid the full amount of its secured claim during the chapter 13 case. Therefore, after the case converted to chapter 7, the amount necessary to redeem the collateral under §722 was \$0.

A similar result was reached in *In re Stoddard*, 167 B.R. 98 (Bankr. S.D. Ohio 1994). In *Stoddard*, the chapter 13 plan had not yet been confirmed when the case converted to chapter 7; however, the parties had stipulated pre-confirmation to the value of the collateral. The court in *Stoddard* found that where the collateral value has been stipulated to or judicially determined in the chapter 13 case prior to conversion, this value established the redemption amount to be paid for purposes of § 722 when the case converts to chapter 7.

In *In re Davis*, 300 B.R. 898 (Bankr. N.D. Ill. 2003), the secured creditor filed a proof of claim in the amount of \$22,939, valuing the collateral at \$14,450. The debtor's chapter 13 plan valued the secured claim at \$14,450; however, the confirmed plan provided Arcadia with a fully secured claim in the amount of \$22,939. The chapter 13 plan was confirmed and the creditor received approximately \$2,000 through the plan before the case converted to chapter 7. In the chapter 7 case, the debtor moved to redeem the collateral for \$6,250. The court examined how to determine the "allowed secured claim" under §506(a). The court found that when a creditor files a proof of claim prior to confirmation and the debtor does not object prior to confirmation, the debtor cannot file an action post-confirmation to collaterally attack the proof of claim. (See *Adair v. Sherman*, 230 F.3d 890, 894-895 (7th Cir. 2000)) Interestingly, the court found that the fact that the chapter 13 plan valued the creditor's secured claim differently than in the creditor's proof of claim constituted "a challenge to the secured claim." Since the value was "disputed," both the debtor and creditor were bound by the terms of the confirmed plan. As a result, the debtor had to pay \$20,939.00 (\$22,939.00 less the \$2,000.00 paid in the chapter 13 case) to redeem the collateral.

C. BAPCPA (2005):

Under 11 U.S.C. § 348(f)(1)(B), valuation of property in chapter 13 will apply only if the case is converted to chapter 11 or 12, but not if the case is converted to chapter 7.

Under 11 U.S.C. § 348(f)(1)(C):

(i) the claim of any creditor holding security as of the date 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.

II. Can the Chapter 7 Trustee Object to Exemptions Following a Conversion from Chapter 11 or 13 to Chapter 7? TC \11 "II. Can the Chapter 7 Trustee Object to Exemptions Following a Conversion from Chapter 11 or 13 to Chapter 7?

A. Bankruptcy Code and Rules

11 U.S.C. § 348 provides:

(a) Conversion of a case from a case under one chapter of this title to a case under another chapter of this title constitutes an order for relief under the chapter to which the case is converted, but, except as provided in subsections (b) and (c) of this section, does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief.

Bankruptcy Rule 4003 states:

(b) *Objecting to a Claim of Exemptions.* A party in interest may file an objection to the list of property claimed as exempt only within 30 days after the meeting of creditors held under §341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later.

Bankruptcy Rule 1019 states:

(2) *New Filing Periods.* A new time period for filing claims, a complaint objecting to discharge, or a complaint to obtain a determination of dischargeability of any debt shall commence pursuant to Rules 3002, 4004, or 4007, provided that a new time period shall be commence if a chapter 7 case had been converted to a chapter 11, 12, or 13 case and thereafter reconverted to a chapter 7 case and the time for filing claims, a complaint objecting to discharge, or a complaint to obtain a determination of the dischargeability of any debt, or any extension thereof, expired in the original chapter 7 case.

B. Cases holding that the chapter 7 trustee may file an objection to exemptions after conversion:

In re Campbell, 313 B.R. 313 (B.A.P. 10th Cir. 2004)
In re Koss, 319 B.R. 317, 320 (Bankr. D. Mass. 2005)
In re Lang, 276 B.R. 716 (Bankr. S.D. Fla. 2002)
In re Fish, 261 B.R. 754 (Bankr. M.D. Fla. 2001)
In re Mims, 249 B.R. 378 (Bankr. D.N.J. 2000)
In re Wolf, 244 B.R. 754 (Bankr. E.D. Mich. 2000)
In re Havanec, 175 B.R. 920 (Bankr. N.D. Ohio 1994)
In re Weismann, 173 B.R. 235 (M.D. Fla. 1994)
In re de Kleinman, 172 B.R. 764 (Bankr. S.D.N.Y. 1994)
In re Bergen, 163 B.R. 377 (Bankr. M.D. Fla. 1994)
In re Jenkins, 162 B.R. 579 (Bankr. M.D. Fla. 1993)
In re Leydet, 150 B.R. 641 (Bankr. E.D. Va.1993)

These courts find that the conversion of a case from chapter 13 to chapter 7 requires the chapter 7 trustee to hold a new creditors meeting. *See* Bankruptcy Rule 4003(b). Since a new creditors meeting is held, a new 30 day deadline period must commence to object to exemptions. The analysis of these courts is summarized as follows:

The conversion of a bankruptcy case from one chapter to another constitutes an order for relief. 11 U.S.C. §348(a). Within a reasonable time after the order for relief in a bankruptcy case, the United States trustee must convene and preside at a meeting of creditors. 11 U.S.C. §341(a); see also Fed. R. Bankr. P. §2003(a) (establishing time limits). Thus, when a case brought under Chapter 11 is converted to a Chapter 7 proceeding, a new meeting of creditors is convened. This new meeting is not a continuation of the creditors meeting in the pre-conversion case, but is a separate meeting for which a new trustee must be selected. *F & M Marquette Nat'l Bank v. Richards*, 780 F.2d 24, 25 (8th Cir. 1985) (citing 11 U.S.C. §348(e)). Federal Rule of Bankruptcy Procedure 4003(b) provides that the 'trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a)' Thus, read together, the provisions establish that a second objections period begins following the post-conversion creditors meeting. This result makes sense. *Bell v. Bell (In re Bell)*, 225 F.3d 203, 223 (2d Cir. 2000) (Moran, J.,

dissenting).

In re Hopkins, 317 B.R. 726, 730

C. Cases holding the chapter 7 trustee *does not* have the right to object to exemptions after conversion:

In re Alexander, 236 F.3d 431 (8th Cir.2001)

In re Smith, 235 F.3d 472 (9th Cir. 2000)

In re Bell, 225 F.3d 203 (2d Cir. 2000)

In re Ferretti, 230 B.R. 883, 891 (Bankr. S.D. Fla. 1999),

aff'd, *Dibraccio v. Ferretti*, 268 F.3d 1065 (11th Cir. 2001)

In re Fonke, 321 B.R. 199 (Bankr. S.D. Tex. 2005)

In re Rogers, 278 B.R. 201 (Bankr. D. Nev. 2002)

In re Page, 240 B.R. 548 (Bankr. W.D. Mich. 1999)

In re Brown, 178 B.R. 722 (Bankr. W.D. Tenn. 1995)

III. Is the Automatic Stay Reimposed Upon Conversion from Chapter 13 to Chapter 7? TC \I "III. Is the Automatic Stay Reimposed Upon Conversion from Chapter 13 to Chapter 7?

A. Cases holding that the automatic stay is *not* reimposed upon conversion to chapter 7:

Vega v. Gasper, 36 F.3d 417 (5th Cir. 1994)

In re State Airlines, Inc., 873 F.2d 264, 268 (11th Cir. 1989)

In re Bryant, 296 B.R. 516 (Bankr. D. Colo. 2003)

In re Gilpin, 209 B.R. 490 (Bankr. W.D. Mo. 1997)

In re Masterson, 189 B.R. 250 (Bankr. D.R.I. 1995)

In re Ramirez, 188 B.R. 413 (B.A.P. 9th Cir. 1995)

In re Standfield, 152 B.R. 528 (Bankr. N.D. Ill. 1993)

Johnson v. Garden State Brickface & Stucco Co., 150 B.R. 617, 619 (E.D. Pa. 1993)

In re Campos, 128 B.R. 790 (Bankr. C.D. Cal. 1991)

In re Greetis, 98 B.R. 509, 513 (Bankr. S.D. Cal. 1989)

See also *In re Parker*, 154 B.R. 240, 243 (Bankr. S.D. Ohio 1993) (“Although conversion of a bankruptcy case from one chapter to another does not automatically reimpose the stay of § 362, under certain circumstances and on a case-by-case basis, the court may in its discretion reinstate the stay pursuant to § 105 of the Bankruptcy Code. . . . However, Fed.R.Bankr.P. 7001(7) requires that any request for injunctive relief be

brought by way of an adversary proceeding.”)

B. Cases holding that the automatic stay is reimposed upon conversion to chapter 7:

In re Perkins, 36 B.R. 618 (Bankr. M.D. Tenn. 1983) (After the chapter 13 proceeding was converted to chapter 7, an agreed order to lift stay required approval of chapter 7 trustee to be enforceable against him. Therefore, the chapter 7 trustee was not bound by an agreed order entered into by chapter 13 trustee, the debtor and his wife, lifting the automatic stay to permit state court to proceed in divorce action involving the debtor. The chapter 7 trustee could attack any provisions of state divorce decree that divested property out of the bankruptcy estate.).

In re Nichols, 134 B.R. 236, 238-39 (Bankr. S.D. Ohio 1991) (Conversion from Chapter 7 to Chapter 13 created new order for relief and new automatic stay requiring creditor to file new motion for relief from stay in subsequent Chapter 13 case, even though relief from stay was previously granted in Chapter 7 proceeding.).

IV. Does the Entry of a Chapter 7 Discharge Preclude Conversion to Chapter 11 or 13? TC \11 "IV.Does the Entry of a Chapter 7 Discharge Preclude Conversion to Chapter 11 or 13?

A. Cases holding that the granting of a discharge does preclude conversion:

In re Markovich, 207 B.R. 909 (B.A.P. 9th Cir.1997)

In re Carrow, 315 B.R. 8, 21 (Bankr. N.D.N.Y. 2004)

In re Gallagher, 283 B.R. 604 (Bankr. M.D. Fla. 2002)

In re Caruso, 272 B.R. 254 (Bankr. D. Neb. 2001)

In re Marcakis, 254 B.R. 77, 82-3 (Bankr. E.D.N.Y. 2000)

In re Hauswirth, 242 B.R. 95 (Bankr. N.D. Ga. 1999)

In re Lesniak, 208 B.R. 902 (Bankr. N.D. Ill.1997)

In re Schwartz, 178 B.R. 340, 345 (Bankr. E.D.N.Y. 1995)

In re Jeffrey, 176 B.R. 4 (Bankr. D. Mass. 1994)

In re Wyciskalla, 156 B.R. 579 (Bankr. S.D. Ill.1993)

In re Kilker, 155 B.R. 201 (Bankr. W.D. Ark. 1993)

In re Tardiff, 145 B.R. 357 (Bankr. D. Me. 1992)

In re Safley, 132 B.R. 397 (Bankr. E.D. Ark. 1991)

In re Jones, 111 B.R. 674, 680 (Bankr. E.D. Tenn. 1990).

B. Cases holding that the granting of a discharge *does not* preclude conversion:

In re Young, 237 F.3d 1168, 1173 (10th Cir. 2001)

In re Rigales, 290 B.R. 401 (Bankr. D.N.M. 2003)

In re Oblinger, 288 B.R. 781 (Bankr. N.D. Ohio 2003)

In re Mosby, 244 B.R. 79 (Bankr. E.D. Va. 2000)

In re Porras, 188 B.R. 375, 377 (Bankr. W.D. Tex. 1995).

C. See also *In re Safley*, 132 B.R. 397 (Bankr. E.D. Ark. 1991) (If the chapter 7 debtor has been granted a discharge and does not seek to set it aside, but then moves to convert case to chapter 13, only those debts not discharged and secured debts are surviving claims which may be included in payment plan under chapter 13; request to convert in order to pay debts does not imply that discharge should be set aside automatically.).

D. See also *In re Martin*, 880 F.2d 857, 860 (5th Cir. 1989) (“We do not reach the question of what happens to the discharge or the underlying debt when the motion to convert is granted after the discharge.”).

V. If a Case has Previously Been Converted from Chapter 11 or 13 to Chapter 7, Does § 706(a) Preclude the Reconversion of the Case to Chapter 11 or 13? TC ¶11 "V. If a Case has Previously Been Converted from Chapter 11 or 13 to Chapter 7, Does § 706(a) Preclude the Reconversion of the Case to Chapter 11 or 13?"

A. Bankruptcy Code

11 U.S.C. § 706(a) provides:

(a) The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title.

B. Cases holding that § 706(a) *does* preclude reconversion:

In re Fleek, 914 F.2d 1490, 1990 WL 136652, (4th Cir. 1990)

In re Carter, 84 B.R. 744 (D. Kan. 1988)

In re Hardin, 301 B.R. 298 (Bankr. C.D. Ill. 2003)

In re Baker, 289 B.R. 764, 767-8 (Bankr. M.D. Ala. 2003)

In re Banks, 252 B.R. 399, 400 (Bankr. E.D. Mich. 2000)

In re Vitti, 132 B.R. 229, 231 (Bankr. D. Conn. 1991)

In re Johnson, 116 B.R. 224 (Bankr. D. Idaho 1990)
In re Bryan, 109 B.R. 534 (Bankr. D.Colo. 1990)
In re Hanna, 100 B.R. 591, 594 (Bankr. M.D. Fla. 1989)
In re Richardson, 43 B.R. 636, 638 (Bankr. M.D. Fla. 1984)
In re Ghosh, 38 B.R. 600, 603 (Bankr. E.D.N.Y. 1984)

C. Cases holding that § 706(a) does not preclude reconversion:

In re Masterson, 141 B.R. 84 (Bankr. E.D. Pa. 1992)
In re Somers Corp., 123 B.R. 35, 37 (Bankr. N.D. Ohio 1990)
In re Johnson, 116 B.R. 224, 227 (Bankr. D. Idaho 1990)
In re Trevino, 78 B.R. 29 (Bankr. M.D. Pa. 1987)
In re Walker, 77 B.R. 803 (Bankr. D. Nev. 1987)
In re Hollar, 70 B.R. 337 (Bankr. E.D. Tenn. 1987)
In re Sensibaugh, 9 B.R. 45 (Bankr. E.D. Va. 1981).

VI. Does a Judgment of Nondischargeability Preclude Conversion from Chapter 7 to Chapter 11 or 13? TC \11 "VI. Does a Judgment of Nondischargeability Preclude Conversion from Chapter 7 to Chapter 11 or 13?

A. Cases holding that a nondischargeability judgment does not preclude conversion:

In re Caldwell, 895 F.2d 1123 (6th Cir. 1990)
In re Easley, 72 B.R. 948, 951 (Bankr. M.D. Tenn.1987)
In re Caldwell, 67 B.R. 296, 300-01 (Bankr. E.D. Tenn.1986)
In re Street, 55 B.R. 763, 765 (B.A.P. 9th Cir. 1985)
In re Jennings, 31 B.R. 378, 380 (Bankr. S.D. Ohio 1983)

VII. Are Post-Petition Claims in a Chapter 11 or 13 Case Dischargeable Upon Conversion to Chapter 7? TC \11 "VII. Are Post-Petition Claims in a Chapter 11 or 13 Case Dischargeable Upon Conversion to Chapter 7?

A. Bankruptcy Code

11 U.S.C. §§ 348(d) states:

A claim against the estate or the debtor that arises after the order for relief but before conversion in a case that is converted under section 1112, 1208, or 1307 of this title, other than a claim specified in section 503(b) of this title,

shall be treated for all purposes as if such claim had arisen immediately before the date of the filing of the petition.

B. Cases holding that post-petition claims *are* discharged upon conversion to chapter 7:

In re Fickling, 361 F.3d 172 (2d Cir. 2004) (For purposes of discharge, all claims, including claims for administrative expenses, that arise after the filing of a chapter 11 petition but prior to conversion to chapter 7, and that are not expressly exempted by the section of the Bankruptcy Code governing exceptions to discharge, are subject to discharge.).

In re Deiter, 33 B.R. 547 (Bankr. W.D. Wis. 1983) (Utility's priority claim arising from services performed and utilities supplied during chapter 13 case was dischargeable in debtor's chapter 7 case.).

In re Fowler, 394 F.3d 1208 (9th Cir. 2005) (Following conversion of chapter 11 case to one under chapter 7, 12 or 13, postpetition, preconversion administrative expense claims retain their status as postpetition administrative expenses.).

C. Cases holding that post-petition claims *are not* discharged upon conversion to chapter 7:

In re Morris, 155 B.R. 422 (Bankr. W.D. Tex. 1993) (Sufficient evidence of bad faith in converting chapter 7 case to chapter 11 and then in reconverting case to chapter 7 warranted finding that "cause" existed to determine that date of order for relief was date of filing of case rather than date of conversion, where debtors, two weeks after filing bankruptcy, incurred over \$100,000 in gambling debts over two-day period, and only change in amended schedules filed in chapter 11 case was addition of gambling debts, thereby giving rise to appearance that case was converted to chapter 11 solely to obtain discharge of postpetition gambling debts.).

In re Nephew, 292 B.R. 729 (Bankr. W.D.N.Y. 2003) (Debtors' postpetition, pre-conversion obligation for an unsecured debt for emergency medical treatment provided to their daughter would be excepted from discharge in "no asset" chapter 7 case previously converted from case under chapter 13; debtors, in failing to file amended schedules adding this postpetition debt within 15 days of conversion contrary to local rule, and despite fact that they had received statements and demand letter from pediatric center prior to first meeting of creditors in converted case, exhibited sufficient recklessness, and pediatric center, in prosecuting state

court collection action to judgment, suffered sufficient prejudice, to render debt nondischargeable. In the alternative, debtors would be required to reimburse center for unnecessary economic prejudice that they had caused in amount equal to balance owing on judgment.).

VIII. After Conversion from Chapter 13 to Chapter 7, Is Property Acquired Post-Petition Property of the Estate? TC \11 "VIII. After Conversion from Chapter 13 to Chapter 7, Is Property Acquired Post-Petition Property of the Estate?

A. Bankruptcy Code

11 U.S.C. § 1306 provides:

(a) Property of the estate includes, in addition to the property specified in section 541 of this title—

(1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title whichever occurs first; and

(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first.

(b) Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.

11 U.S.C. § 348(f), added in 1994, provides:

(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; and

(B) valuations of property and of allowed secured claims in the chapter 13 case shall apply in the

converted case, with allowed secured claims reduced to the extent that they have been paid in accordance with the chapter 13 plan.

(2) If the debtor converts a case under chapter 13 of this title to a case under another chapter under this title in bad faith, the property in the converted case shall consist of the property of the estate as of the date of conversion.

B. General Cases:

In re Stamm, 222 F.3d 216 (5th Cir. 2000).

In re Kollar, 176 F.3d 175, 178 (3d Cir. 1999)

Farmer v. Taco Bell Corp., 242 B.R. 435, 439 (Bankr. W.D. Tenn. 1999)

In re Sargente, 202 B.R. 1023, 1025 (Bankr. S.D. Fla. 1996)

The legislative history of section 348(f) states:

This amendment would clarify the Code to resolve a split in the . . . law about what property is in the bankruptcy estate when a debtor converts from chapter 13 to chapter 7. The problem arises because in chapter 13 . . . any property acquired after the petition becomes property of the estate, at least until confirmation of a plan. Some courts have held that if the case is converted, all of this after-acquired property becomes part of the estate in the converted chapter 7 case, even though the statutory provisions making it property of the estate does not apply to chapter 7. Other courts have held that the property of the estate in a converted case is the property the debtor had when the original chapter 13 petition was filed. . . . This amendment overrules the holding in cases such as *Matter of Lybrook*, 951 F.2d 136 (7th Cir. 1991) and adopts the reasoning of *In re Bobroff*, 766 F.2d 797 (3d Cir.1985).

140 Cong. Rec. H10752-01, H10770-H10771 (1994).

C. Cases Involving Bad Faith:

In re Siegfried, 219 B.R. 581 (Bankr. D. Colo. 1998)

In re Bejarano, 302 B.R. 559, 562 (Bankr. N.D. Ohio 2003)

In re Messer, 2000 WL 33673748 (Bankr. M.D.N.C. 2000)

In re Wiczek-Spaulling, 223 B.R. 538 (D. Minn. 1998)

In re Bejarano, 302 B.R. 559, 562 (Bankr. N.D. Ohio 2003), the court stated:

[U]nder § 348(f) the general rule is that when a case is converted from a Chapter 13 to a Chapter 7, any property acquired by the debtor after the commencement of the case, but prior to conversion, does not become property of the estate in the converted case. The exception to this rule is if the case was converted in “bad faith.”

In *Bejarano*, the debtors were in an automobile accident post-petition, resulting in their child’s broken arm. In addition, they became entitled to tax refunds of over \$4,000 during that period. They sought to convert the case to chapter 7 and to exempt the refunds and the unliquidated personal injury claims. The court noted that bad faith cannot be premised solely on the fact that a debtor acquired assets post-petition and then sought to take advantage of § 348(f). In the absence of a statutory definition, the court sought “the normal everyday meaning of the term.” *Id.* at 562. Looking to a circuit case decided in a different context, the court held that bad faith “implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; . . . it contemplates a state of mind affirmatively operating with furtive design or ill will.” *Id.* (quoting *U.S. v. True*, 250 F.3d 410, 423 (6th Cir. 2001)). Application of this standard requires consideration of “any and all relevant factual circumstances.” *Id.*

The facts cited by the trustee, in arguing that the debtors were trying to manipulate the bankruptcy process, included the tardiness of their motion to convert (made one day before the scheduled hearing on the trustee’s motion to dismiss their chapter 13 petition), their failure to make but one payment-of only \$500-to the trustee despite pendency of their case for a year, failure to attend the third rescheduled meeting of creditors, the incurring of additional post-petition and pre-conversion debt, and the fact that this was their second chapter 13 filing. The court found that these factors indicated, at the very least, that the debtors would never confirm a plan, much less carry it out. The factors also suggested that the debtors were trying to prolong the benefits of the automatic stay, knowing full well that they were unable to propose a confirmable plan. On the other hand, the personal injury claims were not acquired until well after the chapter 13 petition was filed, so the debtors had not filed initially in an effort to deprive their creditors of that asset. And the fact that the debtors had been given an extended time to file a plan suggested that the debtors sincerely believed that they could formulate a viable plan. The most important factor relied upon by the court in finding no bad faith, however, was the small value of the

assets involved. “[N]either of the assets at issue in this case are worth a significant amount of money to the Debtors. Moreover, on account of exemptions, such assets are likely worth even less to the trustee. As such, the court does not see a huge motive for the Debtors to manipulate the bankruptcy system.” *Id.* at 563. The court held that the greater weight of the evidence supported the conclusion that the debtors did not convert their case in bad faith.

The court in *In re Siegfried*, 219 B.R. 581, 585 (D. Colo. 1998), applying a similar “all of the circumstances” test for bad faith, came to the opposite conclusion in light of the debtor’s

pattern of dissembling, failure to fully or accurately disclose financial affairs, disingenuous explanations of wrongful conduct and unfair manipulation of the bankruptcy system to the detriment of his creditors. This continuing pattern of lack of disclosure and procedural gymnastics, combined with an eleventh-hour conversion to another chapter to avoid imminent hearings on (1) objections to confirmation, including objections alleging lack of good faith; and (2) Debtor’s eligibility under Section 109(e), is sufficient to find that this case was converted in bad faith.

Id. at 585-86.

IX. After Conversion from Chapter 11 (Pre-Confirmation) to Chapter 7, Is Property Acquired Post-Petition Property of the Estate? TC VII "IX. After Conversion from Chapter 11 (Pre-Confirmation) to Chapter 7, Is Property Acquired Post-Petition Property of the Estate?"

Patrick A. Casey, P.A. v. Hochman, 963 F.2d 1347 (10th Cir. 1992)

In re Osborn, 176 B.R. 217 (Bankr. E.D. Okla. 1994)

In re Myrvold, 44 B.R. 202, 204 (Bankr. D. Minn. 1984), *aff'd* 784 F.2d 862 (8th Cir. 1986)

The debtor in *Hochman*, invented a medical device while in chapter 11, before grant of a creditor’s motion to convert the case to chapter 7. The question was whether the device, its patent, and the income from a licensing agreement relating to the device were part of the chapter 7 estate. Creditors argued that post-petition property is generally within the estate, with two exceptions-§ 541(a)(6), which deals with proceeds, etc., from property of the estate, and § 541(a)(5) which applies to certain types of property, acquired within 180 days of filing. The court responded that the

creditors

simply have the general rule backwards; under § 541(a)(1) the general rule is that the estate includes interests of the debtor in property as of the commencement of the case. Both of these provisions relied on (§ 541(a)(5) and (6)) are actually exceptions from the general rule that post-petition acquisitions are property of the debtor—exceptions specially provided to include particular property within the bankruptcy estate.

Id. at 1351. Thus, the court held that the property rights in the patent for the medical device did not become property of the chapter 7 estate because those rights did not exist at the time of commencement of the case.

X. After Conversion from Chapter 11 (Post-Confirmation) to Chapter 7, Is Property Acquired Post-Petition Property of the Estate? TC ¶¶ X. After Conversion from Chapter 11 (Post-Confirmation) to Chapter 7, Is Property Acquired Post-Petition Property of the Estate?

A. Cases holding that property acquired post-petition is *not* property of the chapter 7 estate after conversion:

Harker v. Troutman Enters. (In re Troutman Enters.), 253 B.R. 1 (B.A.P. 6th Cir. 2000), *vacated on other grounds*, 286 F.3d 359 (6th Cir. 2002)

In re Winom Tool & Die, Inc., 173 B.R. 613, 614-15 (Bankr. E.D. Mich. 1994)

In re T&S Note Co., 140 B.R. 812 (Bankr. D. Kan. 1992)

In *Troutman*, the court observed that “[n]othing in the Code provides that the postconfirmation conversion of a chapter 11 case to chapter 7 alters the effect of § 1141(b) & (c).” 253 B.R. at 5. Under § 348(a), the date of the original chapter 11 filing is treated as the date the chapter 7 case was commenced. By that time, however, confirmation of the plan has vested the debtor with all property of the estate, § 1141(b). “Accordingly, no provision of the Bankruptcy Code provides for the property to revest in the estate upon conversion from chapter 11 to chapter 7 and there is no property in the chapter 7 estate unless the plan specifically provides for property to remain in the estate.” *Id.*

B. Cases holding that property acquired post-petition is property of the chapter 7 estate after conversion:

Abbott v. Blackwelder Furniture Co. of Statesville, Inc., 33 B.R. 399, 402 (W.D.N.C.1983)
In re D&D Furniture, Inc., 239 B.R. 54, 58-59 (Bankr. E.D. Pa. 1999)
Bezner v. United Jersey Bank (In re Midway, Inc.), 166 B.R. 585 (Bankr. D.N.J. 1994)

In *Bezner*, the issue was whether accounts receivable generated after plan confirmation were property of the post-conversion chapter 7 estate. The court acknowledged that a “literal reading” - much like *Harker*’s, perhaps - could lead to the conclusion that, upon conversion, no property remains in the estate. The court asserted, however, that such a reading “ignores the provisions of chapter 7 providing for distribution of estate property.” *Id.* at 590. The court also relied on cases dealing with the conversion of chapter 13 cases to chapter 7, either after confirmation of the plan or after the debtor has paid over funds to the trustee, holding that the estate included the debtor’s interests in property as of the conversion date. These cases relied on § 348(d), which treats claims arising after confirmation of a chapter 13 plan, but before conversion to chapter 7, as prepetition claims in the chapter 7 case. Thus, the court held that the estate consisted of the debtor’s interests in property, including the accounts receivable, on the date the case was converted to chapter 7. Section 348(f)(1), which was effective after *Bezner* was decided, now undermines the analogy between claims and property that the court found persuasive.

XI. Does the Debtor Have a Right to Convert from Chapter 7 to Chapter 11 or 13?
TC \11 "XI. Does the Debtor Have a Right to Convert from Chapter 7 to Chapter 11 or 13?

A. Bankruptcy Code

11 U.S.C. § 706 provides:

(a) The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.

...

(d) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such

chapter.

Cases holding debtor has unfettered, absolute right to convert:

In re Finney, 992 F.2d 43, 45 (4th Cir. 1993)

Pequeno v. Schmidt, 307 B.R. 568 (S.D. Tex. 2004)

In re Croston, 313 B.R. 447 (B.A.P. 9th Cir. 2004)

In re Miller, 303 B.R. 471 (B.A.P. 10th Cir. 2003)

In re Porras, 188 B.R. 375 (Bankr. W.D. Tex. 1995)

In re Bowman, 181 B.R. 836 (Bankr. D. Md. 1995)

Some courts hold that the right to convert is absolute and unfettered (as long as the case has not been converted previously). These courts rely on the plain meaning of the statute- “may” and “at any time”-and the legislative history, quoted above.

In *Bowman*, the debtor filed a no-asset chapter 7 and got a discharge. On same day the final decree was entered, she amended her schedules to reflect a \$400,000 civil claim. She asserted that the claim would pay all her creditors in full, and moved to dismiss her bankruptcy case. Rather than dismissing the case, the court vacated the final decree and directed the chapter 7 trustee to investigate whether to pursue the claim on behalf of the estate. The trustee employed special counsel and received a settlement offer that would leave no surplus for the debtor. She objected to the settlement and sought to convert to chapter 11, in order to pursue the claim.

The court looked to *In re Finney*, 992 F.2d 43, 45 (4th Cir. 1993), which held that a debtor has a one-time absolute right to convert, but also found the facts justified “the bankruptcy court’s sua sponte consideration of whether an immediate reconversion” under 11 U.S.C. § 1112(b) was warranted under the standards enunciated in *Carolin Corp. v. Miller*, 886 F.2d 693 (4th Cir. 1989). *Bowman* concluded that debtors have a one-time absolute right to convert even if they have been recalcitrant or acted fraudulently. The debtor in this case had not acted so badly that the court could, under § 105, abrogate her statutory right to convert, although she had failed to disclose the claim-an asset-until after discharge and filed her motion to convert immediately after the trustee indicated his intent to accept the settlement offer. Clearly, however, the interests of the debtor directly conflicted with those of her creditors:

Unlike the creditors who could lose payment of their claims entirely, the Debtor is in the enviable position of having little

risk in pursuing the litigation. If she prevails in the litigation, there is a potential to recover a larger sum of money. If she loses most of her debts are discharged. The time factor of when the creditors will actually receive the money also adds an additional layer of risk for creditors. Pursuing the litigation will inevitably prolong distribution past the time set for trial. There may be further postponements due to discovery disputes, post-trial delay from an appeal, or difficulty in collecting on a judgment.

181 B.R. at 845 (citation omitted).

Because that conflict of interest was inconsistent with the debtor's position as debtor-in-possession, the court concluded that it either had to appoint a trustee or reconvert the case to chapter 7. Under Fourth Circuit authorities, *Carolin* and *Finney*, reconversion under § 1112(b) is appropriate when the facts show subjective bad faith on the debtor's part and that the reorganization effort is objectively futile. The court found the first prong satisfied by the circumstances surrounding the debtor's motion to convert, which suggested an improper purpose—namely, “not to rehabilitate or reorganize, but to frustrate the process and gain control of the litigation herself at the last minute when the process was not going her way.” *Id.* at 846. The second prong was satisfied because the debtor was trying to use chapter 11 as “a safe haven for riskless litigation.” *Id.* Thus, the court allowed conversion to chapter 11, but immediately converted the case back to chapter 7 for cause.

In *In re Martin*, 880 F.2d 857 (5th Cir. 1989), the situation was complicated by the fact that the debtor's motion to convert came after discharge had been granted. The court was undeterred:

The statute itself, as we have noted above, speaks in absolute terms. An exhaustive review of the legislative history reveals nothing which would indicate that a post-discharge motion to convert should be treated differently from any other. Nothing in the cases serves to change this conclusion. Therefore, because the statute provides that the debtor has the right to convert “at any time” and because the parties to this appeal have not posed or briefed the question of what happens to the discharge, we hold simply that the denial of the conversion was improper. We do not reach the question of what happens to the discharge or the underlying debt when the motion to convert is granted after the discharge.

Id. at 859-60. See also *In re Gibbons*, 280 B.R. 833 (Bankr. N.D. Ohio 2002); *In re Widdicombe*, 269 B.R. 803 (Bankr. W.D. Ark. 2001).

C. Cases holding debtor *does not* have a right to convert to a chapter for which the debtor is *ineligible*:

In re Hansen, 316 B.R. 505 (Bankr. N.D. Ill. 2004)

In re Stairs, 307 B.R. 698 (Bankr. D. Colo. 2004)

In re Rohl, 298 B.R. 95 (Bankr. E.D. Mich. 2003)

In re Piszczek, 269 B.R. 641 (Bankr. E.D. Mich. 2001)

In re Safley, 132 B.R. 397 (Bankr. E.D. Ark. 1991)

In *Gulley v. DePaola*, 301 B.R. 361 (M.D. Ala. 2003), the debtor sought to convert her case to chapter 13 despite her lack of regular income. The court found some support for the debtor's position in the legislative history and in cases such as *Martin v. Martin (In re Martin)*, 880 F.2d 857 (5th Cir. 1989), and *In re Carter*, 285 B.R. 61 (N.D. Ga. 2002). Even *Martin* and *Carter*, however, recognized that the right to convert could be denied in extreme or egregious circumstances:

Courts which have determined that the conversion right is not absolute have reasoned that although the "absolute" nature of the right is said to derive from the language "at any time," those words do not mean "regardless of the circumstances," but instead refer literally to the time at which the motion to convert can be made, which is at any stage of the Chapter 7 case.

301 B.R. at 364.

These courts adopted the position that the right to convert can be denied in appropriate circumstances, according to *Gulley*, in an effort to avoid holding that §§ 706(a) and (d) are in conflict. The court in *Gulley* relied on the plain meaning of § 706(d) - "that, regardless of what is provided in § 706(a), if a person is not eligible to be a debtor under the chapter to which she seeks to convert her case, she cannot convert her chapter 7 case." *Id.*

D. Cases holding debtor *does not* have right to convert if bad faith:

In re Cooper, 314 B.R. 628 (B.A.P. 6th Cir. 2004)

In re Marrama, 313 B.R. 525 (B.A. P. 1st Cir. 2004)
In re Kuntz, 233 B.R. 580 (B.A.P. 1st Cir. 1999)
In re Oblinger, 288 B.R. 781 (Bankr. N.D. Ohio 2003)
In re Porter, 276 B.R. 32 (Bankr. D. Mass. 2002)
In re Carter, 285 B.R. 61 (Bankr. N.D. Ga. 2002)
In re Pakuris, 262 B.R. 330 (Bankr. E.D. Pa. 2001)
In re Krishnaya, 263 B.R. 63 (Bankr. S.D.N.Y. 2001)
In re Widdicombe, 269 B.R. 803 (Bankr. W.D. Ark.2001)
In re Johnson, 262 B.R. 75 (Bankr. E.D. Ark. 2001)
In re Young, 269 B.R. 816 (Bankr. W.D. Mo.2001)
In re Lesniak, 208 B.R. 902 (Bankr. N.D. Ill. 1997)
In re Thornton, 203 B.R. 648 (Bankr. S.D. Ohio 1996)
In re Starkey, 179 B.R. 687 (Bankr. N.D. Okla.1995)
In re Jeffrey, 176 B.R. 4 (Bankr. D. Mass.1994)
In re Spencer, 137 B.R. 506 (Bankr. N.D. Okla.1992)
In re Tardiff, 145 B.R. 357 (Bankr. D. Me.1992)

Some courts hold that the debtor's right to convert is not absolute, although it should be denied only in egregious cases. If, upon a review of the facts, it appears that the debtor has made the request to convert in bad faith, or has attempted to abuse the bankruptcy process, these courts will deny conversion.

The court in *In re Marcakis*, 254 B.R. 77, 79 (Bankr. E.D.N.Y. 2000), pointed to the legislative history as the source of the erroneous view that the debtor's right to convert is absolute:

[T]he legislative committee's choice of "absolute" in regard to Section 706(a) is infelicitous to say the least and has spawned an interpretation of the statute couched in hyperbolic terms very much at odds with the equitable considerations of eligibility, good faith and appropriateness which are inherent in a court's review of the facts and circumstances in any request brought on by motion.

In re Marcakis, 254 B.R. 79.

The court in *In re Ponzini*, 277 B.R. 399 (Bankr. E.D. Ark. 2002), took a similar position, relying on *In re Marcakis*. *Ponzini* noted, first, that the plain meaning of § 706(a) does not give debtors an absolute right to convert a chapter 7 case to another chapter:

Section 706(a) does not contain the word "absolute" or any

other word or phrase indicating that the right to convert is unequivocal. The courts finding that § 706(a) does provide an absolute right to convert have relied on the phrase “at any time” in § 706(a); however, it is more logical to interpret this phrase as referring to the debtor’s right to convert at any point in the bankruptcy case’s proceedings rather than granting the debtor a one-time absolute right to convert. “The words ‘at any time’ quite obviously mean that the debtor may seek a conversion at any time in the life of the case. However, ‘at any time’ is not the same as and does not mean ‘regardless of circumstances.’” [*In re*] *Young*, 269 B.R. [816,] 822 [(Bankr. W.D. Mo. 2001)] (*quoting* [*In re*] *Starkey*, 179 B.R. [687,] 692 [(Bankr. N.D. Okla. 1995)]).

Ponzini, 277 B.R. at 404.

More importantly, § 706(a) provides that the court “may” convert, which suggests that the right to convert “is presumptive rather than absolute.” *Id.* The Rules requiring the filing of a motion to convert, notice and a hearing (Rules 1017(2), 9013 and 2002(a)(4)), provide additional evidence that the debtor’s right to convert is not absolute. The legislative history spawned the idea that the right to convert is absolute, but its use of that word is not conclusive. Although the right to convert is not absolute, the motion should be granted in the absence of “extreme circumstances amounting to an abuse of process.”

Id. at 405.

Other courts, like *Ponzini*, use a “totality of the circumstances” approach to determine what conduct is sufficiently egregious to justify denial of the debtor’s motion to convert. In *In re Brown*, 293 B.R. 865 (Bankr. W.D. Mich. 2003), the court found sufficient bad faith in the debtor’s “almost constant attempts to avoid the consequences of chapter 7 bankruptcy—namely the sale of” his residence. *Id.* at 871. The debtor had undervalued the property on his schedules, repeatedly failed to appear at § 341 meetings, and failed to pay the filing fee on time. When sale of the property became imminent, he refused to allow access to the trustee, the trustee’s realtor or a prospective buyer, in the process ignoring court orders to the contrary. The court denied the debtor’s motion to convert, finding that it was just another attempt to manipulate the bankruptcy process and avoid sale of the residence:

Section 706(a) provides honest debtors with an [sic] one-time absolute right to convert their chapter 7 case to chapter 11 or 13 so that they may have the opportunity to pay off their debts. The “absolute” nature of the conversion right does not extend, however, to situations where conversion is sought as a means of thwarting the chapter 7 trustee’s attempts to administer the bankruptcy estate or of escaping unintended consequences of a chapter 7 petition. In such circumstances, as here, the Debtor’s motion to convert may be denied for lack of good faith.

Id.

XII. Can a Debtor Dismiss a Chapter 13 Case to Avoid an Imminent Conversion to Chapter 7? TC VI "XII. Can a Debtor Dismiss a Chapter 13 Case to Avoid an Imminent Conversion to Chapter 7?"

A. Bankruptcy Code

11 U.S.C. § 1307 (b):

On request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter.

B. Cases holding that a debtor can dismiss a chapter 13 case to avoid conversion:

In re Nash, 765 F.2d 1410, 1413 (9th Cir. 1985)

In re Patton, 209 B.R. 98 (Bankr. E.D. Tenn. 1997)

In re Greenberg, 200 B.R. 763, 767 (Bankr. S.D.N.Y. 1996)

In re Harper-Elder, 184 B.R. 403, 404-05 (Bankr. D. Colo.1995)

In re Rebeor, 89 B.R. 314, 322 (Bankr. N.D.N.Y.1988)

In re Gillion, 36 B.R. 901, 906 (E.D. Ark.1983)

In re Eddis, 37 B.R. 217, 218 (E.D. Pa.1984)

In *In re Barbieri*, 199 F.3d 616 (2d Cir. 1999), the debtor, who had contracted to sell an apartment building, filed a chapter 13 petition in an effort to escape her contractual obligations when she found another buyer willing to pay a higher price. The bankruptcy court expressed its intention to convert the case to chapter 7, but the debtor’s attorney requested

dismissal before the court's order was actually entered. The Second Circuit held that § 1307(b) gives debtors an absolute right to dismiss that is not limited by § 1307(c), as long as the case has not been converted. The court said that "concerns about abuse of the bankruptcy system do not license us to redraft the statute," and listed a number of other ways that abuse of the bankruptcy process, if it occurs, can be curbed. *See also In re Davenport*, 175 B.R. 355 (Bankr. E.D. Cal. 1994).

In Beatty v. Traub (In re Beatty), 162 B.R. 853 (B.A.P. 9th Cir. 1994), the court stated:

The better reasoned view is that a court must dismiss the case upon the debtor's request for dismissal under section 1307(b) if that request is made prior to the effective time of an order converting the case to Chapter 7. This view comports with the plain language of section 1307(c) which states that the court "shall" dismiss the case upon the debtor's request as well as the purposes of Chapter 13 and the voluntary nature of relief under that Chapter.

Id.

C. Cases holding that a court may grant a pending motion to convert despite the debtor's competing request to dismiss:

Molitor v. Eidson (In re Molitor), 76 F.3d 218, 220 (8th Cir.1996)

In re Cobb, 2000 WL 17840 (E.D. La. 2000)

In re McCraney, 172 B.R. 868, 869 (N.D. Ohio 1993)

Gaudet v. Kirshenbaum Inv. Co. (In re Gaudet), 132 B.R. 670, 675-76 (D.R.I. 1991)

In re Howard, 179 B.R. 7, 9-10 (Bankr. D.N.H. 1995)

In re Vieweg, 80 B.R. 838, 841 (Bankr. E.D. Mich. 1987)

In re Powers, 48 B.R. 120 (Bankr. M.D. La. 1985)

In re Jacobs, 43 B.R. 971, 975-76 (Bankr. E.D.N.Y. 1984)

In re Zarowitz, 36 B.R. 906, 908 (Bankr. S.D.N.Y. 1984) (*dicta*)

In *Molitor*, 76 F.3d at 220, the Eighth Circuit Court of Appeals concluded:

We believe that same broad purpose as well as the principles of statutory construction employed in *Graven* [936 F.2d 378 (8th Cir. 1991) construing § 1208] apply equally well to the nearly identical provisions of Chapter 13 and the instant

case. As in *Graven*, we are mindful that the purpose of the bankruptcy code is to afford the honest but unfortunate debtor a fresh start, not to shield those who abuse the bankruptcy process in order to avoid paying their debts. *Id.* As in *Graven*, we also look to the overall purpose and design of the statute as a whole rather than viewing one subsection in isolation. *Id.* In this case, Molitor failed to offer any defense whatsoever to the Appellees' allegations of bad faith. Instead, he chose to use section 1307(b) as an escape hatch once the Appellees called his bluff. To allow Molitor to respond to a motion to convert by voluntarily dismissing his case with impunity would render section 1307(c) a dead letter and open up the bankruptcy courts to a myriad of potential abuses. We decline to do so.

Id.

XIII. Under BAPCPA, What Fees Can a Chapter 7 Trustee Be Paid After a Chapter 7 Case Is Converted to Chapter 13? TC \11 "XIII. U n d e r BAPCPA, What Fees Can a Chapter 7 Trustee Be Paid After a Chapter 7 Case Is Converted to Chapter 13?

A. BAPCAP (2005):

11 U.S.C. § 1326(b) states:

(3) if a chapter 7 trustee has been allowed compensation due to the conversion or dismissal of the debtor's prior case pursuant to section 707(b), and some portion of that compensation remains unpaid in a case converted to this chapter or in the case dismissed under section 707(b) and refiled under this chapter, the amount of any such unpaid compensation, which shall be paid monthly-

(A) by prorating such amount over the remaining duration of the plan; and

(B) by monthly payments not to exceed the greater of-

(i) \$25; or

(ii) the amount payable to unsecured nonpriority creditors, as provided by the plan, multiplied by 5 percent, and the result divided by the number of months in the plan.

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