

THE CHAPTER 13 ESTATE AND ITS DISCONTENTS

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INTRODUCTION

Thirty years into the life of the Bankruptcy Code, the courts still have no coherent theory of chapter 13. This is decidedly not their fault, as the text of the Bankruptcy Code virtually precludes a perfect theory. Every known theory of chapter 13 does violence to some part of the Bankruptcy Code. The choice is one between the lesser of evils.

In this article, I set forth what I think is the best, most coherent theory of chapter 13. This theory is by no means new to me, though I will have some new things to say about it. The theory I defend goes by the un-descriptive name of the "estate transformation" and has been adopted by a small number of courts.¹ The name is un-descriptive and un-attractive, so hereby re-christen it the "Divestment Theory" ("DT") because the crux of it is that confirmation of a chapter 13 plan divests (*i.e.*, terminates) the chapter 13 estate in favor of the debtor.

According to the DT, the bankruptcy petition creates a chapter 13 estate. Upon plan confirmation, the estate ends, except as to funds the debtor successfully transmits to the chapter 13 trustee for the benefit of creditors. Although the matter seems simple as I have stated it, the DT is in fact rife with controversy and theoretical conflict. Nevertheless, it is the theory that best accords with the language of the Bankruptcy Code.

This article commences with the doctrinal justification for the DT. Part II addresses the difficulties it faces and tries to minimize them. The remainder of the article reviews the competing theories in specific contexts, and why these theories are less adequate than the DT. Part III concerns the automatic stay. Under the DT, confirmation of a chapter 13 plan greatly restricts the automatic stay, which curtails creditor enforcement once the bankruptcy petition is filed.² Other theories manage to keep the automatic stay intact until the plan is completed, which is unfair to post-petition creditors not entitled to distributions under the plan. There should be a connection between application of the automatic stay and entitlement to distributions under the plan.

Part IV concerns inheritances and other windfalls debtors receive after the

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¹ See *Waldron v. Brown (In re Waldron)*, 536 F.3d 1239, 1242 (11th Cir. 2008) (acknowledging court's adoption of "estate transformation approach . . . to resolve the tension between [11 U.S.C.] sections 1306(a) and 1327(b)"); Peter Carpio & Jeffrey L. Cohen, Note, *Modified Estate Transformation: When Does a Chapter 13 Estate Terminate?*, 7 AM. BANKR. INST. L. REV. 213, 217-19 (1999) (discussing courts' three different applications of estate transformation approach).

² 11 U.S.C. § 362(a) (2006).

bankruptcy petition. The DT places these beyond the bankruptcy estate. Other theories attempt to place these within the bankruptcy estate so they may be expropriated for creditors. This makes for bad chapter 13 theory and is also quite unnecessary. If inheritances and the like are disposable income, then creditors may recover them by modifying the confirmed plan, pursuant to section 1329(a)(1), whether or not they are in or *dehors* the bankruptcy estate. If they are not disposable income, it makes no difference to proclaim such property to be "property of the estate," as the debtor is entitled to possess "property of the estate," free and clear of the creditors.

Part VI addresses whether a debtor has power of alienation in chapter 13. Under the DT, the debtor's power is restricted prior to confirmation of the plan and unrestricted thereafter. After confirmation, the debtor is free to alienate assets without court permission. Other theories disagree and have perpetrated some startling incidents of injustice.

Part VII addresses a specific kind of asset in the chapter 13 estate: causes of action. I argue that the proper theory of chapter 13 permits the debtor to bring these causes of action, especially after confirmation of a plan. Furthermore, I argue that the debtor is empowered to enforce avoidance actions such as fraudulent conveyances and voidable preferences. This, I maintain, is required on the DT. Surprisingly, courts have missed the obvious syllogism that must be drawn between the theory of the chapter 13 estate, and the debtor standing to bring avoidance actions.

Part VIII investigates the theory of the chapter 13 estate as it impacts exemptions. Many courts think exemptions in chapter 13 are irrelevant (once the plan is confirmed), since confirmation expels *all* assets (not just exempt assets) from the bankruptcy estate. I argue that this overlooks the fact that debtors have the power to avoid liens that impair these exemptions. These avoidance actions are highly relevant in chapter 13.

Part IX addresses the ability of creditors to garnish property of the chapter 13 estate, where the debtor is *not* the chapter 13 debtor, but rather some creditor of the chapter 13 debtor. For example, suppose the debtor's lawyer has not paid taxes. The Internal Revenue Service ("IRS") attempts to levy the chapter 13 trustee to capture the distributions the trustee owes to the lawyer. Here the debtor is the lawyer, not the chapter 13 debtor. Some of these garnishment cases have been influential in distorting the theory of the chapter 13 estate. I will show that garnishments can be administered correctly if the DT governs chapter 13 jurisprudence.

Finally, Part X considers the effect of converting a chapter 7 case to chapter 13. A proper theory of chapter 13 is vitally necessary to a proper theory of the converted chapter 7 case. I will show how some influential cases have reached the wrong result because of defective chapter 13 theory.

I. THE NATURE OF CHAPTER 13 ESTATE

Relevant to the theory of the chapter 13 estate are five provisions of the Bankruptcy Code. First, section 541(a) describes the bankruptcy estate for all of the chapters. The *grundnorm* of section 541 is that a debtor's pre-petition property is in, while post-petition property is out, of the estate. For our purposes, two exceptions exist. The more important is section 541(a)(6), which expels any proceeds of the estate that are "earnings from services performed by an individual debtor after the commencement of the case."³ Another exception is section 541(a)(5), which brings inheritances, life insurance payouts, and divorce property settlements into the bankruptcy estate if obtained within 180 days after the bankruptcy petition.⁴

The second Bankruptcy Code provision to be considered is the single greatest source of confusion in theorizing the chapter 13 estate. According to section 1306(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.⁵

This provision establishes that the chapter 13 estate *exceeds* the scope of the chapter 7 estate, which is described by section 541(a) alone. Basically, section 1306(a) adds any post-petition property acquired by a debtor after the bankruptcy petition.

The third provision for which a theory of chapter 13 must account is section 1327(b), which provides: "[e]xcept as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor."⁶ The interaction of section 1327(b) with section 1306(A) is the most controversial aspect of chapter 13 theory. According to the DT, section 1306(a)(2)

³ 11 U.S.C. § 541(a)(6) (2006).

⁴ See *In re Chenoweth*, 3 F.3d 1111, 1112–13 (7th Cir. 1993) (holding debtor may not disclaim legacy if decedent has died within 180-day period).

⁵ 11 U.S.C. § 1306(a) (2006). Is there any point to section 1306(a)(2), with regard to earnings, given section 1306(a)(1), which expropriates after-acquired property for the bankruptcy estate? The answer is no. Post-petition proceeds are themselves always after-acquired property, so subsection (a)(2) could have been omitted as redundant.

⁶ 11 U.S.C. § 1327(b) (2006).

and section 1327(b), when read together, mean that "while the filing of the petition for bankruptcy places all the property of the debtor in the control of the bankruptcy court, the plan upon confirmation returns so much of that property to the debtor's control as is not necessary to the fulfillment of the plan."⁷ It would have been better if Congress had said that section 1327(b) operates notwithstanding section 1306(a), as the Bankruptcy Code so often does.⁸ It also would have been better if Congress had stayed away from the word "vest." Courts, like first year property students, have been so confused by this word that they have, in their desperation, resorted to *Black's Law Dictionary* to figure out what it means, usually with unfortunate results.⁹

A fourth provision is section 1326(a), which requires that the debtor pay disposable income to the chapter 13 trustee, even before a plan is confirmed. These funds constitute the chapter 13 estate, once the trustee receives the funds.¹⁰ Only this part of the chapter 13 estate survives confirmation.¹¹

The fifth and final provision (actually a group of provisions) governs conversion of the chapter 13 case to chapter 7. Conversion to chapter 7 pursuant to section 1307 is even more common than actual completion of the plan.¹² Ergo, a

⁷ *Black v. U.S. Postal Serv. (In re Heath)*, 115 F.3d 521, 524 (7th Cir. 1997) (defining section 1306(a)(2) and section 1327(b)); *see also In re Van Stelle*, 354 B.R. 157, 170 (Bankr. W.D. Mich. 2006) (finding "vesting" means "transfer"); *In re Smith*, 280 B.R. 436, 440 (Bankr. N.D. Ill. 2002) ("[P]roperty of the debtor's estate . . . reverts in the debtor upon confirmation of a Chapter 13 Plan.").

⁸ *See* 11 U.S.C. §§ 105(b), 109(a), 303(f), 362(e)(2), 502(d), 503(c), 505(c), 510(c), 521(i)(1), 522(b)(1), 523(b), 524(g)(4)(A)(ii), 548(e), 552(b)(1), 557(c)(1), 723(c), 1307(g), 1322(b)(4), 1326(d), 1328(d) (2006).

⁹ *See Woodard v. Taco Bueno Rests., Inc.*, No. 4:05-CV-804-Y, 2006 U.S. Dist. LEXIS 89135, at *25 (N.D. Tex. Dec. 8, 2006) (using *Black's Law Dictionary* to define "vest" for purposes of section 1327).

¹⁰ *See Barbosa v. Soloman*, 235 F.3d 31, 37 (1st Cir. 2000); *Nash v. Kester (In re Nash)*, 765 F.2d 1410, 1413 (9th Cir. 1985). Where the court has made an income order requiring an employer to pay wages directly to the chapter 13 trustee, the order brings the wage receivable into the chapter 13 estate even before wages are submitted to the trustee. *See* 11 U.S.C. § 1325(c) (2006) ("After confirmation of a plan, the court may order any entity from whom the debtor receives income to pay all or any part of such income to the trustee."); *In re McKnight*, 136 B.R. 891, 892 (Bankr. S.D. Ga. 1992). The income order is, in effect, the trustee's garnishment lien on the debtor's wages. Where no such order is in place, however, only wages actually transmitted to the chapter 13 trustee are in the bankruptcy estate. *See In re Thompson*, 142 B.R. 961, 964 (Bankr. D. Colo. 1992) (holding "property of the estate consists only of those funds actually paid to the Chapter 13 Trustee" in case without court order). For a discussion of income deductions by debtor's employer per court order in chapter 13 cases, *see generally* 3 KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY § 248.1 (3d ed. 2000 & Supp. 2004).

¹¹ *See In re Thompson*, 142 B.R. at 963 (concluding estate after confirmation "consists of the property and future earnings of the debtor dedicated to fulfillment of the Chapter 13 Plan") (quoting *In re Root*, 61 B.R. 984, 985 (Bankr. D. Colo. 1986)). This aspect is probably why the bad name of "estate transformation" has been unhappily adopted. The estate, previously defined by section 1306(a), is "transformed" into the funds successfully conveyed by the debtor to the chapter 13 trustee.

¹² *See Till v. SCS Credit Corp.*, 541 U.S. 465, 493 (2004) (Scalia, J., dissenting) (citing failure rate between 37% and 60% for chapter 13 plans); *In re Jemison*, No. 07-40761, 2007 Bankr. LEXIS 3107, at *10 (Bankr. N.D. Ala. Sept. 6, 2007) (explaining majority of local confirmed chapter 13 plans never completed); Scott F. Norberg, *Consumer Bankruptcy's New Clothes: An Empirical Study of Discharge and Debt Collection in Chapter 13*, 7 AM. BANKR. INST. L. REV. 415, 440 (1999) (stating one-third completion rate in Southern District of Mississippi); William C. Whitford, *The Ideal of Individualized Justice: Consumer*

theory of the chapter 13 estate must reconcile itself with the chapter 7 estate in case of conversion. According to section 348(f)(1), any property the debtor obtained since filing for bankruptcy belongs to the debtor alone. Putting momentarily to one side a confusing "bad faith" exception,¹³ only property that the debtor possessed at the time of the petition, and still possesses, is transferred to the chapter 7 trustee.¹⁴

Synthesizing these ideas, the DT asserts the following: When a debtor files in chapter 13, all his pre-petition property goes into the bankruptcy estate. When the plan is confirmed, the bankruptcy estate is absolutely transferred back to the debtor. Funds the debtor has already paid or will continue to pay to the chapter 13 trustee are held in trust for the creditors whose rights are described in the plan. This is the only bankruptcy estate to survive confirmation. If the case converts to chapter 7, the debtor transfers all property that historically was property of the estate on the day of the bankruptcy petition. Any other property acquired after the bankruptcy petition is not part of the bankruptcy estate.

II. PROBLEMS WITH THE THEORY

A. Violence to Section 1306(a)

The DT is not perfect. First and foremost, it does some violence to the language of section 1306(a), which puts after-acquired property into the chapter 13 estate until the estate is "closed, dismissed, or converted"¹⁵ The challenge posed to the DT is that section 1306(a) contradicts the claim that confirmation of a plan is the point of estate termination.

Now why does section 1306(a) exist? It ends up being rather hard to say. One might maintain that its principal function is the administration of the so-called "best interest of the creditors" test of section 1325(a)(4)¹⁶—a vital component of the *economic* theory of chapter 13. According to section 1325(a)(4), a plan must pay every creditor at least as much as the creditor would have received in a chapter 7

Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy, 68 AM. BANKR. L.J. 397, 411 (1994) (reporting completion rate 31%).

¹³ See *infra* text accompanying note 99–101.

¹⁴ 11 U.S.C. § 348(f)(1) (2006) provides:

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

¹⁵ 11 U.S.C. § 1306(a)(1) (2006).

¹⁶ *Accord In re Fisher*, 198 B.R. 721, 732–33 (Bankr. N.D. Ill. 1996) ("[J]ust as in the situation with conversion, the continuing role of the estate in Chapter 13, under the best interest test, requires that the estate be protected."), *rev'd*, 203 B.R. 958 (Bankr. N.D. Ill. 1997).

liquidation accomplished "on such date"—on the date the plan becomes effective. This is the provision that establishes the "Pareto superiority" of chapter 13 over chapter 7. The economic idea of chapter 13 (and of the other reorganization chapters as well) is that *every* creditor must be at least as well off under the plan as in a hypothetical liquidation of assets at the time the plan is confirmed.

Seemingly, one might say that section 1306(a) is a necessary component for making the "best interest of the creditors" test work. Accordingly, the bankruptcy estate must be enhanced by property obtained between the bankruptcy petition and the confirmation hearing so that the hypothetical liquidation test "on this date" can be effectively administered.¹⁷

This account of section 1306(a), however, must fail. Notice how section 1325(a)(4) sets forth the test:

[T]he value, *as of the effective date of the plan*, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate *of the debtor* were liquidated under chapter 7 of this title on such date.¹⁸

Section 1325(a)(4) indicates that we are to value the *debtor's* property—not property of the estate—as of the effective date of the plan. This, by the way, is indirect evidence that confirmation of the plan terminates the chapter 13 estate, since liquidation of the *debtor's* property is invoked as of the effective date of the plan. The point here is that, since we are to value the *debtor's* property at the time of confirmation, the "best interest of the creditors" test operates whether or not section 1306(a) brings the debtor's post-petition acquisitions into the bankruptcy estate.

Chapter 11 has no equivalent to section 1306(a), yet the principle is implicit in chapter 11 nevertheless. This must be so because, in chapter 11 as well as in chapter 13, the "best interest of the creditors" test is performed as of the time the plan becomes effective.¹⁹ Such a test requires that the bankruptcy estate be enhanced by acquisitions after the bankruptcy petition and before confirmation. Yet, section 1141(b) is thought to terminate the bankruptcy estate. If that is the rule

¹⁷ See 11 U.S.C. § 1325 (a)(4) (2006) (providing "court shall confirm a plan if . . . the value, as of effective date of plan, of property to be distributed" is not less than liquidated value of estate as of such date). Nevertheless, Judge Keith Lundin reports that most reported opinions assume that date of the bankruptcy petition is the date as of which the test must be performed. LUNDIN, *supra* note 10, at § 160.2; see also *In re Green*, 169 B.R. 480, 482 (Bankr. S.D. Ga. 1994) (interpreting "effective date of the plan" as date petition was filed).

¹⁸ 11 U.S.C. § 1325(a)(4) (emphasis added).

¹⁹ See 11 U.S.C. § 1129(a)(7)(A)(ii) (2006) (providing "court shall confirm a plan . . . if . . . with respect to each impaired class of claims or interests," each holder has accepted such plan or will receive or retain such amount, effective as date of plan, not less than amount each holder would retain or receive under liquidation).

in chapter 11, it must also be the rule in chapter 13.²⁰

If the principle of section 1306(a) is inherent in chapter 11 cases, then could section 1306(a) have been left out of chapter 13 altogether? Chapter 13's version of the "best interest of the creditors" test refers to the value of "the estate of the debtor" as of the confirmation date—not the bankruptcy estate. Properly, the "best interest of the creditors" test could be conducted even if section 1306(a) did not exist. So, what is the function of section 1306(a) again? I see only two practical effects. Because section 1306(a) makes post-petition property part of the chapter 13 estate, the debtor must seek court permission to use estate assets out of the ordinary course of business. According to section 1303, "the debtor shall have, exclusive of the trustee, the rights and powers of a trustee under [section] 363(b)."²¹ A trustee may use estate property out of the ordinary course of business only with court permission. Therefore, section 1306(a) puts post-petition property under the tutelage of the bankruptcy court until such time as the plan is confirmed. It also activates the automatic stay against post-petition creditors (but only in the pre-confirmation period).²² In general, section 1306(a) compensates for the fact that, in chapter 13, the debtor is not the trustee, as she is in chapter 11.²³ By virtue of section 1306(a), the debtor is made a fiduciary for the creditors—at least until the plan is confirmed.

Under the DT, the bankruptcy estate is transferred to the debtor when a plan is confirmed. But section 1306(a) brings after-acquired property into the chapter 13 estate until the case is "closed, dismissed, or converted to a case under chapter 7, 11, or 12"²⁴ How can the chapter 13 estate come to an end upon confirmation of a plan, when section 1306(a) includes adequate protection payments in the chapter 13 estate until the case is closed? A chapter 13 case does not close just because a plan is confirmed. Only if the plan is completed can the case be closed.²⁵

²⁰ See *In re Gyulafia*, 65 B.R. 913, 917 (Bankr. D. Kan. 1986) ("Sections 1327(b) and (c) are identical to sections 1141(b) and (c)."). Some courts think that section 1306(a) adds a principle to chapter 13 that otherwise would not be there. See *In re Fisher*, 198 B.R. at 726 (determining post-petition provision would not be applicable and post-petition earnings of debtor would not be property of estate) (citing *Bobroff v. Continental Bank* (*In re Bobroff*), 766 F.2d 797, 802–03 (3d Cir.1985)); see also *In re Thompson*, 142 B.R. 961, 964 (Bankr. D. Colo. 1992) (recognizing some courts find section 1327(b) to be identical to section 1141(b), while no section has been found comparable to 1306(2)).

²¹ 11 U.S.C. § 363(b) (2006).

²² See 11 U.S.C. § 362(a)(2)–(4) (2006).

²³ See 11 U.S.C. § 1302(a) (2006).

²⁴ 11 U.S.C. § 1306(a)(2) (2006).

²⁵ See *In re Ball*, No. 06-1002, 2008 Bankr. LEXIS 1532, at *7 (Bankr. N.D. W. Va. May 23, 2008) ("Chapter 13 cases are not closed until after all plan payments have been made and a discharge entered."); see also *In re Avery*, 272 B.R. 718, 726–27 (Bankr. E.D. Cal. 2002) (requiring trustee to prove estate has been fully administered before case can be closed). Section 1302(b)(1) requires a chapter 13 trustee to "perform the duties specified in section[] . . . 704(9)." 11 U.S.C. § 1302(b)(1). And section 704(a)(9) commands the chapter 7 trustee to "make a final report and file a final account of the administration of the estate with the court and with the United States trustee." 11 U.S.C. § 704(a)(9) (2006). According to section 350(a), "[a]fter an estate is fully administered and the court has discharged the trustee, the court shall close the case." 11 U.S.C. § 350(a) (2006).

Furthermore, a plan might be confirmed before the case is dismissed or converted to chapter 7.²⁶ So section 1306(a) already accounts for the possibility of confirmation and yet still says broadly that all property acquired after the bankruptcy is property of the estate.

The theory I am defending depends upon the premise that section 1327(b) supersedes section 1306(a), even though section 1327(b) fails to use the words "notwithstanding section 1306(a)."²⁷ It is often noted that these two provisions are in conflict.²⁸ A choice must be made as to which statute predominates. In such moments, courts utilize an interpretive canon—the specific outranks the general.²⁹ To quote the ancient wisdom of the Supreme Court:

[W]here there is, in the same statute, a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment.³⁰

The choice of section 1327(b) over section 1306(a) follows this interpretive rule.

If section 1327(b) predominates, section 1306(a) still has utility in the pre-confirmation period. But if section 1306(a) predominates section 1327(b) has no utility at all. Suppose we imagine that the bankruptcy estate does not end at confirmation, as some courts assert. This is consistent with section 1327(b) so, the argument goes, because section 1327(b) does *not* say that the bankruptcy estate *abandons* the bankruptcy estate to the debtor.³¹ It does not say that it *transfers* the bankruptcy estate to the debtor. Rather, it says that confirmation "vests all . . . property of the estate in the debtor."³² Supposedly, it is possible to view "vest" as *not* being the same concept as "absolute transfer."³³ Rather, it is possible to assert that "vest" means that the debtor has a present possessory estate and the bankruptcy

²⁶ See 11 U.S.C. § 1307(c)(6) (2006) (indicating material default in plan is grounds for dismissal or conversion).

²⁷ See Carpio & Cohen, *supra* note 1, at 214 ("The conflict concerning what constitutes 'property of the estate' turns on whether the vesting provision of section 1327(b) ends the bankruptcy estate notwithstanding the decree of section 1306(a), which states that the estate accrues only until closure, dismissal, or conversion of the case.").

²⁸ See *Waldron v. Brown (In re Waldron)*, 536 F.3d 1239, 1242 (11th Cir. 2008); *Telfair v. First Union Mortgage Corp.*, 216 F.3d 1333, 1340 (11th Cir. 2000); *United States v. Harchar*, 371 B.R. 254, 264 (N.D. Ohio 2007).

²⁹ See *Watt v. Alaska*, 451 U.S. 259, 267 (1981).

³⁰ *United States v. Chase*, 135 U.S. 255, 260 (1890).

³¹ Cf. 11 U.S.C. § 554(c) (2006) ("[A]ny property . . . not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 . . .").

³² 11 U.S.C. § 1327(b) (2006).

³³ See *In re Kolenda*, 212 B.R. 851, 854 (Bankr. W.D. Mich. 1997) (holding "vest" need not mean "transfer").

trustee has a future interest.

To an estates lawyer, "vest" means "meet the terms of a condition precedent."³⁴ It does not necessarily mean, for example, "take possession of." A contingent remainder might become a vested remainder when a condition precedent is met, yet the remainder is not a possessory interest.³⁵ Sometimes vesting and possession coincide, as when a condition subsequent divests a present possessory estate in favor of a future interest holder, who both vest and takes possession simultaneously. Possession, however, is not logically necessary to the concept of vesting.³⁶

In chapter 13, prior to confirmation, a debtor *already* has the right to possess the bankruptcy estate.³⁷ What then does "vesting" add? The opposing theory has no answer to this.

My answer is that "vesting" is a clumsy way of saying "transferring absolutely."³⁸ Otherwise, "vesting" means nothing at all.

³⁴ See *Christian v. County of Ontario*, 399 N.Y.S.2d 379, 381 (Sup. Ct. 1977) ("'vested right' expresses concept of present fixed interest.").

³⁵ RESTATEMENT (FIRST) OF PROPERTY § 239 (1936) (stating "[w]hen succeeding interest is subject to condition precedent . . . upon the fulfillment of condition precedent, becomes . . . a vested future interest if all such prior interests have not ended.>").

³⁶ See *In re Chenoweth*, 3 F.3d 1111, 1113 (7th Cir. 1993) (acknowledging "marked distinction between . . . vesting of an estate and the right to enjoy possession of that estate").

³⁷ See 11 U.S.C. § 1306(b) (stating "debtor shall remain in possession of all property of the estate"). In arguing that section 1327(b) does not terminate the chapter 13 estate, the court in *In re Thompson* remarks:

If there is no longer any property of the estate upon confirmation, then § 1306(b) has no meaning. That subsection can have no applicability until confirmation, and if at that time there is no more property of the estate then there is no reason to grant the debtor possession of such nonexistent property of the estate.

142 B.R. 961, 964 (Bankr. D. Colo. 1992). On this view, vesting means possession, and the debtor has *no* possessory right prior to confirmation. Everyone agrees that the debtor has a possessory right prior to confirmation. What section 1306(a) seems to be saying is that, prior to confirmation, the debtor may possess property of the estate, but the plan, when confirmed, may dispossess the debtor. See 11 U.S.C. § 1322(b)(9) (stating "plan may . . . provide for the vesting of property of the estate, on confirmation of the plan . . . in the debtor or in any other entity"). Inconsistently, the *Thompson* court goes on to state that only dollars successfully transmitted to the chapter 13 trustee are property of the estate after confirmation. 142 B.R. at 944. Therefore, a post-petition creditor may levy wages without fear of the automatic stay.

³⁸ See *In re McKnight*, 136 B.R. 891, 894 (Bankr. S.D. Ga. 1992) ("'Vest' as a legal term means to obtain the character or given the rights of absolute ownership."); see also *In re O'Brien*, 181 B.R. 71, 74 (Bankr. D. Ariz. 1995) (finding at time of confirmation term "vests . . . must mean that the bankruptcy estate generally ceases to exist, and the debtor has sole ownership, control, and enjoyment of the property"). Can we say that the transfer to the debtor under section 1327(b) is analogous to abandonment under section 554? 11 U.S.C. § 554 ("[T]rustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate."). Judge David Scholl ruled against this interpretation in *In re Clark*, 71 B.R. 747 (Bankr. E.D. Pa. 1987). In his view, the estate, under the DT, "disappears." *Id.* at 749 (determining when plan is confirmed, "'property of the estate,' vesting in the Debtor, is 'property of the estate' no more"). Disappearance is like abandonment, in that, in effect, an abandoning bankruptcy trustee renounces the judicial lien on assets of the debtor, leaving the pre-petition owners as they were before the bankruptcy. See 11 U.S.C. § 554 ("[T]rustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate."). Judge Scholl remarked, "[w]hen it is considered at more length, it can be concluded that § 1327(b) raises additional conceptual questions, notably

Solid proof that "to vest" means "to transfer absolutely" can be found in Bankruptcy Code section 349(b)(3), which states that dismissal of a bankruptcy case "revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title."³⁹ This enactment as applied to ordinary debtor property assumes that, just prior to the bankruptcy petition, the debtor is vested with property.⁴⁰ Therefore, when section 1327(b) "vests" the debtor with property of the estate, the debtor returns to the state of ownership she had prior to the commencement of the bankruptcy.⁴¹ In short, the bankruptcy estate transfers all of its rights to the debtor. "Vesting" and "absolute transfer" are synonymous.

As further proof, consider that chapter 11 has its version of section 1327(b). According to section 1141(b): "[e]xcept as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor."⁴² In chapter 11, "confirmation usually terminates the existence of the estate."⁴³ Yet, if "vest" does not mean "absolute transfer," then the bankruptcy estate survives confirmation in chapter 11. But no one believes this to be so.

The DT compromises the broad language of section 1306(a) by limiting its effectiveness to the pre-confirmation period. But the opposing view—confirmation does not terminate the bankruptcy estate—entirely consigns section 1327(b) to the memory hole, so that section 1306(a) reigns supreme. If the DT impinges upon the scope of section 1306(a), at least section 1306(a) has a function—to govern the pre-confirmation period. The opposing theory—the bankruptcy estate never ceases to exist in spite of plan confirmation—gives absolutely no function to section 1327(b) and is equally guilty of declaring that one section of the Bankruptcy Code outranks the other.

. . . : If 'property of the estate' effectively disappears at confirmation, is it not improper to state that it 'vests' anywhere?" *In re Clark*, 71 B.R. at 749. This is indeed the problem with the analogy to abandonment. Instead "vesting" must mean a *transfer* of the trustee's hypothetical judicial lien and/or bona fide purchase of real estate to the debtor. This merges with the debtor's residual equity ownership in the bankruptcy estate to become an absolute interest completely divorced from the bankruptcy estate. See generally David Gray Carlson, *Bankruptcy's Organizing Principle*, 26 FLA. ST. U. L. REV. 549, 613–15 (1999) [hereinafter Carlson, *Organizing Principle*] (discussing theory of bankruptcy abandonment).

³⁹ 11 U.S.C. § 349(b)(3) (2006).

⁴⁰ See S. REP. NO. 95-989, at 49, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS, 5787, 5835 ("the basic purpose of [section 349(b)] is to undo the bankruptcy case, as far as is practicable, and to restore all property rights to the position in which there were found at the commencement of the case"); West Va. State Tax Dep't v. Mullins (*In re Mullins*), No. CV 09-0974-TJH (JEM), 2009 U.S. Dist. LEXIS 90691, at **14–15 n.4 (S.D. W. Va. September 30, 2009).

⁴¹ See *In re Toth*, 193 B.R. 992, 996–97 (Bankr. N.D. Ga. 1996) ("[I]f the 'vesting' provided for in § 1327 does not act to end the [bankruptcy] estate, then § 1327 becomes redundant and the term 'vest' is deprived of any meaning separate from 'possession' . . . Therefore, 'vest' must mean something more than 'possession.'").

⁴² 11 U.S.C. § 1141(b) (2006).

⁴³ *Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n*, 997 F.2d 581, 587 (9th Cir. 1993); see also Frank R. Kennedy & Gerald K. Smith, *Postconfirmation Issues: The Effects of Confirmation and Postconfirmation Proceedings*, 44 S.C. L. REV. 621, 743 (1993).

B. Violence to Converted Chapter 7 Scheme

The DT also does some minor violence to the chapter 7 estate of a case converted from chapter 13. According to the DT, property is transferred absolutely to the debtor upon confirmation.⁴⁴ The debtor pays for this transfer by dedicating projected disposable income to the creditor for the duration of the plan. When the case converts after confirmation, the debtor's property is conveyed back afresh to the chapter 7 trustee. But not all of the debtor's property goes into the chapter 7 estate. According to section 348(f)(1), only property that the debtor still possesses and that was, historically, property of the estate at the time of the bankruptcy petition is transferred back to the chapter 7 estate.⁴⁵

If this is so, how is it that conversion "does not effect a change in the date of the filing of the petition"?⁴⁶ Admittedly, this timing rule coheres with the idea that a chapter 13 estate exists continuously from the time of the bankruptcy petition and running past confirmation to the time that the case is converted to chapter 7. Nevertheless, a theory that asserts the discontinuity of the bankruptcy estate (caused by conversion of a plan) is also a viable theory, in spite of this embarrassment.⁴⁷

Under the DT, the automatic stay applies to any creditor with a pre-petition claim against the debtor.⁴⁸ It does not apply to a post-petition creditor, because, according to the DT, there is no "property of the estate" after the plan is confirmed.⁴⁹ Therefore, it is open for a post-petition creditor to obtain a judicial lien on the debtor's property without violating the stay.

If, after such a lien attaches to the debtor's property, the case is converted, the lien is valid in the chapter 7 case. It is not a voidable preference, because,

⁴⁴ See 11 U.S.C. § 1327(b) (2006) ("Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.").

⁴⁵ See 11 U.S.C. § 348(f)(1)(A) (2006) ("[P]roperty of the estate in the converted case shall consist of property of the estate, as of the date filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion . . .").

⁴⁶ 11 U.S.C. § 348(a).

⁴⁷ See *In re Krick*, 373 B.R. 593, 606 (Bankr. N.D. Ind. 2007) ("There is an inherent inconsistency between § 348(f)(1)(A)'s 'relation back' to the date of the petition and the 're-vesting' provision of 11 U.S.C. § 1327(b)."). Section 348(f)(1) dates only from 1994. How did post-confirmation conversions work prior to 1994? Judge Wedoff argues that the bankruptcy estate *must* continue past confirmation because, otherwise, there is no explanation of how the debtor conveys *anything* to the chapter 7 trustee. See *In re Fisher*, 198 B.R. 721, 726 (Bankr. N.D. Ill. 1996) ("If, after confirmation, there is no property in the Chapter 13 estate, this new provision would be absurd: it would provide, in cases of bad faith conversion of a Chapter 13 case after confirmation, that the estate in converted case is composed of nothing."), *rev'd*, 203 B.R. 958 (Bankr. N.D. Ill. 1997). In fact, prior to 1984, courts managed to find that all pre-petition property of the debtor was property of the chapter 7 estate, even if section 1327(b) is read as making the debtor the absolute owner of what was once property of the estate. See generally Michaela M. White, *The Effects of Chapter 13 Plan Confirmation and Case Conversion on Property*, 26 CREIGHTON L. REV. 785, 813–21 (1993) (discussing different courts' treatment of chapter 7 estates for pre-petition property of debtor before and after 1984).

⁴⁸ See 11 U.S.C. §§ 362(a)(5)–(6) (2006).

⁴⁹ Except for the property the chapter 13 trustee controls pursuant to section 1326(a) or the terms of the plan.

according to section 348(a), the original chapter 13 petition governs, and the lien is a post-petition transfer. Nor does section 549(a) apply to avoid the lien. Section 549 allows the trustee to avoid "a transfer of property of the estate" that occurs after the bankruptcy petition is filed.⁵⁰ Per the DT, the judicial lien is a transfer of *debtor* property, not property of the estate. Therefore, the post-confirmation lien (or any other transfer) is good against the chapter 7 trustee in a converted case.⁵¹ The discontinuity in the bankruptcy estate (in converted cases) may not be the DT's most elegant moment, but it functions well enough.

C. Change of Theory By Means of a Plan Term or Confirmation Order

Oddly, section 1322(b)(9) invites debtors to write a plan term that *prevents* the vesting of estate property in the debtor.⁵² Accordingly, a plan may "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."⁵³ And section 1327(b) operates "[e]xcept as otherwise provided in the plan or the order confirming the plan."⁵⁴ These two provisions suggest that, whatever the proper theory of the chapter 13 estate may be, either the debtor (in the plan) or the court (in a confirmation order) may simply change it.

Such a plan term extends the automatic stay against property of the estate.⁵⁵ Why then don't debtors routinely write such plan terms, in order to extend the automatic stay?⁵⁶ Under the theory being defended, debtors are vulnerable to post-petition creditors, who are not subject to the automatic stay once the plan is confirmed. If their plans prevented vesting of property in the debtor, the automatic stay would then protect the property because, nominally, it is estate property. Not much would be lost. In case of conversion to chapter 7, the plan term has no effect on what a debtor must surrender to the chapter 7 estate. Section 348(f)(1) makes clear that the debtor may keep "property of the estate" if it was acquired post-petition. On the other hand, the debtor would have to seek court permission before using or selling anything after plan confirmation.⁵⁷

Some courts have found a repeal of section 1327(b) by the plan to be in bad taste, if the goal is merely to extend the automatic stay for the life of the plan.⁵⁸ Yet

⁵⁰ 11 U.S.C. § 549(a)(1) (2006).

⁵¹ See *Still v. Rossville Bank (In re Chattanooga Wholesale Antiques, Inc.)*, 930 F.2d 458, 462 (6th Cir. 1994).

⁵² See, e.g., *SouthTrust Bank of Alabama v. Thomas (In re Thomas)*, 883 F.2d 991, 993 (11th Cir. 1989); *In re Coker*, 216 B.R. 843, 846 (Bankr. N.D. Ala. 1997); *In re Lambright*, 125 B.R. 733, 735 (Bankr. N.D. Tex. 1991).

⁵³ 11 U.S.C. § 1322(b)(9) (2006).

⁵⁴ 11 U.S.C. § 1327(b) (providing exception to effect of confirmation).

⁵⁵ See *In re Thongta*, 401 B.R. 363, 365, 367–68 (Bankr. E.D. Wis. 2009).

⁵⁶ See *In re Vannordstrand*, No. KS-05-091, 2007 Bankr. LEXIS 210, at **6–7 (B.A.P. 10th Cir. Jan. 31, 2007) (debtor's plan provided for deferred vesting).

⁵⁷ See 11 U.S.C. § 363(b)(1)(B) (2006).

⁵⁸ See, e.g., *In re Segura*, No. 08-14280, 2009 Bankr. LEXIS 460, at *27 (Bankr. D. Colo. Jan. 9, 2009).

section 1327(b) specifically invites just this.⁵⁹ At least one court has imposed such a plan term by means of a confirmation order.⁶⁰ Such an override of the plan by means of a confirmation order (without the debtor's freely given consent) would seem to violate that shortest of United States Code sections, section 1321: "The debtor shall file a plan."⁶¹ Meanwhile, something is rotten in the Denmark of chapter 13 if one court imposes upon a debtor against his will the very provision that another court condemns as inappropriate.

If indeed a plan may simply change the theory of the chapter 13 estate, or if a court can simply repeal section 1327(b) by preserving the bankruptcy estate in a confirmation order, perhaps not much is at stake in theorizing the chapter 13 estate. At best, the theory becomes a default term—it governs unless a court order says otherwise.

The fact that the plan or a confirmation order can simply change the theory of the chapter 13 estate casts doubt on the very project of theorizing the bankruptcy estate. Yet, many substantive issues are decided by the prevailing theory, in cases where the plan and the confirmation order are silent as to whether property of the estate vests in the debtor upon confirmation of a plan. As the "Coase Theorem" teaches, who cares about the law if the law can be overridden by free will?⁶²

Can a court change the theory of the bankruptcy estate over the opposition of a

(refusing plan confirmation where terms vested unnecessary assets for plan funding in estate); *In re Jemison*, No. 07-40761, 2007 Bankr. LEXIS 3107, at *20 (Bankr. N.D. Ala. Sept. 6, 2007) (finding congressional intent against extending automatic stay by this means).

⁵⁹ The *Jemison* court suggested that a proper purpose is to cover property specifically needed to fund the plan. 2007 Bankr. LEXIS 3107 at **11–12, **20–21 ("It would presumably be an abuse of discretion for the bankruptcy judge to confirm a plan that retained more property in the hands of the trustee than was reasonably necessary to fulfill the plan" (citing *Black v. U.S. Postal Service (In re Heath)*, 115 F.3d 521, 524 (7th Cir. 1997))).

⁶⁰ *In re Fatsis*, 396 B.R. 579, 580, 582–83 (Bankr. D. Mass. 2008) (finding debtor violated confirmation order prohibiting him from alienating his real property before being discharged), *aff'd*, 405 B.R. 1 (B.A.P. 1st Cir. 2009).

⁶¹ See, e.g., *In re Cohen*, 305 B.R. 886, 896 (B.A.P. 9th Cir. 2004) ("[U]nlike in chapter 11, only the debtor can propose or modify a plan before confirmation." (citing 11 U.S.C. §§ 1321 & 1323(a) (2006))). Courts apparently feel free to supplement the debtor's plan with terms the debtor does not want. See *In re Brumm*, 344 B.R. 795, 797 (Bankr. N.D. W. Va. 2006) (upholding confirmation order requiring annual income statement disclosures by debtor despite absence in plan confirmation); see also *In re Profit*, 283 B.R. 567, 570 (B.A.P. 9th Cir. 2002) (noting confirmation order required debtor to surrender tax refunds); *In re Midgley*, 413 B.R. 820, 821–22 (Bankr. D. Or. 2009) (highlighting confirmation order requiring debtor report greater income than required under Schedule I); *In re Forte*, 341 B.R. 859, 865–66 (Bankr. N.D. Ill. 2005) (holding confirmation order negated section 1327(b) effect vesting estate in debtor).

⁶² More precisely, the "Coase Theorem" holds that in a universe with no transaction costs, who the heck cares what the law is. But, in a universe where transactions are costly, who the heck knows what is going on. See Jeanne L. Schroeder, Commentary, *The End of the Market: A Psychoanalysis of Law and Economics*, 112 HARV. L. REV. 483, 521 (1998) ("[I]n a perfect world without transaction costs, it does not matter how the law allocates entitlements because people will always contract to reallocate entitlements in an economically efficient manner."); see also RONALD H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 15 (1988) ("Another consequence of the assumption of zero transaction costs, not usually noticed, is that, when there are no costs of making transactions it costs nothing to speed them up, so that eternity can be experienced in a second.").

debtor? There is reason to believe there are *some* limits on a court's power to impose terms a debtor doesn't want. In *Anderson v. Satterlee (In re Anderson)*,⁶³ a bankruptcy court refused to confirm a plan unless the debtor agreed to pay *actual* (not projected) disposable income. The Ninth Circuit Court of Appeals ruled that the bankruptcy court could not condition confirmation of a plan on requirements not to be found in section 1325(b)(1).⁶⁴ While the case involved a refusal to confirm (instead of a confirmation with onerous terms added over the opposition of the debtor), the case would seem to stand against the use of confirmation orders to require things that the debtor actually opposes.⁶⁵ It has occasionally been held that a court may not impose plan terms on the debtor with which the debtor disagrees.⁶⁶ Ergo, there is some reason to believe that a court cannot use the confirmation order as a means to change the theory of the chapter 13 estate that Congress has adopted, even if section 1327(b) invites an override by means of the confirmation order. At best, the confirmation order must achieve what the debtor legitimately wants, free of coercion by the court or trustee.

To summarize, though the DT is not perfect, it wreaks less damage upon the black letter of the Bankruptcy Code than the other theories. It does assert that section 1327(b) overrules section 1306(a) once the plan is confirmed. It requires a theory of the converted chapter 7 case whereby an interruption exists between confirmation of the chapter 13 plan and converting the case—a concept that causes no real difficulty. It requires a leap of faith that courts are not simply free to write their own theory of the chapter 13 estate if they disfavor the one actually legislated by Congress.

The next several sections examine the question of the chapter 13 estate in various functional contexts. I will also examine the motives courts have for deviating from the DT, and whether in fact the courts really needed to deviate from it. I also examine how courts get around the statement of section 1327(b), which establishes some sort of transfer from the bankruptcy estate to the debtor—in my view, an absolute transfer.

⁶³ 21 F.3d 355 (9th Cir. 1994).

⁶⁴ *Id.* at 356.

⁶⁵ See *In re Reed*, No. 03-40669-7, 2007 Bankr. LEXIS 2337, at *2, *18 (Bankr. D. Kan. July 9, 2007) (holding post-confirmation order tax refunds are not assets under converted chapter 7 estates).

⁶⁶ *In re Cassell*, 119 B.R. 89, 94–95 (W.D. Va. 1990). Nor may the trustee modify the plan without court approval. In *System & Services Tech., Inc. v. Davis (In re Davis)*, 314 F.3d 567 (11th Cir. 2002), a secured creditor claiming a car was bifurcated by the plan. The debtor defaulted on paying wages to the chapter 13 trustee. The bankruptcy court lifted the stay so that the collateral could be repossessed. The chapter 13 trustee unilaterally decided that the car soon to be repossessed equaled the amount of shortfall on the secured claim. Therefore, together with payments earlier received under the plan, the trustee deemed the secured claim was entirely satisfied. The bankruptcy court gave a discharge of the secured claim on this basis. This, however, was reversed. A discharge can be given only if the plan is completed. As written, the plan was *not* completed. The trustee's unilateral "modification" of the plan could not be recognized. *Id.* at 569–71.

III. THE AUTOMATIC STAY

Under the DT, confirmation of a chapter 13 plan does not quite spell the end of the automatic stay. It continues to have a narrow sort of existence. It still prohibits "any act to create . . . or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case" ⁶⁷ It also prohibits "any act to collect . . . a claim against the debtor that arose before the commencement of the case" ⁶⁸ These aspects of the automatic stay continue until the debtor is granted or denied a discharge. ⁶⁹

In all other respects, confirmation of a chapter 13 plan terminates the automatic stay. In particular, neither the debtor nor her property is spared from claims that arose *after* the bankruptcy petition was filed. ⁷⁰ Therefore, a post-petition creditor might garnish the very wages from an employer that a chapter 13 trustee expects to receive from the debtor. ⁷¹

Some courts believe that, since wages are typically necessary to execute the plan, garnishment of wages is prohibited. That is to say, that part of the wages necessary to execute the plan is "property of the estate." Therefore, the automatic stay works to protect at least this part of the debtor's right to be paid under an executory employment contract. ⁷²

This theory palpably does not work. A debtor's "job" is an executory contract—property of the estate when the debtor files for bankruptcy. ⁷³ Section 1306(a)

⁶⁷ 11 U.S.C. § 362(a)(5) (2006).

⁶⁸ 11 U.S.C. § 362(a)(6).

⁶⁹ See 11 U.S.C. § 362(c)(2)(C).

⁷⁰ See *Telfair v. First Union Mortgage Corp.*, 216 F.3d 1333, 1340 (11th Cir. 2000) (holding stay was not violated when lender debited escrow account for post-petition attorneys' fees); *In re Fisher*, 203 B.R. 958, 964 (N.D. Ill. 1997) (finding no stay violation where city destroyed debtor's car after property vested and was no longer protected by stay); *Shell Oil Co. v. Capital Fin. Servs.*, 170 B.R. 903, 905–06 (S.D. Tex. 1994) (reporting liens secured by IRS against debtor's property did not violate stay because they occurred post-petition); *In re Petrucci*, 113 B.R. 5, 17 (Bankr. S.D. Cal. 1990) (determining stay not violated where IRS sought to collect post-petition debt from debtor's property); *In re Walker*, 84 B.R. 888, 889 (Bankr. D.D.C. 1988) (holding stay not violated for collection of post-petition condominium fees owed by debtor); *In re Johnson*, 51 B.R. 439, 442 (Bankr. E.D. Pa. 1985) (rejecting stay violation where debtor filed complaint after confirmation of wife's plan). An exception of a sort can be found in section 1305(a), which permits creditors to file post-petition proofs of claim for a narrow range of claims. See 11 U.S.C. § 1305(a) (2006).

⁷¹ See *In re Mason*, 51 B.R. 548, 550 (D. Or. 1985) (holding garnishment by post-confirmation creditor did not violate stay).

⁷² See *In re Leavell*, 190 B.R. 536, 540 (Bankr. E.D. Va. 1995) (finding post-petition earnings are protected by stay from post-confirmation creditors since they are property of estate); *In re Ziegler*, 136 B.R. 497, 500 (Bankr. N.D. Ill. 1992) (finding segment of post-confirmation income necessary to fund plan becomes property of estate, while remainder of income becomes debtor's individual property); *In re Adams*, 12 B.R. 540, 542 (Bankr. D. Utah 1981) (acknowledging wages exceeding funds necessary to execute plan become debtor's property).

⁷³ In chapter 7 cases, proceeds of the job are expelled from the bankruptcy estate, but the job is still *in* the estate. See 11 U.S.C. § 541(a)(6). As to this oddity, see *In re Gyulafia*, 65 B.R. 913, 917 (Bankr. D. Kan. 1986) (holding post-petition tax claims must be filed under 11 U.S.C. § 1305(a)(1), not as administrative expense under 11 U.S.C. § 503(b)). Executory contracts must be assumed with court approval under

captures all pre-confirmation wages and makes them part of the chapter 13 estate. But, all this (including the job) is transferred absolutely to the debtor, under the DT reading of section 1327(b). Only those wages the debtor successfully pays to the chapter 13 trustee are property of the post-confirmation chapter 13 estate.

Under the DT, post-petition creditors are free to levy on any property of a chapter 13 debtor, once a plan is confirmed. In *Annese v. Kolenda (In re Kolenda)*,⁷⁴ a debtor acquired a post-confirmation car and later granted a post-confirmation security interest on that car.⁷⁵ The secured creditor repossessed and sold the car.⁷⁶ This was held to violate an expanded automatic stay. The reason why was that section 1327(b) *never* terminates the chapter 13 estate because the word "vest" does not mean "transfer absolutely."⁷⁷ Thus, the Bankruptcy Code *requires* precisely what some judges found to be in bad faith when plans deferred all vesting of estate property in the debtor until the plan was complete.⁷⁸ From the perspective of the DT, this result is manifestly wrong.

IV. PROPERTY INHERITED AFTER CONFIRMATION ORIGINAL

Under the DT, a debtor who inherits property after confirmation of the plan gets to keep the inheritance while the creditors remain unpaid. I maintain that this is an important part of the basic chapter 13 bargain that is plain on the face of the Bankruptcy Code. According to this bargain, the debtor buys back property of the estate (valued as of the time of the confirmation hearing) in exchange for post-petition disposable income. The requirement of paying all disposable income is adjustable. Under section 1329(a)(1), a plan can be modified (at the behest of the trustee or unsecured creditor) to increase or decrease payments *of disposable income*.⁷⁹ So, if a debtor obtains post-confirmation property, it can be obtained *if it is income*. Otherwise, the basic chapter 13 bargain requires that the debtor keeps *all* estate property (including post-confirmation inheritances).

Lottery winnings, for example, are income. These may be captured in plan modification.⁸⁰ Proceeds from selling a house are income *to the extent of a net*

Bankruptcy Code section 365(a). See 11 U.S.C. § 365(a) (2006) ("[T]he trustee, subject to the court's approval, may assume or reject any executory contract."). But, debtors are invited to write plan terms that assume executory contracts and leases. See 11 U.S.C. § 1322(b)(7) (2006). Confirmation of the plan therefore equates with court approval of assumption of the debtor's contract. An issue that has never been considered is whether a debtor can "cure" and reinstate her job if fired before the bankruptcy petition. But, this thought cannot be pursued here.

⁷⁴ 212 B.R. 851 (W.D. Mich. 1997).

⁷⁵ *Id.* at 853.

⁷⁶ *Id.*

⁷⁷ *Accord In re Henry*, 143 B.R. 811, 814 (Bankr. W.D. Pa. 1992).

⁷⁸ See *supra* text accompanying notes 53–55, 57–58.

⁷⁹ 11 U.S.C. § 1329(a)(1) (2006).

⁸⁰ See *In re Koonce*, 54 B.R. 643, 644–45 (Bankr. D.S.C. 1985) (determining lottery winning acquired by debtor after commencement of chapter 13 case, but before case was "closed, dismissed, or converted," constituted income and therefore, subject to plan modification under section 1329(a) of Bankruptcy Code).

capital gain.⁸¹ An inheritance is not income, according to the Internal Revenue Code.⁸² The better view is that bankruptcy law must not borrow its definition of income from the politically compromised Internal Revenue Code.⁸³ Inheritance is, therefore, income on the simple notion that it makes the debtor wealthier in the balance sheet sense. Accordingly, inheritances can be recaptured by the creditors if they move to modify the chapter 13 plan. Meanwhile, proceeds from a post-confirmation mortgage (that is to say, loan proceeds) are *not* income, as no capital gain is thereby realized.⁸⁴

One theory of the chapter 13 estate holds that section 1327(b) terminates the chapter 13 estate, but any property the debtor acquires *after* confirmation is *in* the estate. In *United States v. Harchar*,⁸⁵ the IRS refused to pay a tax refund when it had unpaid pre-petition claims against the debtor. The court found that the tax refund, arising from post-petition wages, was property of the estate.⁸⁶ Therefore, the *Harchar* court ruled, the IRS was guilty of violating section 362(a)(3), which bars "any act to obtain possession of property of the state or property from the estate or to exercise control over property of the estate."⁸⁷

How could this conclusion be squared with section 1327(b)? That section, the court thought, only transfers estate property to the debtor at the time of confirmation. Since the wages in question were earned in the post-confirmation period, such property was not covered by section 1327(b). The property was, therefore, property of the estate under section 1306(a).⁸⁸

⁸¹ See *Murphy v. O'Donnell (In re Murphy)*, 474 F.3d 143, 154 (4th Cir. 2007) (concluding when debtor sells his condominium and recognizes a net gain, trustee is authorized to modify plan).

⁸² See 26 U.S.C. § 102(a) (gross income "does not include property acquired by gift, bequest, devise, or inheritance").

⁸³ See David Gray Carlson, *Modification of Plans of Reorganization and the Basic Chapter 13 Bargain*, 83 AM. BANKR. L.J. (forthcoming 2009), at Pt. III [hereinafter Carlson, *Modification*].

⁸⁴ See *Murphy*, 474 F.3d at 150 ("By any stretch, a loan, regardless of the size, is not income."); *In re Easley*, 205 B.R. 334, 335–36 (Bankr. M.D. Fla. 1996) (authorizing debtor, who borrowed money from his parents, to modify plan, even though loan money is not income and not increase in assets).

⁸⁵ 371 B.R. 254 (N.D. Ohio 2007).

⁸⁶ *Id.* at 268.

⁸⁷ *Id.* at 269. But, did not the Supreme Court in *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16 (1995), authorize account debtors to refuse to pay without violating the automatic stay? According to the *Harchar* court, a bank that refuses to honor checks does not thereby control property of the estate, but merely refuses to perform a contractual obligation. The IRS, supposedly, does control property of the estate—the tax refund. This would be true if the federal government segregates the refund somehow, but it in fact does not do so. The federal government has an *in personam* obligation to pay the refund, just like a bank does. Therefore, *Strumpf* should have saved the day for the IRS.

⁸⁸ *Harchar*, 371 B.R. at 268 (N.D. Ohio 2007); accord *In re Jackson*, 403 B.R. 95, 100 (Bankr. D. Idaho 2009) ("Any assets acquired by the debtor after confirmation, but before the case is closed, converted or dismissed, become property of the bankruptcy estate under § 306."). This overlooks the fact that a job is an executory contract under Bankruptcy Code section 365 and is, therefore, property of the bankruptcy estate. Section 541(a)(6) excludes *proceeds* of the job from the bankruptcy estate, but not the job itself. Accordingly, confirmation of the chapter 13 plan transfers the job back to the debtor. Assuming the debtor held the same job throughout the post-confirmation period, the wages are proceeds of pre-confirmation property. They are not proceeds received in the first instance. The wages held by the IRS were, therefore,

In any case, all this was beside the point. The court also properly recognized that the IRS, a pre-petition creditor, violated section 362(a)(6) by trying to collect a pre-petition debt. Any error in the theory of the chapter 13 estate was harmless.⁸⁹

My main motive in highlighting the *Harchar* opinion is its concept of after-acquired property. This holding is motivated by the sense that section 1327(b) must mean *something*. According to *Harchar*, section 1327(b) absolutely transfers whatever estate property exists as of confirmation of the plan. But whatever the debtor acquired *after* confirmation is immune from section 1327(b), which by its terms refers only to property in existence as of confirmation. Here, section 1306(a) supposedly governs to make the property "property of the estate."⁹⁰

Under the *Harchar* view, any inheritance or gift of any sort received after confirmation of the plan is in the bankruptcy estate, but anything that existed in the bankruptcy estate on the day of confirmation is transferred to the debtor under section 1327(b). The Christmas after confirmation is a sad one under this theory, as the chapter 13 trustee scoops up all the presents under the tree.⁹¹

In my view, this is all wet, and many courts agree.⁹² The claim is impossibly broad. Taken literally, every existent thing in the bankruptcy estate is transferred to the debtor on confirmation, but any new thing (including proceeds of debtor property) is property of the estate. Therefore, if the debtor buys a car after the confirmation of the plan, the car belongs to the bankruptcy estate. The debtor dares not sell the car without court permission pursuant to section 363(b). But, the pre-confirmation car could be sold post-confirmation without court permission. Proceeds of that car, however, cannot be used without court permission, as the proceeds are property of the estate (even though the car wasn't). This obviously makes no sense.

The Bankruptcy Code is elsewhere rather hostile to "dragnet" powers in creditors. According to Bankruptcy Code section 552(a): "[e]xcept as provided in subsection (b) of this section, property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security

proceeds of property the debtor owned free and clear of the bankruptcy estate. But, wages are *proceeds* of the employment contract. Proceeds are by nature after-acquired property, and therefore, on the *Harchar* court's theory, property of the estate after confirmation.

⁸⁹ In *In re Grogg*, 295 B.R. 297 (Bankr. C.D. Ill. 2003), a post confirmation debtor arguably became entitled to life insurance proceeds. Not sure, the insurance company moved to lift automatic stay in order to start an interpleader action in light of a dispute. The court agreed that the insurance proceeds were property of the bankruptcy estate and that therefore the automatic stay applied. No mention of section 1327(b) was made.

⁹⁰ See *In re Guentert*, 206 B.R. 958, 961–62 (Bankr. W.D. Mo. 1997) (endorsing after-acquired property theory in both chapter 7 and chapter 13 cases).

⁹¹ However, Christmas is not really about the presents. See DR. SEUSS, *HOW THE GRINCH STOLE CHRISTMAS* (Random House 1985) (1957).

⁹² See, e.g., *In re Toth*, 193 B.R. 992, 997 (Bankr. N.D. Ga. 1996) ("Subjecting postpetition creditors to the automatic stay and blocking attempts to collect following postconfirmation defaults would make a debtor a credit pariah."); *In re Petrucci*, 113 B.R. 5, 15 (Bankr. S.D. Cal. 1990) ("[P]roperty of the estate vests in the debtor and is no longer property of estate, unless the plan or order of confirmation provides otherwise.").

agreement entered into by the debtor before the commencement of the case."⁹³ This key provision considers after-acquired property agreements to be inequitable, as they bestow on the debtor the peculiar capacity to acquire property for the benefit of another (even if the debtor personally does not intend this result). The after-acquired property clause makes a debtor the abject slave of the creditor, and so section 552(a) admirably strikes from the wrist of the debtor the chafing shackles of the after-acquired property clause.

How good a theory of chapter 13 is it that reimposes this very slavery on the debtor, granting to the debtor all estate property, but then perpetuating the subservience of the debtor with regard to after-acquired property? On this erroneous view, the debtor does not need court permission to dispose of that which he owned on the day the plan was confirmed, but he is in contempt of court if he conveys something acquired the day after confirmation.

In fact, there is reason to think this is not what Congress intended. This argument has to do with the Seventh Circuit's opinion in *In re Lybrook*⁹⁴ and Congress's overruling of that opinion in 1994.⁹⁵

In *Lybrook*, a debtor filed for chapter 13.⁹⁶ Before the plan was confirmed but more than 180 days after the bankruptcy petition, the debtor inherited substantial property. Instead of confirming a chapter 13 plan, the debtor converted the case to chapter 7 in the hope that there, the debtor might wrest the inheritance away from the creditors. The court ruled that, under section 1306(a), the inheritance was property of the chapter 13 estate and that this, therefore, was also property of the chapter 7 estate. This was so, even though had the debtor filed for chapter 7 initially, the inheritance would have eluded the creditors.⁹⁷ In chapter 7, only inheritances acquired 180 days after the petition are in the chapter 7 estate.⁹⁸

Congress, in 1994, elected to change the result for chapter 13 cases.⁹⁹ According to the 1994 amendments to the Bankruptcy Code, a debtor may keep all after-acquired property from the chapter 7 trustee. An exception is made for bad faith debtors (such as the Lybrooks), who converted their case before a plan was confirmed. The bad faith rule is that the debtors must surrender assets acquired

⁹³ 11 U.S.C. § 552(a). Subsection (b) preserves for creditors proceeds of pre-petition collateral (plus rents and proceeds of hotels). Post-petition proceeds are a type of after-acquired property which otherwise would be disencumbered by section 552(a).

⁹⁴ 951 F.2d 136 (7th Cir. 1991).

⁹⁵ See Bankruptcy Reform Act of 1994, H.R.5116, 103rd Cong. § 303 (1994) (altering rule of *Lybrook* so property included in estate affected by chapter conversions).

⁹⁶ 951 F.2d at 136.

⁹⁷ See *id.*

⁹⁸ See 11 U.S.C. § 541(a)(5) (2006).

⁹⁹ The *Lybrook* result still holds in chapter 11 cases. As with chapter 13, confirmation of a chapter 11 estate terminates the bankruptcy estate and "vests" it in the debtor. See 11 U.S.C. § 1141(b) ("Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor."). A chapter 11 case may convert to chapter 7 after confirmation. See 11 U.S.C. § 1112(b)(4)(N) (defining cause as conversion for a material breach of a confirmed plan). If so, all of the debtor's property is transferred to the chapter 7 trustee, even if acquired after the petition is filed.

before confirmation of a plan. But after confirmation, even bad faith debtors may keep after-acquired property, such as inheritances. According to section 348(f)(2): "[i]f 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 *of the estate* in the converted case shall consist of property of the estate as of the date of conversion."¹⁰⁰ This section does not mention confirmation of a plan, but it is clear that what the debtor must surrender to the chapter 7 trustee is *property of the estate* (not property of the debtor). Since confirmation (I claim) makes the debtor the owner of pre-confirmation property of the estate, section 348(f)(2) properly refers solely to property, if any, under the control of the chapter 13 trustee.¹⁰¹ The post-confirmation inheritance belongs to the debtor alone.

If that is the rule for converted chapter 7 cases, surely it is the rule for chapter 13 cases, where the debtor is faithfully following the plan, lawfully confirmed by the bankruptcy court.

V. DISCLOSURE OF ASSETS

As part of a bankruptcy petition, any debtor must file a schedule of assets.¹⁰² Suppose a chapter 13 debtor acquires an asset after confirmation. Must a debtor amend the schedule of assets originally filed?

Properly, the answer should be no. Once a chapter 13 plan is confirmed, the assets in effect become irrelevant.¹⁰³ The only purpose the schedule of assets serves is to accomplish the "best interest of the creditors" test on the day of confirmation. Therefore, nothing is served by compelling the debtor to update his schedule after a plan is confirmed.¹⁰⁴

A chapter 13 plan may be modified. According to section 1329(b), the modification must conform to the requirements of section 1325(a), including the

¹⁰⁰ 11 U.S.C. § 348(f)(2) (emphasis added). The italicized language was added by BAPCPA.

¹⁰¹ See *In re Brown*, 375 B.R. 362, 380 n.28 (Bankr. W.D. Mich. 2007) ("A Chapter 13 estate will include whatever the debtor has acquired post-petition in the event the case is converted prior to confirmation of a plan.").

¹⁰² See 11 U.S.C. § 521 (a)(1)(B)(i) (requiring debtor to file "a list of creditors; and unless the court orders otherwise—a schedule of assets and liabilities").

¹⁰³ But see *In re Easley*, 205 B.R. 334, 335 (Bankr. M.D. Fla. 1996) ("The debtor is obligated to advise the trustee of the event and to file a supplemental schedule listing this asset."). The *Easley* court draws this principle from *In re Euerle*, which involved a pre-confirmation inheritance. 70 B.R. 72 (Bankr. D.N.H. 1987). Since the inheritance should have been included in the "best interest of the creditors" test, the schedules became misleading when the inheritance came into existence. This is a different situation from the case where the inheritance occurs after confirmation of the plan.

¹⁰⁴ See *Smith v. Scales Express, Inc.*, No. 05-331-BH-B, 2006 U.S. Dist. LEXIS 53638, at **6–7 (S.D. Ala. Aug. 2, 2006) (finding no duty to disclose because "post Chapter 13 confirmation cause of action against . . . [defendant] was statutorily never meant to be included in the bankruptcy estate."); *In re Foreman*, 378 B.R. 717, 722–23 (Bankr. S.D. Ga. 2007) ("Debtor's wrongful death action arose postconfirmation, and no party has asserted that Debtor's potential recovery in that action is necessary to fulfill the plan . . . the cause of action is not property of the estate, and Debtor is not required to amend her schedules to disclose it to this Court.").

"best interest of the creditors" test. But, if section 1329(b) is properly interpreted, then this test is done once and for all in the original confirmation. It is not redone as of the time of the modification. This would violate the basic chapter 13 bargain, whereby the debtor keeps all assets in exchange for wages. The only thing that modification can accomplish is adjustment when the disposable income of the debtor changes.¹⁰⁵ In contrast to changes in assets, changes in income are highly relevant to modifying chapter 13 plans, which unsecured creditors may bring about. New section 521(f)(4)(B) now requires that chapter 13 debtors file:

(B) annually after the plan is confirmed and until the case is closed, not later than the date that is 45 days before the anniversary of the confirmation of the plan; a statement, under penalty of perjury, of the income and expenditures of the debtor during the tax year of the debtor most recently concluded before such statement is filed under this paragraph, and of the monthly income of the debtor, that shows how income, expenditures, and monthly income are calculated.¹⁰⁶

Chapter 13, therefore, (after BAPCPA) explicitly envisions reports on income, but not on "principal"—*i.e.*, non-income assets.

Nevertheless, in *Waldron v. Brown (In re Waldron)*,¹⁰⁷ a debtor was uselessly made to amend his schedule because he had the good fortune of being injured in a post-confirmation automobile accident and, therefore, was now the owner of a cause of action under an uninsured motorist act.

The *Waldron* court reached its conclusion by reading section 1306(a) in isolation. Therefore, even though all property was sold back to the debtor at confirmation, property of the estate still existed, and the cause of action was part of that property.

How does this cohere with section 1327(b)? The *Waldron* court makes the after-acquired property point that I criticized earlier.¹⁰⁸ According to the *Waldron* court, section 1327(b) succeeds in giving back to the debtor only property of the estate that existed at the time of confirmation. After-acquired property is governed by section 1306(a) alone—not by section 1327(b).¹⁰⁹ So, any post-confirmation injury is part of the chapter 13 estate.¹¹⁰

Even if true or defensible, the matter is irrelevant. The debtor is solely entitled

¹⁰⁵ I develop this proposition at length in Carlson, *Modification*, *supra* note 83, at Pt. IV(A).

¹⁰⁶ 11 U.S.C. § 521(f)(4)(B).

¹⁰⁷ 536 F.3d 1239 (11th Cir. 2008).

¹⁰⁸ See *supra* text accompanying notes 81–101.

¹⁰⁹ Accord *In re Nott*, 269 B.R. 250, 256–57 (Bankr. M.D. Fla. 2000).

¹¹⁰ Where the creditors would get all the damages from pain and suffering, there is decent support for the proposition that the plaintiff-debtor has not actually been injured after all. That is to say, it is no tort to injure the insolvent. See generally David Gray Carlson, *Indemnity, Liability, Insolvency*, 25 CARDOZO L. REV. 1951 (2004).

to possess property of the estate.¹¹¹ Creditors in chapter 13 are entitled to disposable income only. The personal injury award would have to become income before the creditors could expropriate it by modifying a chapter 13 plan.

The *Waldron* court purports to find plenty of precedent for its decision, but not all the cases cited are pertinent. For example, the court rests heavily on *Barbosa v. Soloman*,¹¹² where a trustee moved to modify a plan because the debtors had made a nice profit in selling a real estate investment. The property was acquired pre-petition, but the proceeds were generated post-petition. Although the *Barbosa* court is unclear, it should be the case (and undoubtedly was) that plan modification was based on capturing the post-tax capital gain—*i.e.*, disposable income. Increases in disposable income is fair game in modifications, but non-income assets are not.

In addition, the *Waldron* court relies on cases in which a debtor filed for bankruptcy and never listed a lawsuit as an asset.¹¹³ After bankruptcy, debtors are estopped from claiming that their claims have value. These cases, however, cannot be used to prove that post-confirmation acquisitions are property of the bankruptcy estate. These cases involve a failure to disclose the existence of a *pre*-petition asset.

In any case, the *Waldron* court's holding was very limited: "[w]e do not hold that a debtor has a free-standing duty to disclose the acquisition of any property interest after the confirmation of his plan under Chapter 13. Neither the Bankruptcy Code nor the Bankruptcy Rules mention such a duty."¹¹⁴ The court merely held that the bankruptcy court had discretion to order the debtors to amend their schedules.

It is relevant that BAPCPA adds a new disclosure requirement under section 521(f)(4)(B).¹¹⁵ If the cause of action in *Waldron* (a pre-BAPCPA case) had to be reported in a BAPCPA venue, surely, then it must have been reported under section 521(f)(4)(B). Here, Congress addressed and presumably exhausted the subject of post-confirmation disclosure.

If a debtor has a duty to disclose acquisition of an asset after confirmation of a plan, unfair use of judicial estoppel may arise. Judicial estoppel has been used where a debtor allegedly has a *pre-petition* cause of action and does not disclose it in a schedule of assets.¹¹⁶ Suppose, however, the debtor has a cause of action that arises *after* a chapter 13 plan is confirmed. If there is a duty to disclose the asset,

¹¹¹ See 11 U.S.C. § 1306(b) (2006) (authorizing debtor to possess all property of estate unless otherwise stated in confirmed plan).

¹¹² 235 F.3d 31 (1st Cir. 2000).

¹¹³ See *Ajaka v. BrooksAmerica Mortgage Corp.*, 453 F.3d 1339, 1344–45 (11th Cir. 2006) (discussing debtor's lack of disclosure of his TILA claim); *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1288 (11th Cir. 2002) (barring debtor from pursuing monetary claims from lawsuit for not disclosing lawsuit to bankruptcy court).

¹¹⁴ *Waldron v. Brown (In re Waldron)* 536 F.3d 1239, 1246 (11th Cir. 2008).

¹¹⁵ See *supra* text accompanying note 106.

¹¹⁶ See *Cannon-Stokes v. Potter*, 453 F.3d 446, 447–48 (7th Cir. 2006) (precluding debtor from bringing employment discrimination lawsuit because debtor filed bankruptcy petition at same time as lawsuit and debtor denied any valuable legal claims in petition).

then judicial estoppel equally applies. A state court has so concluded.¹¹⁷ Presumably, the *Waldron* court's holding that the debtor does *not* have a "free-standing duty"¹¹⁸ to disclose post-confirmation causes of action precludes unfair use of the estoppel concept.¹¹⁹

Just such an issue in *Woodward v. Taco Bueno Restaurants, Inc.*,¹²⁰ occasioned the invention of a new theory of the chapter 13 estate. In *Woodward*, a debtor with a confirmed chapter 13 plan suffered post-confirmation employment discrimination. He sued, and the defendant moved for summary judgment on the basis of judicial estoppel. The premise was that the debtor had a duty to report post-confirmation property to the bankruptcy court. The debtor did not report the employment cause of action. Therefore, the employer reasoned, the cause of action must have no value (or otherwise it would have been disclosed).

The *Woodward* court denied summary judgment, because it found the law requiring disclosure of post-confirmation assets to be unclear. Nevertheless, the court proffered a new theory of the chapter 13 estate. According to this theory, section 1306(a) makes the new cause of action part of the bankruptcy estate. Property of the estate then "vests" back to the debtor under section 1327(b). Therefore, the theory looks to what the word "vest" means.

Resorting to BLACK'S LAW DICTIONARY, the *Woodward* court discovered that "to vest" means "[t]o give an immediate, fixed right of present or future enjoyment."¹²¹ The *Woodward* court, therefore, read section 1327(b) as simply promising enjoyment of assets only after the plan is completed.

Under this interpretation, after confirmation, the bankruptcy estate continues to exist and assets may be added to the estate in accordance with section 1306, but the debtor is immediately vested with the right to the future enjoyment of the assets in that estate free and clear of any creditor claims provided for by the plan once

¹¹⁷ See *Period Homes, Ltd. v. Wallick*, 569 S.E.2d 502, 503 (Ga. 2002) (stating debtors who file under chapter 7 or 11 have no duty to disclose causes of actions, however, debtors filing under chapter 13 have an affirmative duty to disclose under section 1306(a)); see also *Wolfork v. Tackett*, 540 S.E.2d 611, 612 (Ga. 2001) (applying judicial estoppel where debtor failed to disclose tort claim arising during chapter 13 proceeding).

¹¹⁸ 536 F.3d at 1246.

¹¹⁹ See generally Theresa M. Beiner & Robert B. Chapman, *Take What You Can, Give Nothing Back: Judicial Estoppel, Employment Discrimination, Bankruptcy and Piracy in the Courts*, 60 U. MIAMI L. REV. 1, 20 (2005) (contrasting different courts' decisions to estop chapter 13 debtors for their failure to disclose lawsuits).

¹²⁰ No. 4:05-CV-804-Y, 2006 U.S. Dist. LEXIS 89135, at *3 (N.D. Tex. Dec. 8, 2006) (examining chapter 13 debtor's duty to disclose cause of action arising two years after confirmation of plan).

¹²¹ *Id.* at *25 (citing BLACK'S LAW DICTIONARY 1563 (6th ed. 1990)). The *Woodard* court has been criticized for using an out-of-date dictionary. See *West Va. State Tax Dep't v. Mullins (In re Mullins)*, No. 06-3625 (RHK/AJB), 2009 U.S. Dist. LEXIS 90691, at **14-15 (S.D.W. Va. Sept. 30, 2009). If dictionaries change willy-nilly at the caprice of their editors, perhaps they should not be used in serious litigation.

he faithfully completes his obligations under the plan and is entitled to a discharge.¹²²

But what is the point of saying such a cause of action is in the bankruptcy estate? If the plan is completed, then the debtor finally owns it. If the plan is in default and converts to chapter 7, then the debtor also owns it. If the case is dismissed, then the debtor likewise owns it. Nothing is accomplished in this new theory of the chapter 13 estate.

A harder issue is the cause of action that arises after the bankruptcy petition but before plan confirmation. Such a cause of action should figure in the "best interest of the creditors" test of section 1325(a)(4). This test must be performed as of the effective date of the plan. Yet most reported opinions wrongly assume that the date of the bankruptcy petition is the date as of which the test must be performed.¹²³ Under such a view, the cause of action becomes irrelevant to the "best interest" calculation. Where the test is correctly performed, however, tort defendants will be unable to find any specific bankruptcy rule that requires the original asset schedules to be supplemented.

VI. PERMISSION TO SELL OR ENCUMBER

A proper theory of the chapter 13 estate implies that a debtor is free to alienate assets once the plan is confirmed.

Prior to confirmation of the plan, this is not so. According to section 1303, "the debtor shall have, exclusive of the trustee, the rights and powers of a trustee under section[] 363(b)"¹²⁴ According to section 363(b), a trustee may use, sell, or lease property of the estate out of the ordinary course of business only with court permission. Ergo, prior to confirmation, chapter 13 debtors, like trustees, must obtain court permission to use, sell, or lease property of the estate.

Clearly, debtors in the pre-confirmation period do not seek court permission every time they "use" the family lawn mower or make a trip to the grocery store to spend post-petition wages. They do routinely seek permission to sell a house, however.¹²⁵ There is no good theory, other than common sense, that explains why, prior to confirmation, debtors need not seek permission to use property of the estate for ordinary living purposes. Trustees in chapter 7 must do so, but the thought that

¹²² Woodward, 2006 U.S. Dist. LEXIS 89135, at *26.

¹²³ See LUNDIN, *supra* note 10, at § 160.1 and accompanying text; see also *In re Green*, 169 B.R. 480, 482 (Bankr. S.D. Ga. 1994) ("[T]he date the petition was filed is the point in time at which to measure the amount which would have been paid to unsecured creditors").

¹²⁴ 11 U.S.C. § 1303 (2006).

¹²⁵ See *In re Perez*, 339 B.R. 385, 398–99 n.14 (Bankr. S.D. Tex. 2006) (interpreting section 363(b) to allow chapter 13 debtor to sell residence after notice and hearing); see also *In re Dawson*, 411 B.R. 1, 26 n.22 (Bankr. D.D.C. 2008) (requiring notice and hearing under section 363(b) before debtor may pursue property cause of action).

a chapter 13 debtor must also do so is absurd. Transactions in the ordinary course of *business* do not require court permission,¹²⁶ but the trip to the grocery store is not the course of a consumer debtor's business. If read literally, section 363(b) requires court permission to use or sell anything. Without any justification from the Bankruptcy Code, judges have simply declared that debtors, without court permission, may dissipate the chapter 13 estate for ordinary living expenses.¹²⁷ Undoubtedly, such a rule lightens the motion calendar.¹²⁸ But it exalts common sense over the plain meaning of the Bankruptcy Code.

Whatever may be true prior to confirmation, according to the DT, the debtor needs no permission to sell anything after confirmation.¹²⁹ Courts, however, have reached a different conclusion. In *Bargeski v. Rose*,¹³⁰ a post-confirmation debtor conveyed a cotenancy in her house to her husband, from whom she was separated. Later, she converted her case to chapter 7. Properly, the cotenancy was hers to give. Nevertheless, the court approved the trustee's avoidance action against the non-debtor spouse.¹³¹ No justification of this holding was made in light of section 1327(b), but obviously the court assumed that confirmation of the estate did not terminate the chapter 13 estate.¹³² The court virtually apologized to the non-debtor spouse:

While the harsh reality faced by Albert seems unjust because he did

¹²⁶ See 11 U.S.C. § 363(b)(1) (2006) ("The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate. . .").

¹²⁷ See *In re Laflamme*, 397 B.R. 194, 204 (Bankr. D. N.H. 2008) ("The Bankruptcy Code . . . does not contain any explicit provision that governs what a debtor can do with chapter 13 estate property while the debtor is waiting to have a proposed plan confirmed. Presumably a debtor must be able to use earnings to pay ordinary and necessary living expenses in that interim gap period."); *In re Fisher*, 198 B.R. 721, 733 n.18 (Bankr. N.D. Ill. 1996) ("Chapter 13 debtors have authority under Section 1303 to deal with estate property in the ordinary course, which should include expending estate property for ordinary living expenses. Only extraordinary purchases, sales, and credit transactions should require court approval."), *rev'd on other grounds*, 203 B.R. 958 (N.D. Ill. 1997).

¹²⁸ See *In re Laflamme*, 397 B.R. at 204–05 ("The administrative burdens and uncertainties attendant upon such a radical departure from Chapter XIII practice . . . would be a substantial deterrent to chapter 13 use by nonbusiness debtors.").

¹²⁹ See *In re Suratt*, No. 95-6183-HO, 1996 U.S. Dist. LEXIS 22610, at **2–4 (D. Or. Jan. 10, 1996) (acknowledging debtors may use, sell, or lease property once property vested); see also *In re Jemison*, No. 07-40761, 2007 Bankr. LEXIS 3107, at **21–22 (Bankr. N.D. Ala. Sept. 6, 2007) ("Would debtors seek Court approval to hold a garage sale for property of the estate having a value of \$50?"); *In re Rangel*, 233 B.R. 191, 198 (Bankr. D. Mass. 1999).

¹³⁰ No. RWT 05-0962, 2006 U.S. Dist. LEXIS 29059, at *1, (D. Md. Mar. 31, 2006), *aff'd sub nom* *Rose v. Bargeski*, No. 06-1480, 2007 U.S. App. LEXIS 18110 (4th Cir. July 30, 2007).

¹³¹ See *id.* at **3–4.

¹³² The court assumed that section 549(a) was relevant, but section 549(a) assumes a *valid* conveyance that must be avoided. In fact, the better theory is that the debtor simply had no ability to convey property of the estate without court permission. Properly, section 549(a) applies only if the transferor has some legitimate power over the bankruptcy estate. See generally David Gray Carlson, *Bankruptcy's Acephalous Moment: Postpetition Transfers Under the Bankruptcy Code*, 21 EMORY BANKR. DEV. J. 113 (2004). Of course, if the cotenancy was already out of the bankruptcy estate, the debtor had every right to make a conveyance.

nothing of a dishonest nature in connection with this property, this Court agrees with the observation of the Bankruptcy Court that "this case involves an unfortunate combination of actions taken in good faith . . . that interacted with the harsh provisions of the Bankruptcy Code to produce [this] unfair result."¹³³

In fact, this unfair result should not be blamed entirely on the Bankruptcy Code. According to section 1327(b), confirmation transfers the chapter 13 estate to the debtor who *rightfully* conveyed the cotenancy to the spouse.¹³⁴

Debtors nevertheless needlessly seek court permission following the confirmation of a chapter 13 plan, sometimes to their regret. In *In re Drew*,¹³⁵ debtors sought to refinance their mortgages. They wished to pay the plan amounts early, thereby, ending the plan. Properly, the debtors did not need court permission to refinance. They did (arguably) need court permission to modify the plan in order to "reduce the time for [plan] payments."¹³⁶ Motions for permission to refinance (coupled with early payout) should, therefore, be interpreted as motions to modify a confirmed chapter 13 plan pursuant to section 1329(a).

The *Drew* court thought that, if the debtor were to borrow funds, those funds would be property of the estate (at least where a pre-petition house served as collateral for the loan).¹³⁷ Such a view erases section 1327(b) from the Bankruptcy Code. But, in addition, the fact that loan proceeds were in the chapter 13 estate is irrelevant. Debtors are permitted to possess property of the estate.¹³⁸ They are required to pay projected disposable income to the trustee and are *not* required to liquidate the chapter 13 estate for the benefit of creditors. They may do so,¹³⁹ but are not required to do so.

The *Drew* court justified its decision with dictum from *Black v. United States*

¹³³ *Bargeski*, 2006 U.S. Dist. LEXIS 29059, at **10–11.

¹³⁴ The court mitigated its holding by ruling that the non-debtor spouse only had to pay the value of the cotenancy as calculated on the day of the bankruptcy petition. *See id.* at *14. The court thought that such a conclusion was required by section 348(f)(1)(B), which, at the time, provided that "valuations of property . . . in the Chapter 13 case shall apply in the converted case." *Id.* at *13. Presumably, the court had in its mind that the house was valued for purposes of the "best interest of the creditors" test when the plan was confirmed, and the house should be deemed worth only that much. This is a very dubious reading of section 348(f)(1)(B). The premise of the court's (erroneous) opinion is that the cotenancy in question was in, rather than outside, the estate. This fact has nothing to do with valuations. In any case, BAPCPA has been amended to negate any chapter 13 valuations in a converted chapter 7 case.

¹³⁵ 325 B.R. 765 (Bankr. N.D. Ill. 2005).

¹³⁶ *See* 11 U.S.C. § 1329(a)(2) (2006). Courts are divided on this. *See* Carlson, *Modification*, *supra* note 83, at Pt. IV(B).

¹³⁷ 325 B.R. at 770 (allowing gifts, inheritances and windfalls acquired by debtor post-petition to be included in chapter 13 estate).

¹³⁸ *See* 11 U.S.C. § 1303 (2006) ("[T]he debtor shall have . . . the rights and powers of a trustee under sections 363(b), 363(d), 363(e), 363(f), and 363(l), of this title.").

¹³⁹ *See* 11 U.S.C. § 1322(b)(8) (2006) (stating 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").

Postal Service (In re Heath):¹⁴⁰

We read the two sections, 1306(a)(2) and 1327(b), to mean simply that while the filing of the petition for bankruptcy places all the property of the debtor in the control of the bankruptcy court, the plan upon confirmation returns so much of that property to the debtor's control as if not necessary to the fulfillment of the plan.¹⁴¹

According to the *Drew* court, the mortgage proceeds were necessary to fulfillment of the plan and, therefore, property of the estate: "[t]hus, the Court holds that the refinancing proceeds are part of the Debtors' bankruptcy estates post-confirmation because those proceeds were acquired by the Debtors for use in making payments under their confirmed plans."¹⁴² But this is entirely circular reasoning. The loan proceeds were part of the bankruptcy estate only because the court (not the debtor) decided that the creditors should receive the loan proceeds.

This violates the basic deal in chapter 13: in exchange for paying projected disposable income for a stipulated time, the debtor gets to keep all assets of the bankruptcy estate. Granted, if the creditors find out about surplus income beyond the amount projected in the plan, they can move to modify the plan.¹⁴³ But they can never force the debtor to borrow in order to increase the payout to creditors. In effect, the court countenanced a raid by the chapter 13 trustee on non-income assets by means of modification.

In *Drew*, by the time the trustee moved to modify the plan, the debtors had already obtained new mortgage loans on the increased value of their homes. But, conceptually, *Drew* also countenances *forcing* debtors into mortgage or even outright sales of the home. If the court can exploit the fact that the debtor has borrowed and can order the proceeds be paid to the creditors, then it can likewise insist that the debtor sell the house in order to generate proceeds for the creditors. The illegitimate principle of *Drew* is that debtors can be forced, through the modification procedure, into liquidating non-income assets for the benefit of creditors.¹⁴⁴ This violates the basic chapter 13 bargain and cannot be countenanced.

Another oft-cited case that erases from our distracted globes the memory of section 1327(b) is *In re Aneiro*¹⁴⁵ where the chapter 13 debtor ran a pizza parlor from leased premises. The lease was assumed under the confirmed plan. Later, the debtor and the landlord amended the lease to cover less space at a lower rent and

¹⁴⁰ 115 F.3d 521 (7th Cir. 1997).

¹⁴¹ *Id.* at 524.

¹⁴² *In re Drew*, 325 B.R. 765, 770 (Bankr. N.D. Ill. 2005).

¹⁴³ See Carlson, *Modification*, *supra* note 83, at Pt. IV(A).

¹⁴⁴ The deadline for the trustee's motion to modify is completion of payments under the plan. The *Drew* court intimated that, had the debtors tendered some of the loan proceeds in satisfaction of the plan obligation, the trustee's motion to modify would have been too late. See *In re Drew*, 325 B.R. at 770–71.

¹⁴⁵ 72 B.R. 424 (Bankr. S.D. Cal. 1987).

shorter term. The debtor defaulted on rent, and the landlord's successor in interest moved to lift the automatic stay.¹⁴⁶

According to the *Aniero* court, the modifications in the lease were invalid. The debtor's lease was property of the estate, and the debtor could not convey back some of the space and time under the lease. But, according to section 1327(b), the lease was entirely transferred back to the debtor, who was free to modify it without court permission.¹⁴⁷

*In re Fatsis*¹⁴⁸ is a stark example of injustice. In *Fatsis*, a debtor sold stock post-petition *and used the proceeds to make plan payments*.¹⁴⁹ In my view, the debtor was authorized to sell the stock and *not* use the proceeds for plan payments. Here, the debtor sold the stock and used it to fund the plan—a noble act of sacrifice not required by the Bankruptcy Code.

In bankruptcy as in life, no good deed goes unpunished. When the case was later converted to chapter 7, the trustee moved for sanctions against the debtor. The court agreed and fined the debtor \$13,332. It should be noted, however, that the confirmation order forbade the debtor from transferring any property, and it contained this clause:

[A]ll property of the estate as defined in 11 U.S.C. §§ 541 and 1306 including, but not limited to, any appreciation of the value of real property owned by the debtor as of the commencement of the case, shall remain property of the estate during the term of the plan and shall vest in the debtor(s) only upon discharge.¹⁵⁰

In short, the court, in its confirmation order, thought it had the right to repeal section 1327(b) altogether. And, indeed, section 1327(b) is conditioned as follows: "[e]xcept as otherwise provided in . . . the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor."¹⁵¹ One

¹⁴⁶ *Id.* at 428.

¹⁴⁷ See 11 U.S.C. § 1327 (2006) ("[T]he confirmation of a plan vests all of the property of the estate in the debtor."). Since the lessor's motion assumed that the lease existed *as modified*, the court denied the lessor's motion to lift the stay. Nevertheless, the debtor was not paying rent. So, presumably, the lessor could return to court citing the lease as originally executed. After all, no rent was being paid on *this* lease either. See *In re Aneiro*, 72 B.R. at 430.

¹⁴⁸ 396 B.R. 579 (Bankr. D. Mass. 2008) *aff'd*, 405 B.R. 1 (B.A.P. 1st Cir. 2009).

¹⁴⁹ See *id.* at 581. Or, so, the debtor claimed. On appeal, the appellate panel remarked, "there is no evidence in the record which conclusively establishes that the Debtor actually paid all or even some of the \$13,332.43 to the Trustee." *In re Fatsis*, 405 B.R. 1, 11 (B.A.P. 1st Cir. 2009).

¹⁵⁰ *In re Fatsis*, 405 B.R. at 4.

¹⁵¹ 11 U.S.C. § 1327(b) (2006) (emphasis added). The *Fatsis* case cites *In re Beesley*, 139 B.R. 247 (Bankr. D. Idaho 1992), but this case involved the pre-confirmation sale of a boat without court permission. Such a sale *does* require court permission. There is something odd in *Beesley*. The debtor sold the boat (at a cut-rate price to a friend) and then remitted the proceeds to the chapter 13 trustee. The trustee then sued the buyer under section 549 for avoidance of a post-petition transfer. But, if the debtor had no authority to transfer property of the estate, section 549 is hardly needed for the trustee to recover the boat. Rather, the trustee

cannot help but view the confirmation order in *Fatsis* as rewriting the plan against the will of the debtor (who is supposed to have that right),¹⁵² and legislatively repealing section 1327(b) to boot. In short, the court issued an illegal confirmation order and, then, punished the debtor for not following it, even though the debtor was sacrificing an asset in order to fund the plan, an act which the Bankruptcy Code does not require.¹⁵³

Courts occasionally hold that post-confirmation debtors must humbly request permission to borrow.¹⁵⁴ But, how can this be countenanced, in light of section 1304(b)? According to this confusing provision:

Unless the court orders otherwise, a debtor engaged in business may operate the business of the debtor and, subject to any limitations on a trustee under sections 363(c) and 364 of this title and to such limitations or conditions as the court prescribes, shall have, exclusive of the trustee, the rights and powers of the trustee under such sections.¹⁵⁵

This section states that a debtor operating a business must get court permission to borrow. Presumably, this provision is canceled when the plan is confirmed. But, even if it is not cancelled, the Bankruptcy Code requires debtors *in business* to seek court permission to borrow pursuant to section 364. Is it not obvious that debtors who are *not* in business may borrow (if they can) without court permission, whether before or after the bankruptcy petition?

Whether debtors need permission to borrow raises the puzzle of section 1305. This infrequently cited provision permits post-petition creditors to file proofs of claim, apparently with the end of coming under the plan terms.¹⁵⁶ The claims,

could have brought a turnover action under section 542(a). But, whether proceeding under section 542(a) or section 549, the trustee could not recover the boat *and* keep the proceeds of the boat. The two actions are inconsistent. Retention of the funds suggests that the trustee ratified the sale after the fact. See 11 U.S.C. §§ 549 & 542(a) (2006).

¹⁵² See 11 U.S.C. § 1321 (2006) ("The debtor shall file a plan.").

¹⁵³ See *In re Fatsis*, 396 B.R. at 580, 582–83. A better vision of the chapter 13 estate occurs in *In re Krick*, 373 B.R. 593 (Bankr. N.D. Ind. 2007). In *Krick*, the debtor entered chapter 13 as cotenant of property. A plan was confirmed, according to which the debtor was to pay rent to the other cotenants and was not to convey or encumber her real estate interest. (Usually, it is said that cotenants do not owe rent to other cotenants.) The debtor nevertheless conveyed her cotenancy to the other cotenants. Later, the chapter 13 case, as usual, converted to chapter 7.

¹⁵⁴ See *In re Rangel*, 233 B.R. 191, 194 n.1 (Bankr. D. Mass. 1999) (requiring debtor to request permission before acquiring post-petition consumer debt); *In re Fisher*, 198 B.R. 721, 729 n.13 (Bankr. N.D. Ill. 1996) (discussing requirement of obtaining court's permission before securing certain types of credit), *rev'd*, 203 B.R. 958 (N.D. Ill. 1997); see also LUNDIN, *supra* note 10, at § 262.1 ("[I]n most jurisdictions, the plan, the order of confirmation or local rule forbids debtors to incur new debt without court approval.").

¹⁵⁵ 11 U.S.C. § 1304(b) (2006).

¹⁵⁶ See 11 U.S.C. § 1305 (2006). Whereas a debtor may file a proof of claim for a creditor under 11 U.S.C. § 501(c), section 1305(a) permits only an "entity that holds a claim against the debtor" to file. *In re Bagby*, 218 B.R. 878, 887 (Bankr. W.D. Tenn. 1998) (asserting only holder of post-petition claim, not debtor, may

however, are limited to taxes¹⁵⁷ and consumer debt "that is for property or services necessary for the debtor's performance under the plan."¹⁵⁸ If such a post-petition claim is allowed, the plan may (but apparently need not) provide for its payment.¹⁵⁹

Section 1305(c) mysteriously provides: "A claim filed under subsection (a)(2) of this section shall be disallowed if the holder . . . knew or should have known that prior approval by the trustee of the debtor's incurring the obligation was practicable and was not obtained."¹⁶⁰ What is the meaning of section 1305(c)? Probably nothing, where the creditor chooses not to file a proof of claim.¹⁶¹ Post-confirmation creditors have no need for a proof of claim where they can attach assets free and clear of the automatic stay.¹⁶²

Section 1305 should properly be viewed as limited to the pre-confirmation period. Once the plan is confirmed, it is simply too late for post-petition creditors to participate. Plans may be modified, but there is a school of thought that holds post-confirmation allowance of claims is simply not permitted to wear the garb of plan modification.¹⁶³ Nevertheless, at least a few courts have intimated that post-petition creditors may file proofs of claim after confirmation and that the plan may be modified to pay off such creditors on a senior basis.¹⁶⁴

file proof of claim); *see also In re Trentham*, 145 B.R. 564, 567 n.5 (Bankr. E.D. Tenn. 1992) ("[D]ebtor has no standing . . . to file a proof of claim on behalf of postpetition creditor.").

¹⁵⁷ 11 U.S.C. § 1305(a)(1) (2006).

¹⁵⁸ 11 U.S.C. § 1305(a)(2). Debtor attorneys, however, may not skip the procedures of section 330 and use section 1305(a)(2) instead. *See In re Phillips*, 219 B.R. 1001, 1008 (Bankr. W.D. Tenn. 1998) ("Simply put, § 1305 is not the appropriate procedural vehicle for an attorney to seek to collect postpetition fees for providing routine legal services.").

¹⁵⁹ *See* 11 U.S.C. § 1322(b)(8) (2006) ("[T]he 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.").

¹⁶⁰ 11 U.S.C. 1305(c).

¹⁶¹ *See In re Ziegler*, 136 B.R. 497, 500 (Bankr. N.D. Ill. 1992). If a post-petition creditor chooses to file a proof of claim, the proof of claim is not, like in other cases, deemed allowed unless someone objects. Rather, the court must decide to allow the claim. *See In re Bagby*, 218 B.R. at 886. Even if the debtor consents to the proof of claim, the claim is not allowed until the court says so. *See id.* at 887 (indicating claims will not be permitted until court administers hearing).

¹⁶² *See In re Gyulafia*, 65 B.R. 913, 915–16 (Bankr. D. Kan. 1986) (finding post-petition creditor "has a choice between voluntary participation in the wage-earner plan under section 1305 or going directly against the debtor pursuant to applicable nonbankruptcy law . . ."); *see also LUNDIN, supra* note 10, at § 238.2 (noting post-petition creditor may choose not to file proof of claim and may instead seek relief from stay to collect its claim).

¹⁶³ *See Chrysler Fin. Corp. v. Nolan (In re Nolan)*, 232 F.3d 528, 532–34 (6th Cir. 2000) (determining that debtors may not use post-confirmation modification to alter treatment of secured claims); *In re Gyulafia*, 65 B.R. at 917 (post-confirmation taxes treated as pre-petition claims and not collectable by IRS); Carlson, *Modification, supra* note 83, at Pt. V(B). One court worries about rendering statutory language superfluous, if the chapter 13 estate really ends at confirmation: "a post-confirmation creditor would not need to file such a claim." *In re Rangel*, 233 B.R. 191, 195 (Bankr. D. Mass. 1999). But such a point is non-responsive. Section 1305 is not superfluous if it governs pre-confirmation claims against the bankruptcy estate.

¹⁶⁴ *See, e.g., In re Bagby*, 218 B.R. at 886 (denying approval of modification plan for failure to give proper notice); *In re Trentham*, 145 B.R. 564, 569 (Bankr. E.D. Tenn. 1992) (denying approval of modification plan because debtors did not receive trustee approval before obtaining credit). The court in *Trentham* also opined that post-petition creditors must be paid 100%, unless they consented to lesser treatment. *Id.* at 569

Finally, section 1328(d) warns that there can be no discharge of "an allowed claim filed under section 1305(a)(2) . . . if prior approval by the trustee of the debtor's incurring such debt was practicable and was not obtained."¹⁶⁵ The question arises how a post-petition claim can be allowed if no permission was obtained. The answer is that, under section 1305(c), a claim is disallowed only if the creditor knew or should have known that approval was practicable. A claim might be allowed even though there was no approval, provided the creditor was ignorant. So, where there was no approval and the claim was nevertheless allowed, there can be no discharge. But, so what? If a discharge is needed, then the debtor can simply file a new bankruptcy case and receive a discharge there.¹⁶⁶

Do these provisions engender a duty to obtain permission to borrow, as some courts think?¹⁶⁷ Even if they did, it should be noted that *court* approval is not required—only *trustee* approval. Furthermore, oddly, any duty to seek approval would be related to "property or services necessary for the debtor's performance under the plan."¹⁶⁸ If a debtor were to borrow in order to finance a luxury vacation, no approval is necessary since a luxury vacation is presumably not necessary to performing the plan.

In any case, these sections, read together, indicate that, when the debtor borrows money without permission, the debtor actually owes the money. The act of borrowing is not *ultra vires*. This act is not like acts in violation of the automatic stay, for example, which are said to be void acts.¹⁶⁹ The only penalty for unapproved borrowings is loss of the discharge. Therefore, it cannot be said that these provisions, taken together, require any permission, let alone *court* permission.¹⁷⁰ And furthermore, it is reasonable to conclude that the ability of a court to allow a claim under section 1305(a) ends with confirmation of the plan. After that point (arguably),¹⁷¹ new creditors cannot be added to the plan through the modification process.

("[P]ostpetition consumer creditors . . . are to be paid 100% unless the creditor affirmatively consents to being paid less than 100%.").

¹⁶⁵ 11 U.S.C. § 1328(d) (2006).

¹⁶⁶ See *In re Jemison*, No. 07-40761, 2007 Bankr. LEXIS 3107, at *19 (Bankr. N.D. Ala. Sept. 6, 2007) (noting most debtors will "immediately file another case in which they schedule the unpaid debts left over from the dismissed case"). A new petition in chapter 13, however, is subject to a new limit imposed by BAPCPA. Under section 1328(f), added by BAPCPA, if the debtor received a general chapter 13 discharge (regular or hardship) two years preceding the date of the new chapter 13 case, there cannot be another discharge of the post-petition claim against the debtor. 11 U.S.C. § 1328(f)(2).

¹⁶⁷ See, e.g., *In re Turek*, 346 B.R. 350, 356 n.9 (Bankr. M.D. Pa. 2006) ("[Debtors are] required to obtain court approval before selling or encumbering their home because it remains property of the estate.").

¹⁶⁸ 11 U.S.C. § 1305(a)(2).

¹⁶⁹ See Carlson, *Bankruptcy's Acephalous Moment*, *supra* note 132, at 113–14 ("[T]ransfers in violation of the automatic stay are . . . void or voidable.").

¹⁷⁰ See *In re Jemison*, 2007 Bankr. LEXIS 3107, at *15 ("There are no restrictions in the Code prohibiting a chapter 13 debtor from incurring ordinary consumer debt after the commencement of the case and before the debtor is granted a discharge.") (footnote omitted).

¹⁷¹ I defend this complicated proposition in Carlson, *Modification*, *supra* note 83, Pt. V(B).

VII. CAUSES OF ACTION

Suppose, at the time the debtor files a chapter 13 bankruptcy petition, the bankruptcy estate has within it a cause of action. Who may enforce it?

Prior to confirmation, the cause of action is property of the estate. The chapter 13 debtor is entitled to "possess" this cause of action.¹⁷² To bring a lawsuit is to "use" this asset.¹⁷³ The debtor has the rights and powers, exclusive of the trustee, under section 363(b). Bringing law suits therefore falls under section 363(b). This adds up to a requirement that the debtor must ask court permission to bring a lawsuit.¹⁷⁴

After confirmation, the matter changes. The cause of action is transferred to the debtor and, as with other property, the debtor needs no court permission to use property that is purely her own. In fact, the trustee is unable to enforce causes of action that belong to the debtor alone.¹⁷⁵

The fact that the debtor may bring pre-petition causes of action after confirmation without court permission is a straightforward application of section 1327(b), which transfers the cause of action back to the debtor. What is not recognized, however, is that this same reasoning gives to debtors the right to enforce voidable preference and fraudulent conveyance causes of action. These causes of action are property of the estate.

Taken in isolation, section 541(a) is awkward on the question. Under section 541(a)(3), the estate includes "property that the trustee recovers under section . . . 550" ¹⁷⁶ And section 550(a) refers to various avoidance theories of a bankruptcy trustee. Is the pure cause of action property of the estate, when only *that which is recovered* is mentioned in section 541(a)(3)? This issue has puzzled the courts. Cases exist in which fraudulent conveyance theories, at least, are estate property

¹⁷² See 11 U.S.C. § 1306(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."); *Smith v. Rockett*, 522 F.3d 1080, 1081 (10th Cir. 2008); *Cable v. Ivy Tech. State Coll.*, 200 F.3d 467, 473 (7th Cir. 1999).

¹⁷³ *In re Dawson*, 411 B.R. 1, 24 (Bankr. D.D.C. 2008) ("[A] debtor in a chapter 13 case is entitled to invoke § 363 with respect to the 'use' of a cause of action that is property of the estate."); *In re Henneghen*, No. 03-11853-SSM, 2005 Bankr. LEXIS 1770, at *21 (Bankr. E.D. Va. June 22, 2005) ("The only way to 'use' a cause of action is to bring suit upon it or settle it."); *In re York*, 291 B.R. 806, 815 (Bankr. E.D. Tenn. 2003) ("[T]he debtor has the right to bring suit because the debtor has the right to use the property—the cause of action that came into the bankruptcy estate."); 124 CONG. REC. H 32,409 (daily ed. Sept. 28, 1978) ("[C]ertainly it is intended that the debtor has the power to sue and be sued"); Lundin, *supra* note 10, at § 47.7.

¹⁷⁴ See *In re Dawson*, 411 B.R. at 27 n.25; see also *Ivy Tech. State Coll.*, 200 F.3d at 471. But see *In re Davis*, 216 B.R. 898, 902 (Bankr. N.D. Ga. 1997).

¹⁷⁵ *Black v. United States Postal Serv. (In re Heath)*, 115 F.3d 521, 524 (7th Cir. 1997). In *In re Frausto*, 259 B.R. 201 (Bankr. N.D. Ala. 2000), a chapter 13 trustee nevertheless pursued a pre-petition cause of action and obtained a settlement. *Id.* at 205. A post-petition creditor of debtor was permitted to garnish settlement and take it away from trustee. This was the correct result. Because a plan had been confirmed, the debtor owned this asset free and clear of the bankruptcy estate. The post-petition creditor, not subject to the automatic stay, was entitled to it, and the chapter 13 trustee was absolutely not entitled to it.

¹⁷⁶ 11 U.S.C. § 541(a)(3).

under section 541(a)(1).¹⁷⁷ In the end, it is rather impossible to assert that causes of action arising from non-bankruptcy law are "property," whereas causes of action arising under the Bankruptcy Code are *not* property. If *all* causes of action are property, then, at least prior to confirmation of a reorganization plan, they *all* fall under the jurisdiction of section 363(b),¹⁷⁸ and they are *all* transferred to the debtor upon confirmation of the plan.

Suppose we agree that a voidable preference cause of action is property of the estate from the moment the bankruptcy petition is filed. May a debtor bring this cause of action either before or after confirmation? A majority of courts say no, but none of these cases justifies this conclusion in the context of a theory of the chapter 13 estate.¹⁷⁹ Usually, these cases emphasize that the chapter 13 debtor has limited *powers* of a trustee, and lacks any *power* to bring avoidance actions. But, if *all* causes of action constitute the *use* of property of the estate, then the debtor is *directly* authorized to bring avoidance actions. That is because the debtor has the "rights and powers" of a trustee under section 363(b).¹⁸⁰

This simple point has completely eluded the courts. Most courts hold that the debtor can never bring avoidance causes of action. The minority of courts that grant standing to the debtor cite pragmatic grounds,¹⁸¹ overlooking a straightforward theory, available from a proper theory of the chapter 13 estate.

*Dawson v. Thomas (In re Dawson)*¹⁸² addresses these points. In *Dawson*, a chapter 13 debtor wished to bring a pre-petition cause of action, but he needed the aid of section 108(a) to do it. Section 108(a) tolls statutes of limitations for *trustees*. Wishing to assert a statute of limitations, the defendant argued that section 108(a) was not available to a chapter 13 debtor because the debtor is not a trustee. Nevertheless, Judge Martin Teel ruled that a debtor could use section 108(a) because debtors have "the rights and powers" of a trustee under section 363(b).¹⁸³ Since lawsuits are brought under section 363(b), the rights of the trustee included the right to a tolling under section 108(a). But, if avoidance actions are property of the estate, these too are brought under section 363(b). And, if the debtor has the trustee's power under section 108(a), then she likewise has the trustee's power under sections 547, 548, and the like.

¹⁷⁷ See Carlson, *Organizing Principle*, *supra* note 38, at 577.

¹⁷⁸ See *In re Cohen*, 305 B.R. 886, 891 (B.A.P. 9th Cir. 2004) (requiring court approval for trustee to assign avoidance action).

¹⁷⁹ See, e.g., *Knapper v. Bankers Trust Co. (In re Knapper)*, 407 F.3d 573, 583 (3d Cir. 2005) (rejecting chapter 13 debtor's ability to bring action under section 544(b)(1)); *Realty Portfolio, Inc. v. Hamilton (In re Hamilton)*, 125 F.3d 292, 296–97 (5th Cir. 1997) (chapter 13 debtors cannot use section 544 to exercise trustees' "strong-arm" avoidance powers).

¹⁸⁰ 11 U.S.C. § 1303 (2006).

¹⁸¹ See *In re Ryker*, 301 B.R. 156, 161 (D.N.J. 2003) ("The rationale for these cases appears to be a pragmatic one, based on the realities of the bankruptcy practice and the Chapter 13 trustee's lack of incentive to bring such actions.").

¹⁸² 411 B.R. 1 (Bankr. D.D.C. 2008).

¹⁸³ 11 U.S.C. § 1303.

Yet, inconsistently, Judge Teel endorses the notion that debtors have no standing to bring avoidance actions. According to Judge Teel,

The better reasoned decisions hold that, in contrast to the provisions authorizing a chapter 13 debtor to pursue causes of action that are property of the estate, none of the provisions of chapter 13 authorize a chapter 13 debtor to sue on a trustee's avoidance powers . . . Congress thought that it was inappropriate to permit chapter 13 debtors, who are principally consumer debtors, to be armed with avoidance powers, and decided that the avoidance powers should remain vested in the chapter 13 trustee. This explains why Congress elected not to follow the approach of chapter 12 of vesting the debtor with all the powers of a chapter 11 trustee until the debtor is displaced as a debtor in possession, and instead resorted to different statutory language for authorizing the debtor to invoke a trustee's power to sue on claims that are property of the estate. That explanation also lends support to viewing the chapter 13 debtor as suing as a trustee for the purposes of § 108(a) when the debtor invokes a trustee's powers under § 363 to sue on a cause of action that is property of the estate.¹⁸⁴

This view makes sense only if avoidance actions are somehow not property of the estate. If they *are* property of the estate, then the debtor may *use* them under section 363(b). Indeed, section 541(a)(3) only makes that which is recovered from avoidance actions property of the estate. But, how can it be that a cause of action—no matter what its source—is *not* property of the estate? If not, the automatic stay does not protect this cause of action. If it is, then this property is under control of the debtor in chapter 13 cases.

If causes of action created by the Bankruptcy Code are property of the estate, Judge Teel's distinction cannot hold. If a chapter 13 debtor has access to the *trustee's* power under section 108(a), then how could she *not* have access to the *trustee's* power to pursue a voidable preference of fraudulent conveyance?¹⁸⁵

A case that approaches the analysis I am advocating without quite reaching it is *Houston v. Eiler (In re Cohen)*.¹⁸⁶ In *Cohen*, the court properly notes that, if avoidance actions exist, this must be accounted for in the "best interest of the creditors" test. The court imagines a simple hypothetical whereby the bankruptcy estate has only one asset—the debtor has made a voidable \$100,000 transfer. The

¹⁸⁴ *In re Dawson*, 411 B.R. at 24–25.

¹⁸⁵ In any case, at least one court has held that the chapter 13 trustee can appoint the debtor to bring avoidance actions. *In re Ryker*, 315 B.R. 664, 665 (Bankr. D. N.J. 2004) ("[T]he Court finds that the debtor may request that the Chapter 13 trustee ratify, join or seek substitution as the plaintiff . . ."), *aff'd*, No. 06-1872, 2007 U.S. App. LEXIS 17993 (3d Cir. July 26, 2007).

¹⁸⁶ 305 B.R. 886 (B.A.P. 9th Cir. 2004).

debtor has but \$90,000 in disposable income over the applicable commitment period. "It would be an odd system that would require a chapter 13 debtor to depend upon the recovery of an avoidable transfer in order to have a confirmable plan but not permit the debtor to avoid the transfer,"¹⁸⁷ the court remarks. It then notes that section 1303 awards certain powers to the debtor (including the power to use assets per section 363(b)) and is merely silent as to the avoidance powers. From this it follows, apparently, that the trustee and the debtor have concurrent power to avoid conveyances.¹⁸⁸ In fact, if the court had simply noticed that *any* cause of action (including any avoidance actions) is estate property usable only pursuant to section 1303, it could have found that the debtor has *exclusive* control over avoidance litigation.

Does this mean that the debtor can pocket the proceeds of avoidance actions? Yes, indeed. In the *Cohen* court's hypothetical, some of the proceeds (\$10,000) go directly to the creditors. This amount is paid under the province of section 1322(b)(8), which permits a plan to "provide for the payment of all or part of a claim against the debtor from property of the estate or property of the debtor."¹⁸⁹ Beyond that, section 1325(b)(1) requires that all disposable income be paid into the plan. If the debtor has \$90,000 of disposable income, then this must be paid into the plan, and only \$10,000 of non-income assets are being paid into the plan. Ergo, the debtor is pocketing \$90,000 of the proceeds from the avoidance action.¹⁹⁰

Misunderstanding its own hypothetical, the *Cohen* court held otherwise. First, it ruled that section 1306(a) outranks section 1327(b)¹⁹¹—contrary to what we said here. Ergo, if the debtor recovers proceeds, they are property of the estate. On this view, the debtors could use them only with court permission pursuant to section 363(b). The court also implies that the creditors always have access to these proceeds.¹⁹² But this is not so, unless the proceeds are somehow disposable income. Yet the debtor should keep most of the proceeds because they were bought by the debtor with post-confirmation wages.

There is another aspect to the *Cohen* case that the court overlooked. The case involved the debtors' attempt to avoid an unperfected security interest in a payment intangible. The debtors were seeking to mount an adversary proceeding against the secured creditor, but, in truth, the adversary proceeding was not even necessary. The debtors owned the payment intangible free and clear from the mere fact that a chapter 13 plan was confirmed. This result is dictated by state law, to which

¹⁸⁷ *Id.* at 897.

¹⁸⁸ *See id.* at 894 (indicating "legislative history behind § 1303 explains that the list of exclusive powers 'does not imply that the debtor does not also possess other powers concurrently with the trustee'" (citing 124 CONG. REC. 32,409 (daily ed. Sept. 28, 1978))).

¹⁸⁹ 11 U.S.C. § 1322(b)(8) (2006).

¹⁹⁰ In *In re Cohen*, the proceeds were expressly committed to fund the plan. 305 B.R. at 898.

¹⁹¹ *Id.* at 898.

¹⁹² *See id.* ("The transferee, as the holder of an allowed unsecured claim, could even request modification of an existing confirmed plan to provide for payment of the recovery to creditors.").

bankruptcy law must comply.

To see why, let us leave the jurisdiction of the bankruptcy court and consider the basic relationship between a debtor, an unperfected secured creditor and a person who becomes a lien creditor while the security interest is unperfected. This consideration is important because a bankruptcy trustee is just such a lien creditor, both under the UCC¹⁹³ and under the Bankruptcy Code.¹⁹⁴

In *Cohen*, the debtors borrowed money from a secured creditor (call her *SP*) and granted *SP* a security interest in a tort cause of action. So the defendant in the tort case was what Article 9 calls an account debtor (and whom I will call *AD*). *SP* had an obligation to file a financing statement to perfect its security in this payment intangible, but it failed to do so.¹⁹⁵ Suppose now that one of the unsecured creditors of the debtor (call her *JC*) obtains a money judgment and that, pursuant to a writ of execution, the sheriff garnishes *AD*. Under Article 9, *JC* has become a lien creditor and is senior to *AD*.¹⁹⁶ *AD* must, therefore, pay *JC* in lieu of the plaintiff-debtor.

Now consider that *JC* is precisely the equivalent of the chapter 13 trustee. This means that *AD* must pay the bankruptcy estate in case it is liable for the tort. This right to payment from *AD* is transferred to the debtors by section 1327(b). So, without the need of any adversary proceeding, *AD* already had the obligation to pay the debtors in *Cohen*. This is because the strong-arm power is *self-executing*, both in and out of chapter 13. At least one court has recognized this expressly.¹⁹⁷

Some chapter 11 cases have addressed the effect of confirmation on avoidance actions. Section 1123(b)(3)(B) directly authorizes a plan that delegates to post-confirmation debtors the right to bring avoidance actions.¹⁹⁸ But courts sometimes hold that the chapter 11 plan must explicitly assign avoidance actions to the debtor:

We view § 1123(b)(3) as, at least in part, a notice provision. Creditors have the right to know of any potential causes of action that might enlarge the estate—and that could be used to increase payment to the creditors Compliance with § 1123(b)(3) gives notice of that intent.¹⁹⁹

¹⁹³ U.C.C. § 9-102(a)(52)(C) (2005) ("[L]ien creditor' means . . . a trustee in bankruptcy from the date of the filing of the petition.").

¹⁹⁴ See 11 U.S.C. § 544(a)(1) (2006) ("The trustee shall have, as of the commencement of the case, . . . the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by . . . a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists.").

¹⁹⁵ See *In re Cohen*, 305 B.R. at 904.

¹⁹⁶ See *Citibank, N.A. v. Prime Motor Inns Ltd. P'ship*, 780 N.E.2d 503, 504 (N.Y. 2002).

¹⁹⁷ See *In re Robertson*, 232 B.R. 846, 852–53 (Bank. D. Md. 1999).

¹⁹⁸ See 11 U.S.C. § 1123(b)(3)(B) (2006); *Fleet Nat'l Bank v. Gray* (*In re Bankvest Capital Corp.*), 375 F.3d 51, 59 (1st Cir. 2004); Official Comm. of Unsecured Creditors of *Cybergenics Corp. v. Chinery*, 330 F.3d 548, 579 (3d Cir. 2003).

¹⁹⁹ *Harstad v. First Am. Bank*, 39 F.3d 898, 903 (8th Cir. 1994).

Courts have also denied the debtor a right to sue because, according to section 550(a), avoidance actions can only be brought "for the benefit of the estate."²⁰⁰ If there is no estate after confirmation, then it supposedly follows that the debtor cannot recover *for herself*. This attempt to deny standing to the debtor does not work. It is fairly clear that a trustee need not proceed under section 550(a) in order to prosecute an avoidance action. Voidable preference actions can proceed under section 551 or can be free-standing. Congress itself has acknowledged this position.²⁰¹ If so, "benefit of the estate" must fall out of the equation.

In any case, if the trustee *sells* a cause of action to a third party for consideration, the estate benefits from the sales proceeds. Even though the buyer keeps the proceeds of the cause of action, the estate benefits by the buyer's action because, unless the buyer can take title to the avoidance action, there will be no market for such causes of action.

A chapter 13 debtor, in effect, buys all causes of action through the "best interest of the creditors" test. This test must include in the value of the estate the present value of all causes of action, including avoidance actions. Indeed, if these avoidance causes of action are *not* transferred to the debtor, they ought not to be included in the bankruptcy estate for the purposes of the "best interest of the creditors" test. Excluding these assets from the test lowers the minimum a debtor must pay to the detriment of creditors (and therefore, at some level, to the detriment of the bankruptcy estate).

Furthermore, if a debtor buys an avoidance action from the bankruptcy estate through the "best interest of the creditors" test, then creditors are entitled to capture any capital gain above and beyond the valuation attributed to the valuation. Suppose, for example, that the right to recover a fraudulent conveyance is valued at \$100. The debtor buys this cause of action with post-confirmation disposable income. Later, the debtor recovers \$150 at the cost of \$5. The debtor has enjoyed a capital gain of \$45, which the creditors may capture through plan modification.²⁰² To summarize, the theory of the chapter 13 estate espoused here supports the notion that, at least after confirmation, the debtor has standing to bring avoidance causes of action, as well as state-law causes of action that are part of the bankruptcy estate at the time of confirmation. Many courts have denied a chapter 13 debtor's standing to

²⁰⁰ *Id.*

²⁰¹ See 11 U.S.C. § 547(i) (2006). By way of background, the Seventh Circuit alarmed commercial lawyers by holding that any creditor with an insider guarantor was subject to the one-year voidable preference period to which insiders are subjected. In so ruling, the court, interpreted section 550(a). *Levit v. Ingersoll Rand Fin. Corp.*, 874 F.2d 1186, 1200–01 (7th Cir. 1989). In 1994, Congress amended section 550(a) in an attempt to save assured creditors from this one-year period. But, soon it was discovered that the same result could be generated from section 547 itself, without any reference to section 550(a). See Steve H. Nickles, *Deprizio Dead Yet? Birth, Wounding, and Another Attempt to Kill the Case*, 22 CARDOZO L. REV. 1251, 1255 (2001). BAPCPA added section 547(i) to kill off this idea once and for all. Ergo, Congress agrees that avoidance actions do not depend on section 550(a).

²⁰² Carlson, *Modification*, *supra* note 83, at Pt. III.

bring avoidance actions, but if it is admitted that the debtor has standing to bring *any* cause of action after confirmation of a plan, it must also be admitted that the debtor has standing to bring causes of action created by the Bankruptcy Code. It may seem odd that a debtor can avoid a fraudulent conveyance she herself made,²⁰³ but, under chapter 13 theory, she has bought this privilege by paying all disposable income in exchange for ownership of the chapter 13 estate.

VIII. EXEMPTIONS

Exempt property is an important consideration in a chapter 13 case but only indirectly. Exemptions must be considered in the "best interest of the creditors" test,²⁰⁴ where a hypothetical liquidation dividend must be generated in order to set a minimum plan payment.²⁰⁵ This involves reducing the hypothetically liquidated estate by the value of exempt property.

Many conclude that, beyond this indirect consideration, exemptions are superfluous. The meaning of an exemption is that the exempt item is expelled from the bankruptcy estate in favor of the debtor.²⁰⁶ If confirmation of a plan means that all property of the estate is transferred to the debtor, then it may seem that exemptions are superfluous. Except for the wages paid by the debtor to the chapter 13 trustee,²⁰⁷ "there [is] no estate from which the property could be exempted."²⁰⁸ What's the sense in *exempting* things from property of the estate when the debtor already owns these things, thanks to confirmation of the plan?²⁰⁹ Indeed, one appellate panel has ruled that, after confirmation, a bankruptcy court has no jurisdiction to rule on an objection to a claimed exemption.²¹⁰

In fact, exempt property is relevant to a chapter 13 debtor, even beyond the indirect impact on the "best interest of the creditors" test. The act of expulsion is not all that the bankruptcy exemptions mean. Section 522(c) is a substantive rule

²⁰³ This phenomenon has long been an acknowledged irony in chapter 11 cases. See *Belisle v. Plunkett*, 877 F.2d 512, 516 (7th Cir. 1989) (avoiding constructive trust in real property where debtor was wrongdoer).

²⁰⁴ See *Armstrong v. Lindberg (In re Lindberg)*, 735 F.2d 1087, 1089 (8th Cir. 1984); see also *In re Campbell*, 313 B.R. 313, 321 (B.A.P. 10th Cir. 2004); *In re Walker*, 153 B.R. 565, 569 n.2 (Bankr. D. Or. 1993); James B. McLaughlin, Jr., *Lien Avoidance by Debtors in Chapter 13 of the Bankruptcy Reform Act of 1978*, 58 AM. BANKR. L.J. 45, 53 (1984).

²⁰⁵ Exemptions in this environment have been called "academic exemptions," in contrast with *real* exemptions, where property is expelled from the bankruptcy estate. *In re Brown*, 178 B.R. 722, 726 (Bankr. E.D. Tenn. 1995).

²⁰⁶ See *Owen v. Owen*, 500 U.S. 305, 308 (1990) ("An exemption is an interest withdrawn from the estate (and hence from the creditors) for the benefit of the debtor.").

²⁰⁷ See *In re Thompson*, 142 B.R. 961, 964 (Bankr. D. Colo. 1992) (observing debtors "provide . . . only so much of their earnings" to trustee as is necessary to execute confirmation plan).

²⁰⁸ *Lindberg v. Lindberg (In re Lindberg)*, 735 F.2d 1087, 1089 (8th Cir. 1984); see also *In re Stinson*, 27 B.R. 18, 20 (Bankr. D. Or. 1982); 5 COLLIER ON BANKRUPTCY, ¶ 1300, at 1300-81 (Alan N. Resnick et al. eds., 15th ed. rev. 2006).

²⁰⁹ See *In re Brown*, 375 B.R. 362, 376 (Bankr. W.D. Mich. 2007); *In re Walker*, 153 B.R. at 569.

²¹⁰ *In re Campbell*, 313 B.R. 313, 316 (B.A.P. 10th Cir. 2004).

governing the exempt items following expulsion.

According to section 522(c), exempt property is "not liable during or after the case for any debt of the debtor that arose . . . before the commencement of the case."²¹¹ Thus, even if a debtor is denied a discharge, the debtor may still retain the exempt property from pre-petition creditors. Often this does not matter. Where property is exempt under nonbankruptcy law, pre-petition creditors are stymied regardless of section 522(c). But, the Bankruptcy Code provides federal exemptions, which may not prove homeomorphic to nonbankruptcy exemptions. Also, states have occasionally created exemptions that are valid in bankruptcy, but nowhere else.²¹² Section 522(c) protects exemptions, which are unique to bankruptcy, but otherwise would be vulnerable to the sheriff under state law.

A key exception in section 522(c) is that, if the property is encumbered by a pre-petition lien, the property remains encumbered by that lien once the exempt item is expelled from the bankruptcy estate.²¹³ But, where that lien is a judicial lien or a nonpossessory, nonpurchase-money security interest on certain designated property,²¹⁴ section 522(f) provides an opportunity for the debtor to avoid the lien to the extent it impairs the exemption. Unless these liens are avoided, the debtor is compelled to give cram down rights to the creditors.²¹⁵

On the other hand, suppose the bankruptcy estate does not end at confirmation. In other words, suppose section 1306(a) outranks section 1327(b). In that case, exemption (in the expulsion sense) is entirely relevant in chapter 13. This was implicitly the position taken recently by the Seventh Circuit in *In re Willett*,²¹⁶ where a debtor sought to avoid a judicial lien in the post-confirmation period.

The *Willett* cases added a complex wrinkle. At the time the debtors filed for bankruptcy, the debtor had only a remainder interest in their residence. The life estate was held by the mother of one of the debtors. Technically, at the time of bankruptcy, the debtors were merely licensees in their residence with no other right

²¹¹ 11 U.S.C. § 522(c)(1) (2006).

²¹² See, e.g., N.Y. DEBT. & CRED. LAW § 282(2) (2006). For details on this provision, see, David Gray Carlson, *Critique of Money Judgment (Part Two: Liens on New York Personal Property)*, 83 ST. JOHN'S L. REV. 43, 218–20 (2009). Some courts view "bankruptcy only" exemptions as unconstitutional. See *infra* text accompanying note 233 for further discussion on unconstitutionality of exemptions.

²¹³ An exception is also made for nondischargeable tax and domestic claims. See 11 U.S.C. § 522(c)(1) (2006).

²¹⁴ See 11 U.S.C. § 522(f)(1). On these avoidable security interests, see generally David Gray Carlson, *Security Interests on Exempt Property After the 1994 Amendments to the Bankruptcy Code*, 4 AM. BANKR. INST. L. REV. 57 (1996) [hereinafter Carlson, *Security Interests on Exempt Property*].

²¹⁵ See LUNDIN, *supra* note 10, at § 50.1; McLaughlin, *supra* note 204, at 64–67. On this basis, at least one court of appeals has ruled that the chapter 13 trustee has standing to object to a proof of a secured claim to the extent the lien in question violates section 522(f). See *Tower Loan of Miss., Inc. v. Maddox (In re Maddox)*, 15 F.3d 1347, 1355–56 (5th Cir. 1994). Read straight up, section 522(f) grants the avoidance power only to the debtor. See 11 U.S.C. § 522(f)(1) (2006) ("Notwithstanding any waiver of exemptions but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property . . .").

²¹⁶ 544 F.3d 787 (7th Cir. 2008).

of possession while their mother lived. Beyond this license (revocable at the will of the mother-in-law), the debtors owned a mere future interest.²¹⁷ Only the future interest was encumbered by a judicial lien.

After bankruptcy, the mother conveyed her life estate to the debtors, so that they had fee simple absolute. The debtors then sought to avoid a judicial lien based on the value of the remainder interest as of the time of the bankruptcy petition. On appeal, however, the court ruled that the debtors must use the fee simple interest to calculate the amount of lien avoidance.

This strikes me as wrong. The judicial lien in question encumbers the remainder interest only. The life estate is post-petition property that belongs to the debtors alone. To this the judicial lien could never attach. It is a violation of the automatic stay for a lien to be created against property of the debtor.²¹⁸ Furthermore, if a discharge is appropriate, the pre-petition judgment is void under section 524(a), thereby, preventing any future lien arising from that judgment from ever attaching.

If I have this right, then the life estate is not encumbered by the judicial lien, but the remainder interest (nested within the bankruptcy estate) is. Now, as is true in most states, Indiana's homestead exemption has a monetary limit.²¹⁹ It seems to me, that the exemption may be used to protect the much less valuable remainder interest, which therefore must be valued separately. If, after avoidance, some amount of lien survives, the post-petition lien enables the creditor to sell only the remainder. The debtors' life estate *pur autre vie* is not exempt property, but after discharge, the life estate is off limits to the pre-petition creditors with dischargeable claims.²²⁰

According to the valuations used by the lower courts in *Willett*, the remainder interest of the debtors at the time of the chapter 13 petition was \$65,000. The value of the fee simple absolute at the time of the life estate was conveyed to the debtors was \$95,000. The lower courts assumed that only the remainder was relevant, and that it should be valued as of the time of the bankruptcy petition. This roughly coheres with the DT. According to section 522(a)(2), value "means fair market value as of the date of the filing of the petition or, with respect to property that becomes property of the estate after such date, as of the date such property becomes

²¹⁷ *Id.* at 789. Indiana Code section 34-55-10-2 exempts real estate "constituting the personal or family residence of the debtor or a dependent of the debtor, or estates or rights in that real estate . . . of not more than [\$15,000]." IND. CODE § 34-55-10-2(c)(1) (2008).

²¹⁸ See 11 U.S.C. § 362(a)(5) (2006). One difficulty: with regard to the after-acquired property effect of a judicial lien, what "act" has the creditor committed that violates this provision? Perhaps the debtors' receipt of the life estate (which automatically results in the judicial lien) is an "act" within the meaning of section 362(a)(4). See 11 U.S.C. § 362(a)(4) (referring to "any act to create, perfect, or enforce any lien against property of the estate").

²¹⁹ See *In re Willett*, 544 F.3d at 790 (noting at time of Willetts' bankruptcy, Indiana exemption for married couple was \$15,000).

²²⁰ It is, however, a gift and, therefore, post-confirmation disposable income, which the creditors may capture in a plan modification. See Carlson, *Modification*, *supra* note 83, at Pt. III(B).

property of the estate."²²¹ One would have thought that valuation as of the time of lien avoidance is the better choice, but that is not what section 522(a)(2) provides.

On appeal, the court held that the life estate, granted post-petition, must be joined with the remainder to compose a fee simple absolute estate. Accordingly, the \$95,000 value (assessed at a time later than the bankruptcy petition) had to be used for calculating the avoidance amount. This conclusion can only be true if confirmation of the plan does not terminate the bankruptcy estate. In such a case, the bankruptcy estate includes *both* the pre-petition remainder interest *and* the post-petition life estate.

In fact, even on the erroneous theory of the chapter 13 estate, the value should have been less than \$95,000. Part of the property was the remainder. As to the remainder, the timing rule of section 522(a)(2) points to the time of the petition. At that time, the remainder's value not only had to be valued in a softer real estate market, but the remainder's value was depressed because the life estate was (at that time) comparatively longer. Two years later, the life estate was less valuable because the life of the mother was shorter. Therefore, even though the life estate and the remainder joined together to create a fee simple absolute estate, the applicable value is based on the separate parts—a less valuable remainder and a less valuable life estate. (This, of course, assumes that the judicial lien actually attaches to the life estate, which of course is wrong.)

Although the *Willett* court did not expressly articulate a theory of the chapter 13 estate, the result reached can only be comprehended if section 1306(a) outranks section 1327(b). *Willett* therefore *sub silentio* overrules earlier cases such as *Black v. United States Postal Service (In re Heath)*,²²² which correctly theorized the nature of the chapter 13 estate.

IX. GARNISHING THE DEBTOR

The theory of the chapter 13 estate has been invoked when one of the creditors provided for under the plan is herself a debtor (not in bankruptcy) and a creditor of that creditor seeks to garnish the debtor or the chapter 13 trustee of the bankrupt debtor.

In *In re Root*,²²³ the debtor's lawyer owed taxes. The IRS, therefore, levied the debtor (who ironically was an employee of the IRS). Not afraid to bite the hand that feeds him, the debtor sought sanctions against the IRS for violating the automatic stay. The court denied the debtor's motion, but only after theorizing the chapter 13 estate. According to the court, there *must* be a chapter 13 estate after confirmation.

If there is no estate over which the Chapter 13 Trustee has control,

²²¹ 11 U.S.C. § 522(a)(2) (2006).

²²² 115 F.3d 521 (7th Cir. 1997).

²²³ 61 B.R. 984 (Bankr. D. Colo. 1986).

then that Trustee is nothing more than an officious intermeddler. Even 11 U.S.C. § 704(9) (made applicable to Chapter 13 Trustees by 11 U.S.C. § 1302(b)(1)), provides that the Trustee shall " . . . make a final report and file a final account of the administration of the *estate* [emphasis added] with the court." There must be an "estate" upon and after confirmation, and that estate consists of the property and future earnings of the debtor dedicated to fulfillment of the Chapter 13 Plan.²²⁴

This much-quoted comment is unnecessary to the result. Under the plan, the debtor does not owe the legal fee directly to his lawyer. Rather, the debtor owes the chapter 13 trustee, who in turn owes the debtor's lawyer. The proper garnishee in this case is the chapter 13 trustee. Nevertheless, the court's remark is off the mark. Yes, there is a bankruptcy estate—what the debtor successfully transmits to the chapter 13 trustee. As to these funds, the trustee can write a report at the end of the case.²²⁵ The requirement of reportage does not entail the view that the debtor's wages are property of the chapter 13 estate after confirmation. Only wages successfully conveyed to the chapter 13 trustee are property of the estate. The IRS should have garnished the chapter 13 trustee, not the debtor.

In *Laughlin v. U.S. Internal Revenue Service*,²²⁶ the IRS levied a chapter 13 trustee for taxes owed by a bankruptcy attorney. The trustee owed the attorney distributions from three different cases. Properly, the IRS was held not guilty of violating the automatic stay. The levy neither affected the debtor, nor interfered with the debtor's payment of wages to the trustee in any way. It simply diverted the funds from the taxpayer to the IRS, as IRS levies are supposed to do.²²⁷ This case correctly theorizes garnishing the bankruptcy estate.

X. THE BANKRUPTCY ESTATE IN CASES CONVERTED TO CHAPTER 7

A. Conversion as a Transfer of Debtor Property

A final consideration is the fate of the chapter 13 estate in a conversion to chapter 7. According to Bankruptcy Code section 348(f)(1):

²²⁴ *Id.* at 985; see *In re Leavell*, 190 B.R. 536, 539–40 (Bankr. E.D. Va. 1995) (discussing multiple reasons why estate continues to exist upon confirmation of chapter 13 plan).

²²⁵ *West Va. State Tax Dep't v. Mullins (In re Mullins)*, No. 2:00-6571. 2009 U.S. Dist. Lexis 90691, at *17 (S.D.W. Va. Sept. 30, 2009).

²²⁶ 912 F.2d 197 (8th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991).

²²⁷ For a view that the IRS violated the stay in *Laughlin*, see Michaela M. White, *The Effects of Chapter 13 Plan Confirmation and Case Conversion on Property*, 26 CREIGHTON L. REV. 785, 807 (1993). Such a view is untenable. The IRS levy is in no way inconsistent with the plan. If the plan calls for the attorney to be paid and if the IRS garnishes this amount because the attorney has not paid taxes, the attorney's claim is extinguished, just as the plan calls for. See 26 U.S.C. § 6332(e) (2006).

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 the 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 conversion²²⁸

Under the DT, confirmation of a chapter 13 plan transfers the bankruptcy estate to the debtor. A good faith conversion to chapter 7²²⁹ is a new transfer of *debtor* property to the chapter 7 trustee. But not all debtor property is transferred. Pursuant to section 348(f)(1)(A), the debtor transfers only property that historically was property of the estate on the day of the bankruptcy petition. Any property the debtor may have conveyed away prior to the conversion is *not* property of the estate.

What of property the chapter 13 trustee possesses? This is genuinely property of the estate after confirmation of the chapter 13 plan. According to section 1326(a), a debtor must commence payments to the trustee even before a plan is confirmed. If a plan is not confirmed, the trustee is instructed to return the funds to the debtor,²³⁰ after deducting administrative claims on the estate.²³¹ If a plan is confirmed, the trustee is instructed to distribute the funds to the creditors pursuant to the plan. The one thing the chapter 13 trustee must not do is to give these funds to the chapter 7 trustee.²³²

A startling interpretation of section 348(f)(1) is *In re Brown*.²³³ In this case, a chapter 13 debtor listed his house as exempt under Michigan's bankruptcy-only

²²⁸ 11 U.S.C. § 348(f)(1) (emphasis added).

²²⁹ On bad faith debtors, see *infra* text accompanying notes 265–97.

²³⁰ See *Stamm v. Morton (In re Stamm)*, 222 F.3d 216, 218 (5th Cir. 2000) (“[D]ebtor’s wages, earned after the filing of their Chapter 13 petition and before discharge under Chapter 7, are not part of the Chapter 7 estate.”); see also *In re Crews*, No. 06-10338, 2007 Bankr. LEXIS 2277, at *8 (Bankr. S.D. Ala. June 26, 2007) (“[T]he legislative history of Section 348(f)(1)(A) expresses congressional intent that property acquired after commencement of a chapter 13 case but prior to conversion to a chapter 7 does not constitute property of the estate.”). A contrary case is *Resendez v. Lindquist*, 691 F.2d 397 (8th Cir. 1982). This case, however, precedes the 1994 enactment of section 348(f)(1) and, therefore, must be considered overruled. In *Resendez*, the chapter 7 trustee had possession of the funds in question already. The debtor then attempted to claim that these funds were exempt. The court ruled that, since the debtor voluntarily paid the wages to the chapter 13 trustee, the debtor forfeited any exemption in the property that the chapter 7 trustee had recovered. See 11 U.S.C. § 522(g)(1)(A) (2006) (indicating debtor may exempt transferred property if such transfer was not voluntary).

²³¹ See 11 U.S.C. § 1326(c) (2006). This would include claims by the debtor’s attorney. Section 503(b)(2) defines as an administrative claim “compensation and reimbursement awarded under section 330(a) of this title.” 11 U.S.C. § 503(b)(2). Section 330(a)(4)(B) directly mentions the debtor’s attorney in chapter 13 cases. See 11 U.S.C. § 330(a)(4)(B) (2006).

²³² See *In re Pegues*, 266 B.R. 328, 332 (Bankr. D. Md. 2001).

²³³ 375 B.R. 362 (Bankr. W.D. Mich. 2007).

exemption. Judge Jeffrey Hughes had recently declared such exemptions to be unconstitutional.²³⁴ Nevertheless, the chapter 13 trustee did not object to the exemption. A plan was confirmed and later went into default. The case was converted to chapter 7. The chapter 7 trustee wished to challenge the exemption. The debtor claimed that, under Rule 4003(b), the trustee had to challenge an exemption "within 30 days after the meeting of creditors held under § 341(a) is concluded"²³⁵ More than 30 days had allegedly passed since the chapter 13 creditors' meeting was closed, according to the debtor.²³⁶ The trustee, in turn, argued that, since a *second* creditors' meeting must be called in the converted chapter 7 case, the trustee had 30 days after *that* meeting to challenge the exemption.

In a learned opinion, Judge Hughes opined that the trustee had a second chance, but in the end, he ruled that, even though the house could not be exempted, the debtor could keep the house nevertheless.

Why? Because section 348(f)(1)(A) brings only *property of the estate* at the time of the conversion into chapter 7. The house *ceased* to be property of the estate when the plan was converted. Therefore, section 348(f)(1) did not apply. In short, Judge Hughes thought that, in converted chapter 7 cases, one does not ask whether the *debtor's* property was historically property of the estate at the time of the bankruptcy petition. Rather, one asks whether, at the time of conversion, the property was indeed *the debtor's property*. If the answer is yes, the chapter 7 trustee cannot have it.²³⁷

So, in *Brown*, the debtor was able to keep his house, even though it was not exempt. But, Judge Hughes cautioned:

[T]he bad news for Debtor is that the . . . residence is not entitled to the protection afforded by Section 522(c) because the residence was not "exempted" from the bankruptcy estate by operation of Section

²³⁴ See *In re Wallace*, 347 B.R. 626, 635 (Bankr. W.D. Mich. 2006).

²³⁵ *In re Brown*, 375 B.R. 362, 366 (Bankr. W.D. Mich. 2006).

²³⁶ The record was unclear whether the chapter 13 creditors' meeting was ever closed. *Id.* at 365–66.

²³⁷ *Id.* at 374 n.22 ("While a subsequent Chapter 7 trustee would in theory have a second opportunity to object to the exemptions the debtor had previously claimed were the case later converted to a Chapter 7, the Chapter 7 trustee would not be able to actually take advantage of that opportunity because of the debtor's already successful exemption of that interest prior to the case being converted."). Judge Hughes compares the debtor's property to the law of gravity:

Think of property status as being like gravity and Rule 4003(b) as being a road sign. Both a road sign and Rule 4003(b) give direction. However, as helpful as a road sign may be, the traveler must still give heed to the inconvenience of gravity, especially when the road sign leads to the edge of a cliff. The same deference must be given to the status of property vis-a-vis the bankruptcy estate when seeking guidance from Rule 4003(b).

Id. at 375. I take this difficult metaphor to mean that just because Rule 4003(b) points in the direction towards recovery does not prove there will be a recovery because recovery violates natural law (the law of gravity).

522(l), but was rather simply removed at a later date through the confirmation process.²³⁸

Section 522(c) states that exempted property is off limits to pre-petition creditors. But, *pace* Judge Hughes, loss of section 522(c) is of no consequence whatsoever, in the typical case. The automatic stay prevents any pre-petition creditor from "any act to create . . . against property of the debtor any lien" ²³⁹ As for post-petition creditors, section 348(d) provides that their claims "shall be treated for all purposes as if such claim had arisen immediately before the date of the filing of the petition."²⁴⁰ Section 348(d) means that post-petition creditors are subject to the automatic stay (just like the pre-petition creditors) and are subject to discharge in the chapter 7 case.²⁴¹

Ironically, if the debtor had stayed in chapter 13, the post-petition creditors would not have been subject to the automatic stay and therefore, would have access to the house. Or, if the debtor had started in chapter 7 and if the house *had* been exempt, the post-petition creditors would have had access to the house, since section 522(c) does not apply to post-petition creditors. Or, since the house was not exempt, if the debtor had started in chapter 7, the pre-petition creditors would have obtained the house to the exclusion of the post-petition creditors, through the bankruptcy liquidation process. But because he started in chapter 13 and then ended up in chapter 7, the debtor kept the house from both the pre-petition *and* the post-petition debtors.²⁴²

Judge Hughes imagines that the case would be different if the plan itself provided that property of the estate would not revert in the debtor, in spite of

²³⁸ *Id.* at 382.

²³⁹ 11 U.S.C. § 362(a)(5) (2006). The automatic stay also applies to prevent "any act to collect a claim against the debtor that arose before the commencement of the case" 11 U.S.C. § 362 (a)(5).

²⁴⁰ 11 U.S.C. § 348(d) (2006).

²⁴¹ Judge Hughes seemed to think that section 522(c) empowers pre-petition creditors to obtain the house:

[T]he debtor's failure . . . to exempt . . . in his prior Chapter 13, coupled with his successful removal of . . . [the exempt property] through the subsequent confirmation of his Chapter 13 plan, would have left . . . [the exempt property] "liable . . . for any debt . . . that arose . . . before the commencement of the case." 11 U.S.C. § 522(c). Indeed, this would be so even though the debtor himself would be protected from those same pre-petition debts through the separate Section 524(a)(2) injunction issued post-conversion in conjunction with his Chapter 7 discharge.

In re Brown, 375 B.R. at 377. This does not follow. Section 522(c) does not create an enforcement right. Rather, a pre-petition creditor would have to obtain a money judgment. This is precisely what the discharge injunction in section 524(a)(2) prevents. Also, pre-petition judgments are dissolved. *See* 11 U.S.C. § 524(a)(1) (2006). The injunction prevents the pre-petition creditor from starting over.

²⁴² A further paradox: Judge Hughes in *In re Brown*, 375 B.R. at 380 n.28, adopts the after-acquired property theory I have criticized. *See supra* text accompanying notes 92–96. Therefore, if the debtor had moved into the house after confirmation, then the house goes into the converted chapter 7 estate, where both the pre-petition and post-petition creditors could get it.

section 1327(b). Indeed, section 1322(b)(9) invites (but does not require) "vesting of property of the estate, on confirmation of the plan or at a later time, in the debtor or in any other entity."²⁴³ And, we have seen, dubiously, the courts have forced anti-vesting language on a debtor in a confirmation order, even though the debtor is supposed to be the author of the plan. If such a plan term had existed, then, if the house was listed as exempt on the debtor's Schedule C, the house would have been exempted from the chapter 13 estate. And, as the chapter 13 trustee did not object to the exemption by the Rule 4003 deadline, the house would have been beyond the reach of the chapter 7 estate. Although Judge Hughes thought the chapter 7 trustee had a second shot at objecting to the exemption, it would have been to no avail.²⁴⁴ Once it is out of the estate, whether by exemption or confirmation, the house does not come back to the chapter 7 estate, because section 348(f)(1) applies only to "property of the estate" as it exists as of the time of the conversion.²⁴⁵

This is at least the result where the debtor claims that the entire house is exempt—what Judge Hughes calls an "in-kind exemption."²⁴⁶ The debtor, in *Brown*, however, modestly claimed a mere monetary exemption in the house. In that case, the house is part in and part out of the chapter 7 estate. If we view the trustee as a lien creditor on the house,²⁴⁷ then the trustee could sell the house and retain the surplus over valid liens and over the monetary exemption.²⁴⁸

But, wasn't Judge Hughes of the opinion that the chapter 7 trustee had a second shot under Rule 4003 to object to an exemption? It turns out that, given Judge Hughes's theory of the chapter 13 estate and of section 348(f)(1), the trustee's second shot at an objection always fails. Either confirmation of the chapter 13 case destroys the chapter 7 trustee's case or, if, 30 days after the chapter 13 creditors' meeting is closed, the chapter 13 trustee never objected to the exemption, the property is expelled from the estate and never comes back. In either case, Judge Hughes might as well have said that the trustee's second chance doesn't exist.

²⁴³ 11 U.S.C. § 1322(b)(9) (2006).

²⁴⁴ See *In re Brown*, 375 B.R. at 382 ("Therefore, it makes no difference that the Chapter 7 trustee now has a renewed opportunity to object . . .").

²⁴⁵ And, of course, even some of this property (if any) is expelled from the chapter 7 estate because section 348(f)(1) exonerates any property the debtor acquired after the bankruptcy petition was filed. 11 U.S.C. § 348(f)(1) (2006).

²⁴⁶ *In re Brown*, 375 B.R. at 382 n.30.

²⁴⁷ 11 U.S.C. § 544(a)(1) (2006).

²⁴⁸ By the way, where in the Bankruptcy Code does it say that, in the case of a monetary exemption, if the trustee sells the property, the debtor gets the monetary equivalent of the exemption? Once the exempt property is liquidated, the trustee holds cash. But, *cash* is not necessarily exempt. Where state-law exemptions are used, one would have to find a "proceeds" theory within state law itself. See *In re Williams*, 337 B.R. 846, 853 (Bankr. E.D. Va. 2005) (tracing permitted under liberal interpretation of Virginia law). Such principles can be elusive. See also Carlson, *Security Interests on Exempt Property*, *supra* note 214, at 218–20 (discussing New York law). Nevertheless, courts assume without analysis that debtors are always entitled to cash proceeds where an exempt item is sold by the trustee. See, e.g., *In re Brown*, 375 B.R. at 372 (remarking exempt car's sale proceeds goes to debtor).

In a different *In re Brown*,²⁴⁹ Judge John Cook more directly denied the chapter 7 "burial" trustee a second chance to object to an exemption. He reasoned that exemptions meant *expelling* property from the bankruptcy estate. *Objecting* to an expulsion after it has occurred is useless. At this point, the trustee needs an avoidance theory, which the Bankruptcy Code fails to give.²⁵⁰ Ergo, if exemption is achieved under another chapter (here, chapter 11), it is too late in the converted chapter 7 case for the trustee to prevent what has already occurred.

This view of exemptions is quite unnecessary. A signed and delivered deed to Blackacre expels Blackacre from the owner's estate. But if the deed was procured by fraud or was executed without capacity, then the deed produces only a voidable title. The transferee holds legal title in trust for the transferor. Likewise, if an exemption is procured by fraud or without capacity, the exempt property is held in trust for the bankruptcy trustee. True, the *objection* procedure is irrelevant to a constructive trust theory, but the trustee can simply bring a turnover order to recover the legal title.²⁵¹

In *Taylor v. Freeland & Kronz*,²⁵² a debtor listed an obviously non-exempt asset in a straight chapter 7 case. The trustee did not object because the asset did not seem valuable. Later, it proved to be valuable. The trustee argued that he could *recover* the asset's proceeds because "the debtor did not have a good-faith or reasonably disputable basis for claiming it."²⁵³ The court responded to this argument by emphasizing that deadlines are deadlines and the trustee was too late. The court also refused to consider any argument based on the notorious section 105(a),²⁵⁴ because the meaning of this provision was not raised by the trustee in the lower courts. (The Supreme Court—our court of lazy resort—declines to investigate alternative grounds to uphold the decision of the lower court.) Therefore, it is an easy matter, in a case where section 105(a) may be considered, to hold that a debtor holds the wrongly exempted property in trust pending its recovery by the bankruptcy trustee.²⁵⁵

²⁴⁹ 178 B.R. 722, 724 (Bankr. E.D. Tenn. 1995).

²⁵⁰ See *In re Halbert*, 146 B.R. 185, 189 (Bankr. W.D. Tex. 1992) ("If the property has already been removed from the estate at some distant point in the past, a current objection in the Chapter 7 would not appear to be a proceeding which would 'recover' the property.").

²⁵¹ 11 U.S.C. § 542(a) (2006) (mandating property or its value be turned over to trustee).

²⁵² 503 U.S. 638 (1992).

²⁵³ *Id.* at 639.

²⁵⁴ According to 11 U.S.C. § 105(a):

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

²⁵⁵ See *Barroso-Herrans v. Lugo-Mender (In re Barroso-Herrans)*, 524 F.3d 341, 344 (1st Cir. 2008); *Nardei v. Maughan (In re Maughan)*, 340 F.3d 337, 341–42, 344 (6th Cir. 2003); *In re Williams*, 337 B.R.

In any event, the nature of a converted case has to be that conversion constitutes a transfer of all the debtor's property to the chapter 7 "burial" trustee. Therefore, to the extent the debtor still possesses the exempted item, it is transferred back to the chapter 7 trustee, and the debtor will have to claim the exempted item all over again. At that time, the trustee can object to the exemption effectively, if she has good grounds.²⁵⁶

B. Proceeds

Section 348(f)(1) prevents property acquired by a debtor after a bankruptcy petition from entering the chapter 7 estate. This is a rare moment where a congressional amendment of the Bankruptcy Code has benefited consumer debtors.²⁵⁷ If it were not for section 348(f)(1), then *all* of a debtor's property would enter the chapter 7 estate. The exemption procedure would have to be invoked all over again.

What does go into the converted chapter 7 estate is *debtor* property that the debtor still possesses and that was property of the estate historically at the time of the bankruptcy petition.

If this principle is taken seriously, then *proceeds* of what historically was property of the estate do not go to the chapter 7 trustee. Although it is easy to forget, proceeds are, strictly speaking, after-acquired property. For this reason, when section 552(a) strikes down after-acquired property clauses in pre-petition security agreements, section 552(b) saves proceeds from the effects of this invalidation. This was done precisely because proceeds are always after-acquired property.

Article 9 scholars sometimes forget this point. According to old section 9-

846, 850 (Bankr. E.D. Va. 2005).

²⁵⁶ Judge Cook, in *In re Brown*, 178 B.R. 722 (Bankr. E.D. Tenn. 1995), denies this theory of the converted case. He asserts that, in a case converted from chapter 11, where section 348(f)(1) does not apply, none of the debtor's assets is transferred to the converted bankruptcy estate. *See id.* at 727-28. For this proposition, he cites *Still v. Rossville Bank (In re Chattanooga Wholesale Antiques, Inc.)*, 930 F.2d 458 (6th Cir. 1991). *Chattanooga*, however, concerned whether post-confirmation payments actually made could be recovered in the converted chapter 7 case. The answer was, properly, no. *See id.* at 461-62, 465. The case says nothing about the fate of debtor property *not* transferred to third parties. Judge Cook's principle guarantees that in chapter 11 and chapter 12 conversions, the burial trustee never gets any assets at all.

²⁵⁷ Section 348(f)(1) was designed to legislate the result in *Bobroff v. Cont'l Bank (In re Bobroff)*, 766 F.2d 797 (3d Cir. 1985). In this case, a post-petition tort claim owned by the debtor was held not part of the converted chapter 7 estate:

If debtors must take the risk that property acquired during the course of an attempt at repayment will have to be liquidated for the benefit of creditors if chapter 13 proves unavailing . . . no reason of policy suggests itself why the creditors should not be put back in precisely the same position as they would have been had the debtor never sought to repay his debts

Id. at 803 (internal quotations and citation omitted).

306(2), a security interest "continues in[to]"²⁵⁸ proceeds. This led some to suppose that the original collateral and the proceeds are the same thing. This is what continuity implies. But, even the briefest consideration reveals that, where the original collateral is a diamond ring and the proceeds are cash, the ring and the cash are two different things, not the same thing.²⁵⁹ The ring and the cash have different time-space coordinates and chemical components, the surest hallmarks of difference in the transient half-world of phenomena.²⁶⁰

Suppose a chapter 13 debtor possesses a pre-petition cause of action. A plan is confirmed, so that, the debtor is the sole owner of it. Now suppose the debtor collects in cash. For ease of illustration, suppose the debtor keeps the cash under his mattress in distrust of the American banking system. Later, the chapter 13 plan goes into default, and the case is converted to chapter 7. Under section 348(f)(1), the cash does *not* belong to the chapter 7 trustee. In *Bogdanov v. Laflamme (In re Laflamme)*,²⁶¹ the court held otherwise. In *Laflamme*, the debtor had earned commissions prior to bankruptcy and received them after bankruptcy. No plan was ever confirmed, and the case converted to chapter 7. The chapter 7 trustee sued the debtor for the proceeds of her pre-petition work.

The *Laflamme* court held for the trustee. It reasoned that proceeds were property of the estate under section 541(a)(6), which provides that the bankruptcy estate in any chapter includes "[p]roceeds . . . except such as are earnings from serviced performed by an individual debtor after the commencement of the case."²⁶² Since these commissions were earned before the commencement of the case, the proceeds were part of the bankruptcy estate under section 541(a)(6). But, so what? These proceeds, admittedly covered by section 541(a)(6), were not "property of the estate, *as of the date of filing of the petition*, that remains in the possession of . . . the debtor on the date of conversion."²⁶³ As of the date of the petition, property of the estate was the obligation of the employer to pay. After the petition, the property was cash. The cash did *not* exist as estate property, historically, at the time of the bankruptcy petition.²⁶⁴ So, it should not have been property of the estate in chapter 7.²⁶⁵

²⁵⁸ U.C.C. § 9-306(2) (2005).

²⁵⁹ See Raymond T. Nimmer, *Security Interests in Bankruptcy: An Overview of Section 547 of the Code*, 17 HOUS. L. REV. 289, 325–26 (1980).

²⁶⁰ New Article 9 has better metaphysics. According to new section 9-315(a)(2), a security interest does not continue into, but attaches to, proceeds. See U.C.C. § 9-315.

²⁶¹ 397 B.R. 194 (Bankr. D.N.H. 2008).

²⁶² 11 U.S.C. § 541(a)(6) (2006).

²⁶³ 11 U.S.C. § 348(f)(1)(A) (2006).

²⁶⁴ *In re Laflamme*, 397 B.R. at 200. The court went on to hold that the debtor was entitled to use the proceeds without court permission for ordinary living expenses. Beyond that, the debtor would have to account to the chapter 7 trustee for the commissions.

²⁶⁵ *Cf. In re Wiczek-Spaulding*, 223 B.R. 538, 541 (Bankr. D. Minn. 1998) (holding post-petition proceeds of exempt property must be valued as of time proceeds came into existence, not time of bankruptcy petition pursuant to section 522(a)(2)).

C. Bad Faith Conversions

If and when a chapter 13 case converts to chapter 7, section 348(f)(1) reserves for chapter 13 debtors all property acquired after the bankruptcy petition. But section 348(f)(2) provides a different rule if a debtor converts to chapter 7 in bad faith.

Section 348(f), enacted in 1994, was designed to overrule *In re Lybrook*,²⁶⁶ where chapter 13 debtors, more than 180 days after bankruptcy, but before a plan was confirmed, inherited property and converted the case to chapter 7 in the hope of keeping the inheritance away from the creditors. The *Lybrook* court ruled that property in the chapter 7 cases included post-petition acquisitions by the debtor. Congress responded by awarding post-petition property to debtors in section 348(f)(1). But, it also enacted section 348(f)(2), where conversions are in bad faith. According to section 348(f)(2): "[i]f 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 of the estate in the converted case shall consist of the property of the estate as of the date of conversion."²⁶⁷ If I am right about the chapter 13 estate, subsection (f)(2) is very limited in scope. The only thing that the chapter 7 trustee receives from the bad faith debtor is "property of the estate as of the date of conversion." Since, after confirmation, the bankruptcy estate consists of funds actually in possession of the chapter 13 trustee, a bad faith conversion conveys at best only this modest amount into chapter 7.²⁶⁸ Confirmation of the plan conveys all other property of the estate to the debtor personally. None of the bad faith debtor's property goes to the chapter 7 trustee under this provision.

For those who have read this far and still insist upon the plain meaning of the Bankruptcy Code, it is possible to maintain that bad faith debtors are actually better off than good faith debtors. Suppose a chapter 13 debtor owns a house. A plan is confirmed. The house belongs absolutely to the debtor. Since the house was historically property of the estate, a good faith debtor sacrifices the house to the chapter 7 trustee.²⁶⁹ A bad faith debtor does not, as the house is the debtor's own

²⁶⁶ See *Lybrook v. Robb (In re Lybrook)*, 951 F.2d 136, 139 (7th Cir. 1991) ("There was a Chapter 13 estate, it included the inheritance, and it continued intact into Chapter 7 upon conversion.")

²⁶⁷ 11 U.S.C. § 348(f)(2).

²⁶⁸ See *In re Siegfried*, 219 B.R. 581, 584 (Bankr. D. Colo. 1998) ("[I]f the bad faith conversion is done prior to confirmation, any property in the hands of the Chapter 13 Trustee and, potentially, any property acquired by debtor during the pendency of the Chapter 13, will become property of the Chapter 7 estate."). According to section 1326(c), the trustee is commanded to distribute these funds to the creditors pursuant to the plan. The *Siegfried* court implies that section 348(f)(2) overrides this command.

²⁶⁹ In *In re Salas*, No. 2:05-cv-1107-GEB, 2006 U.S. Dist. LEXIS 85686 (E.D. Cal. Nov. 14, 2006), the court ruled that post-petition appreciation somehow remained with the debtor. The chapter 7 trustee was stuck with the valuation of the house in the chapter 13 plan pursuant to the "best interest of the creditors" test. This holding is dubious. The house was valued as part of a test to determine how much minimal disposable income (or other finding) was required to justify confirmation of the plan. Since home mortgages cannot be crammed down, there was no bifurcation of an undersecured creditor involved. Rather, there was simply the equity in the house (in light of an unmodified mortgage). This "thing" should have been

property, not property of the estate at the time of conversion. Section 348(f)(2) only submits *property of the estate* at conversion to the chapter 7 process.

Must this interpretation be accepted? Alternatively, one might say that section 348(f)(1)(A) applies to good faith and bad faith cases alike, but that the rule of section 348(f)(2) supplements the chapter 7 estate in bad faith cases. Thus, the house of the bad faith debtor goes to the chapter 7 trustee under section 348(f)(1)(A). Section 348(f)(2) adds that any post-confirmation funds held by the chapter 13 trustee also go into chapter 7 in a bad faith case. The trouble with this argument, based on supplementation, is the popular "knew how to" canon of interpretation.²⁷⁰ Congress knew how to supplement the bankruptcy estate in section 1306(a) by expressly adding property to what section 541(a) already provides. But, in section 348(f)(2), there is no evidence of supplementation—only displacement. Therefore, Congress must have intended the little absurdity that I have described in converted chapter 7 cases. Nevertheless, the result is absurd. Absurdity is a license to ignore the Bankruptcy Code,²⁷¹ and courts should have no trouble ruling that section 348(f)(2) cannot be read to displace section 348(f)(1)(A). Rather, the two statutes should be read together so that bad faith debtors not to receive a better housing deal than honest debtors. Can it be doubted Congress intended otherwise?

What, then, is bad faith, for the purposes of section 348(f)(2)? In *Lybrook*, chapter 13 debtors converted to chapter 7 hoping to keep an inheritance away from the creditors. Was this bad faith? The *Lybrook* court intimated as much:

We are more impressed by the bankruptcy judge's observation that a rule of once in, always in is necessary to discourage strategic, opportunistic behavior that hurts creditors without advancing any legitimate interest of debtors. A debtor who lacks confidence that he can actually work his way out of his financial hole by payments under a Chapter 13 plan will nevertheless have an incentive to proceed under that chapter for as long as he can, holding his creditors at bay and thus staving off the evil day when they seize his assets. For he knows that if his position deteriorates further it is the creditors who will bear the loss, while if he should get lucky and win a lottery or a legal judgment, or inherit money (after 180 days have passed since the filing of the petition), he will be able to keep his windfall by the simple expedient of converting to Chapter

transferred to the chapter 7 trustee, with no reference to value at all. In any case, BAPCPA clearly changes the result. Today, section 348(f)(1)(B) states that when cases convert from chapter 13 to chapter 7, valuations in chapter 13 are to be revisited.

²⁷⁰ See Charles Jordan Tabb, *The Bankruptcy Reform Act in the Supreme Court*, 49 U. PITT. L. REV. 477, 517 n.259 (1988).

²⁷¹ See *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966) ("In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act.").

7—and remember that the debtor can convert to that chapter from Chapter 13 at will.²⁷²

But, in overruling *Lybrook*, Congress seemed to disagree. According to Congressman Jack Brooks:

This amendment overrules the holding in cases such as *Matter of Lybrook*, 951 F.2d 136 (7th Cir. 1991) However, it also gives the court discretion, in a case in which the debtor has abused the right to convert and [has] converted in bad faith, to order that all property held at the time of conversion shall constitute property of the estate in the converted case.²⁷³

The legislative history of section 348(f)(2), therefore, suggests that converting a case (prior to confirmation) to save an inheritance is not bad faith.

There is a good argument for this, beyond the legislative history. First, chapter 13 permits debtors to keep non-income assets (*i.e.*, principal),²⁷⁴ but requires them to surrender disposable income.²⁷⁵ Inheritance is income, if obtained after confirmation of the plan.²⁷⁶ *Lybrook* involved a pre-confirmation inheritance. Accordingly, the inheritance would be included in the "best interest of the creditors" test, if a plan were to be confirmed. The *Lybrooks*, therefore, could buy back the inheritance by paying a great deal of disposable income (and, failing that, liquidating assets to make up the deficit).²⁷⁷ Instead of buying, they sought to convert to chapter 7, where they could have the inheritance for free. Yet, even this is not bad faith, according to Congress. How then is it bad faith for a debtor to convert the case after confirmation? After confirmation, the inheritance is no longer property of the estate and therefore section 348(f)(2) is absolutely incapable of conveying the inheritance to the chapter 7 trustee.

In *Smith v. Scales Express, Inc.*,²⁷⁸ a debtor filed for chapter 13 and was in an auto accident two weeks later. The case converted to chapter 7. The defendant in the auto accident argued that, since the debtor did not list this cause of action on bankruptcy schedules, it must not exist—a judicial estoppel argument. The court ruled that converting to chapter 7 was not in bad faith. Therefore, the tort action was not property of the chapter 7 estate and need not be disclosed. But the court did not rule that converting auto accident victims are always in good faith. The court

²⁷² 951 F.2d at 137–38.

²⁷³ 140 CONG. REC. H10,752 (daily ed. Oct. 4, 1994) (statement of Rep. Brooks).

²⁷⁴ See 11 U.S.C. § 1306(b) (2006).

²⁷⁵ See 11 U.S.C. § 1322(a)(1) (2006).

²⁷⁶ See *supra* text accompanying notes 79–85.

²⁷⁷ See 11 U.S.C. § 1322(b)(8) (permitting plan to "provide for the payment of all or part of a claim against the debtor from property of the estate or property of the debtor").

²⁷⁸ No. 05-331-BH-B, 2006 U.S. Dist. LEXIS 53638 (S.D. Ala. Aug. 2, 2006).

took care to note that the debtor converted because he was unable to work, thanks to injuries sustained.

The tort cause of action is rather like the inheritance. It is capricious post-petition property that should not go to the chapter 7 trustee, even if the debtor, on his bed of pain, is motivated to keep the judgment away from the pre-petition creditors.²⁷⁹ The desire to keep assets away from creditors cannot be what "bad faith" means.

Another feature of section 348(f)(2) to be emphasized is that it applies only when the *debtor* converts the case. When the chapter 13 trustee moves to convert the case, section 348(f)(2) is irrelevant. In *U.S. Trustee v. Bostick (In re Bostick)*,²⁸⁰ the debtor filed for chapter 13 and won the lottery four days later. The debtor then dissipated much of the winnings in a wild spending spree. Before any plan was confirmed, the chapter 13 trustee moved to convert the case. In chapter 7, the United States trustee sought to deny a discharge under section 727(a)(2)(B) because the debtor had dissipated the bankruptcy estate. But in fact, the lottery winnings were not part of the chapter 7 estate under section 348(f)(1); section 548(f)(2) could not apply because the debtor was not the instigator of the conversion.

This raises the general question of revenge in chapter 7 for actions taken in chapter 13 prior to the conversion. Many courts, overlooking the fine point made in *Bostick*, hold that a debtor might be denied a chapter 7 discharge for chapter 13 misbehavior.²⁸¹ But, sometimes revenge is exacted on a bad theory of the chapter 13 estate. In *Baker v. Rank (In re Baker)*,²⁸² the debtors earned a legal fee after a chapter 13 plan was confirmed. Properly, this money was the debtors' own property, as the bankruptcy estate terminated when the plan was confirmed. True, the fee was disposable income, but the plan did not anticipate it and did not require that it be paid to the chapter 13 trustee. In any case, the debtors used the fee to finance a vacation to Asia. Later, the debtors converted the case to chapter 7. The trustee sought to deny the debtors a discharge for dissipating the chapter 13 estate.

Under the 1994 amendments, section 348(f)(1)(A) would have precluded the notion that the debtors were dissipating what would become property of the chapter 7 estate. But, the *Baker* case was not subject to the 1994 amendments. The Fifth Circuit thought it had to choose between two views: the *Lybrook* view and the view of *Bobroff v. Continental Bank (In re Bobroff)*,²⁸³ which presciently anticipated section 348(f)(1)(A). Even though Congress had ratified *Bobroff* and renounced

²⁷⁹ See *In re Bejarano*, 302 B.R. 559, 563 (Bankr. N.D. Ohio 2003); *In re Wiczek-Spaulding*, 223 B.R. 538, 540 (Bankr. D. Minn. 1998) ("[S]imply taking advantage of what . . . [section 348(f)(1)] provides does not by itself amount to bad faith.").

²⁸⁰ 400 B.R. 348 (Bankr. D. Conn. 2009).

²⁸¹ See *In re Standifer*, No. 7-00-16958 MA, 2008 Bankr. LEXIS 4024, at *24-25 (Bankr. D.N.M. Dec.17, 2008).

²⁸² 154 F.3d 534 (5th Cir. 1998).

²⁸³ 766 F.2d 797, 804 (3d Cir. 1985).

Lybrook,²⁸⁴ the Fifth Circuit thought *Lybrook* better represented the law prior to 1994. In fact, the choice was an unnecessary one. *Lybrook* involved a pre-confirmation conversion. *Baker* involved a post-confirmation conversion. As such, section 1327(b) terminated the bankruptcy estate, which meant that the Bakers committed no wrong in visiting the pleasure domes of Xanadu. The *Baker* result makes sense only if section 1306(a) cancels section 1327(b) altogether.

It has been suggested that *Baker* is overruled by the 1994 amendments.²⁸⁵ This may be so, depending on what section 727(a)(2)(B) means. This provision requires the denial of a discharge for transferring "property of the estate, after the date of the filing of the petition" ²⁸⁶ If "property of the estate" means "property of this particular chapter 7 case"—if it does *not* mean "property of the estate in the historically concluded chapter 13 case"—then *Baker* is overruled and post-confirmation vacations are rightful. But if we combine the view that section 1327(b) does not terminate the bankruptcy estate, and if section 727(a)(2)(B) refers to "property of the estate in the now concluded chapter 13 case," *Baker* still lives and reigns, though it badly theorizes the chapter 13 estate.²⁸⁷

Must the bad faith relate to the decision to convert, or may bad faith unrelated to the conversion trigger the penalty in section 348(f)(2)? Courts seem to think that any badness from the chapter 13 era justifies expanding the bankruptcy estate.²⁸⁸

In *Wyss v. Fobber (In re Fobber)*,²⁸⁹ the debtors started in chapter 7, but converted to a chapter 13. Once there, they purported to sell a valuable tractor in the pre-confirmation period and without court permission. The proceeds were used to pay creditors. On motion of the chapter 13 trustee, the case was converted back to chapter 7, where the debtors received a discharge.²⁹⁰ Because the debtors did not themselves move to convert to chapter 7, section 348(f)(2) did not apply.

The chapter 7 trustee sought to revoke the discharge because, pursuant to section 727(d)(2), "the debtor acquired property . . . of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to

²⁸⁴ See generally H.R. REP. NO. 103-834, at 42-43 (1994); 140 CONG. REC. H10,752-02 (daily ed. May 18, 1994); 140 CONG. REC. H10,070-71 (daily ed. May 12, 1994).

²⁸⁵ See *In re Standiferd*, 2008 Bankr. LEXIS 4024, at *13-14; *In re Frausto*, 259 B.R. 201, 209 (Bankr. N.D. Ala. 2000).

²⁸⁶ 11 U.S.C. § 727(a)(2)(B) (2006).

²⁸⁷ In *Standiferd*, the debtors failed to report profits as the confirmation order required. This justified a denial of a discharge under section 727(a)(2), which punishes dissipation of the bankruptcy estate. But, as the profits were realized after confirmation of the plan, such a holding assumes that section 1327(b) is wiped out by section 1306(a). There is also the issue of whether a court has jurisdiction to impose extra requirements on chapter 13 debtors not required by the Bankruptcy Code through the use of confirmation orders. But that issue must be left for another day. See *In re Standiferd*, 2008 Bankr. LEXIS 4024, at **11-12.

²⁸⁸ See *In re Siegfried*, 219 B.R. 581, 585 (Bankr. D. Colo. 1998) (failure regarding disclosure of debts and "eleventh-hour conversion" to avoid hearing amounted to bad faith).

²⁸⁹ 256 B.R. 268 (Bankr. E.D. Tenn. 2000), *aff'd mem.*, 202 F.3d 268 (6th Cir. 1999).

²⁹⁰ *Fobber v. Wyss (In re Fobber)*, No. 99-5302, 1999 U.S. App. LEXIS 34019, *3 (6th Cir. 1999).

deliver or surrender such property to the trustee"²⁹¹

A couple of points about this influential case may be made. First, the debtors sold the pre-petition tractor without court permission, which is required under section 363(b). Properly, the sale is void, and the trustee can simply get the tractor from the buyer by bringing a turnover proceeding under section 542(a).²⁹² The buyer might then sue the debtors for breach of warranty of title.²⁹³ Nevertheless, the issue is whether the debtors both *acquired* property of the estate and then fraudulently failed to deliver or surrender "property of the estate."

The first requirement of section 727(d)(2) is that the debtors *acquire* property of the estate. Arguably, the tractor was acquired by the debtors when they converted their chapter 7 case to chapter 13. In chapter 7, the debtors had *de facto* possession of the tractor, but the trustee was entitled to use, sell, or lease it with court permission. In chapter 13, the debtors "acquired" the trustee's right to use, sell, or lease.²⁹⁴

Later, the debtor "acquired" cash from the alleged buyer of the tractor. Was this cash property of the estate in either chapter 13 or the reconverted chapter 7 case? The court thought so,²⁹⁵ but, it left out an analytical step. The tractor was still property of the estate because the debtors had no authority to sell it. If so, the cash received was not proceeds of the tractor. The chapter 7 trustee cannot have both the tractor *and* the cash. Nevertheless, it is open for the bankruptcy court to ratify the debtors' illegal sale. If so, the buyer obtains good title to the tractor, and the debtors become the constructive trustees of the cash received for the benefit of the chapter 7 estate. On this theory of ratifying an unauthorized sale, the question of acquisition can be decided in favor of the chapter 7 trustee. The element of "knowingly and fraudulently failed . . . to deliver" property of the estate, however, becomes problematic if the trustee ratifies what the debtor did in order to create a constructive trust in the proceeds.

Another hard issue is whether the debtors failed to deliver property of the estate. Under section 348(f)(1)(A), only property that was in the chapter 7 estate at the time of the bankruptcy petition *that the debtor still possesses* is property of the converted chapter 7 case. Since the tractor (and proceeds of the tractor) were gone by the time of conversion,²⁹⁶ the debtors cannot be found guilty of failing to deliver property of the chapter 7 estate.

The *Fobber* court thought that the illegal sale of the tractor and subsequent

²⁹¹ 11 U.S.C. § 727(d)(2).

²⁹² The trustee need not "avoid" the transfer under section 549(a) because the debtors had no title to give, without court permission. See *In re Fobber*, 256 B.R. at 271–73. The point makes a difference, as section 549(d) has a statute of limitations that is not applicable to turnover actions under section 542(a).

²⁹³ See UCC § 2-312(1)(b) (requiring seller to warrant goods as free of any interest, lien, or encumbrance).

²⁹⁴ See 11 U.S.C. § 1303 (2006).

²⁹⁵ See *In re Fobber*, 256 B.R. at 275–76, 278.

²⁹⁶ See *id.* at 271, 274. The bad faith rule of section 348(f)(2) cannot apply, here, because that rule is invoked only when the *debtor* converts the case in bad faith. See *infra* text accompanying notes 265–297.

disposition of the proceeds should be punished by revocation of the chapter 7 discharge. But it could not really reconcile the result with section 348(f)(1)(A): "this court is convinced that § 348(f) was never designed to be a safe harbor for debtors who fraudulently and surreptitiously dispose of property of the estate with in chapter 13. As such, this court holds that § 348(f) is inapplicable to the facts of the present case."²⁹⁷

What does it mean that section 348(f) does not apply? Presumably, it means that the law prior to the 1994 amendments applies. And, what is that? Courts were split between the view of the future section 348(f) and the *Lybrook* view. Obviously, the court surreptitiously chose the *Lybrook* view, under which the debtors did indeed fail to deliver property of what should have been the chapter 7 estate.

D. Administrative Priority

One consequence of the proper theory of the chapter 13 estate is that, in a converted case, a post-petition creditor of the debtor cannot claim to be an administrative creditor. Rather, such a creditor is treated as a pre-petition creditor under section 348(d).²⁹⁸ An administrative claim must comply with section 503(b), which requires that a claim be for "the actual, necessary costs and expenses of preserving the estate"²⁹⁹ This, a post-petition creditor could not show simply because there is no bankruptcy estate to preserve.³⁰⁰

Under the DT, the only chapter 13 estate after confirmation is the funds successfully transmitted from the debtor to the chapter 13 trustee. Typically, a provider of credit to the post-confirmation debtor is not helping to preserve these funds. To be sure, the post-confirmation creditor is perhaps helping to make post-confirmation income possible, but that is not good enough. Such a contribution does not *preserve* the estate. Arguably, it helps to *create* the bankruptcy estate. But, section 503(b)(1)(A) insists on *preservation*.

²⁹⁷ *In re Fobber*, 256 B.R. at 279.

²⁹⁸ According to this provision:

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 . . . 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.

11 U.S.C. 348(d) (2006).

²⁹⁹ 11 U.S.C. § 503(b) (2006).

³⁰⁰ *Cf. In re Frausto*, 259 B.R. 201, 205 n.7 (Bankr. N.D. Ala. 2000) ("Econolube did not prove that there was a bankruptcy estate that these costs preserved."); *In re Gyulafia*, 65 B.R. 913, 916–17 (Bankr. D. Kan. 1986) ("At confirmation, all the property of the estate is vested in the debtor, thereby terminating the estate's existence, although the court has continued jurisdiction . . . to oversee the plan's execution." (quoting *In re Westholt Mfg. Inc.*, 20 B.R. 368, 372 (Bankr. D. Kan. 1982))).

In *Security Bank v. Neiman*,³⁰¹ hog farmers filed in chapter 13. A plan was confirmed, and a veterinarian tended to the hogs, patiently nursing them to porcine salubrity. The case converted to chapter 7 and the hogs went into the Galilee of the chapter 7 estate. The veterinarian's claim was allowed as an administrative claim. True, when the veterinarian performed the service, the hogs had been transferred to the debtor. The Eighth Circuit decided, however, that the hogs were always property of the estate. It followed the view that the bankruptcy estate does not end with confirmation of a chapter 13 plan. This got them to where they wanted to be: the veterinarian was an administrative creditor in the chapter 7 case. But, such a view deletes section 1327(b) from the Bankruptcy Code and cannot be supported.

The idea that post-confirmation claims can be administrative in nature is refuted by section 1305(a)(2), which provides that post-petition consumer debts can be allowed if they are "for property or services necessary for the debtor's performance under the plan."³⁰² Does not this provision preempt any notion that post-petition claims can *also* be allowed as administrative claims? It would seem that either post-petition creditors qualify under section 1305(a)(2) for plan treatment or not at all.

CONCLUSION

In this article, I have defended the so-called "estate transformation" theory of the chapter 13 estate. I have renamed it the "Divestment Theory." According to the DT, all assets of the chapter 13 estate are transferred to the debtor upon confirmation of the plan. A chapter 13 estate exists thereafter only to the extent the debtor successfully conveys plan payments to the chapter 13 estate. Courts frequently reject the DT. First, they find a way to read section 1327(b) out of the Bankruptcy Code. According to section 1327(b), "the confirmation of a plan vests all of the property of the estate in the debtor." Some courts claim the word "vest" does not mean "transfer absolutely." This is done to exalt section 1306(a), which states that all the debtor's post-petition acquisitions are in the chapter 13 estate until the case is "closed, dismissed or converted." Since confirmation does not close the case, confirmation must not terminate the chapter 13 estate. Other courts admit that section 1327(b) terminates the chapter 13 estate as it existed on the day the plan was confirmed, but section 1306(a) still works to sweep in the debtor's post-confirmation acquisitions. This is done in order to honor the words of both section 1306(a) and section 1327(b).

Under the theory I have defended, to "vest" means to transfer absolutely. I have presented strong textual evidence that this is so. Section 1327(b), therefore, overrules section 1306(a), but retains some utility for this provision by limiting its effect to the pre-confirmation period. The DT, though it requires the view that a

³⁰¹ 1 F.3d 687 (8th Cir. 1993).

³⁰² 11 U.S.C. § 1305(a)(2) (2006); *see supra* text accompanying notes 265–94.

specific provision of the Bankruptcy Code overrules a more general provision, is the one that does least damage to the text of the Bankruptcy Code and accords with well-accepted canons of statutory interpretation.