Southwest Bankruptcy Conference

Consumer

Chapter 7/Chapter 13 Conversions

Jenny L. Doling
J. Doling Law, PC | Palm Desert, Calif.

Dianne C. Kerns
Chapter 13 Trustee | Tucson, Ariz.

Jen Lee
Jen Lee Law | San Francisco

CONCURRENT SESSION

2023

CHAPTER 7 / CHAPTER 13 CONVERSIONS

American Bankruptcy Institute
Southwest Conference
Santa Barbara, California
August 28-30, 2023

YOUR PANELISTS

Jen Doling
Jen Doling Law, Palm Desert

Dianne Kerns
Chapter 13 Trustee, Tucson

Jen Grondahl Lee
Jen Lee Law, San Francisco

Randy Nussbaum
Sacks Tierney, Scottsdale

2

CHAPTER 13 DISMISSAL GUIDELINES

Is Dismissal an Absolute Right?

- It is axiomatic of Chapter 13 law that a Debtor has an absolute right to dismiss a Chapter 13 proceeding. Presumably the premise is that an individual Debtor should not be subject to involuntary servitude to pay back creditors.
- At the same time, granting that automatic right encourages a Debtor to seek a Chapter 13 with the full knowledge that failing under that Chapter does automatically move the case to Chapter 7.
- The Courts have carved out exceptions to the statute to ensure that Debtors do not utilize Chapter 13 to engage in a variety of shenanigans while proceeding in bad faith.
- From an equitable perspective, the Bankruptcy Courts' desire to erode such a right makes perfectly good sense.
- If one wanted to avoid the repercussions of an unfavorable property settlement agreement, Chapter 13 could allow you to do so while Chapters 7 and 11 would not. Finally, even in the face of certain statutory exceptions, Chapter 13 was a temporary safe harbor for multiple filers.

4

IMPACT OF NICHOLS

- Judicial meddling ended abruptly with Nichols v. Marana Stockyard & Livestock Mkt., Inc. (In re Nichols), 10 F.4th 956 (9th Cir. 2021).

- In Nichols, Chapter 13 debtors engaged in a number of blatant and offensive machinations which would have succeeded if the Debtors had been allowed to exercise their right to dismiss their case once their wrongdoing was exposed.

- The Appellate Court in Nichols reversed both the trial court and the BAP by concluding that the pertinent statute, 11 USC§ 1307(b), did not contain any qualifications, conditions, or exceptions.; the statute should be interpreted as it unequivocally read.

- Since that time, other cases have understandably followed Nichol's lead, and at least in the Ninth Circuit, has put this matter to bed once and for all.

5

COLBURN

- We would assume that in the face of such an unequivocal and simple statute, losing the right to dismiss would be impossible. Colburn demonstrates nothing could be further from the truth.

- In response to a Motion filed under §1307 (c), the Debtor requested the case be dismissed if the court was inclined to convert it but did not specifically move under §1307 (b). For reasons that are unclear, the Debtor did not move under the proper statute.

- The Court found that the creditor's conversion request was appropriate and granted that request. For a variety of reasons, being parked in Chapter 7 was the absolute last place the Debtor wanted to be so upon conversion, the debtor appealed the conversion order.

- The Colburn case was especially intriguing because the Nichols case was decided while the issue was before the Bankruptcy Court, which had triggered a Motion for Reconsideration.

- Therefore, by the time the Court entered what became an appealable Order, the bankruptcy Judge was fully aware of the scope of the Nichol's decision

6

WHEN IS THE RIGHT TO DISMISS NOT AUTOMATIC

- A Debtor does not have an automatic right to dismiss if the Chapter 13 case previously converted from a Chapter 7.

- The Bankruptcy Code drafters decided that once an individual initiates a case in Chapter 7, which does not include any automatic dismissal rights, the same restrictions should apply if the case is converted to Chapter 13.

- This difference is very important because in most cases, the very reasons motivating a party to dismiss a Chapter 13 are the ones motivating the conversion from Chapter 7.

- Once in Chapter 13, if the Debtor cannot perform under that Chapter, the Debtor is facing the very real possibility that the case could be converted to Chapter 7. If that wasn't the case, then a Debtor in a converted case could circumvent the lack of an automatic dismissal right by simply not performing in Chapter 13 to prompt the case being dismissed.

7

WHEN IS THE RIGHT TO DISMISS NOT AUTOMATIC (CONT.)

- A Debtor also has to consider whether to exercise the automatic right to dismiss when that Debtor may actually end up in a much better situation by actually converting the case to Chapter 7.

- The policy and factual considerations as to why a conversion to Chapter 7 could be far superior will be discussed in another section of this presentation, but occasionally, in the zeal to dismiss a Chapter 13, a Debtor places himself in a potentially precarious situation, whereas a simple conversion to Chapter 7 would have been far more beneficial.

- This is especially the case in situations where an individual dismisses a case with an expectation to file a subsequent Chapter 7 at a later date but loses certain benefits by first dismissing his Chapter 13.

8

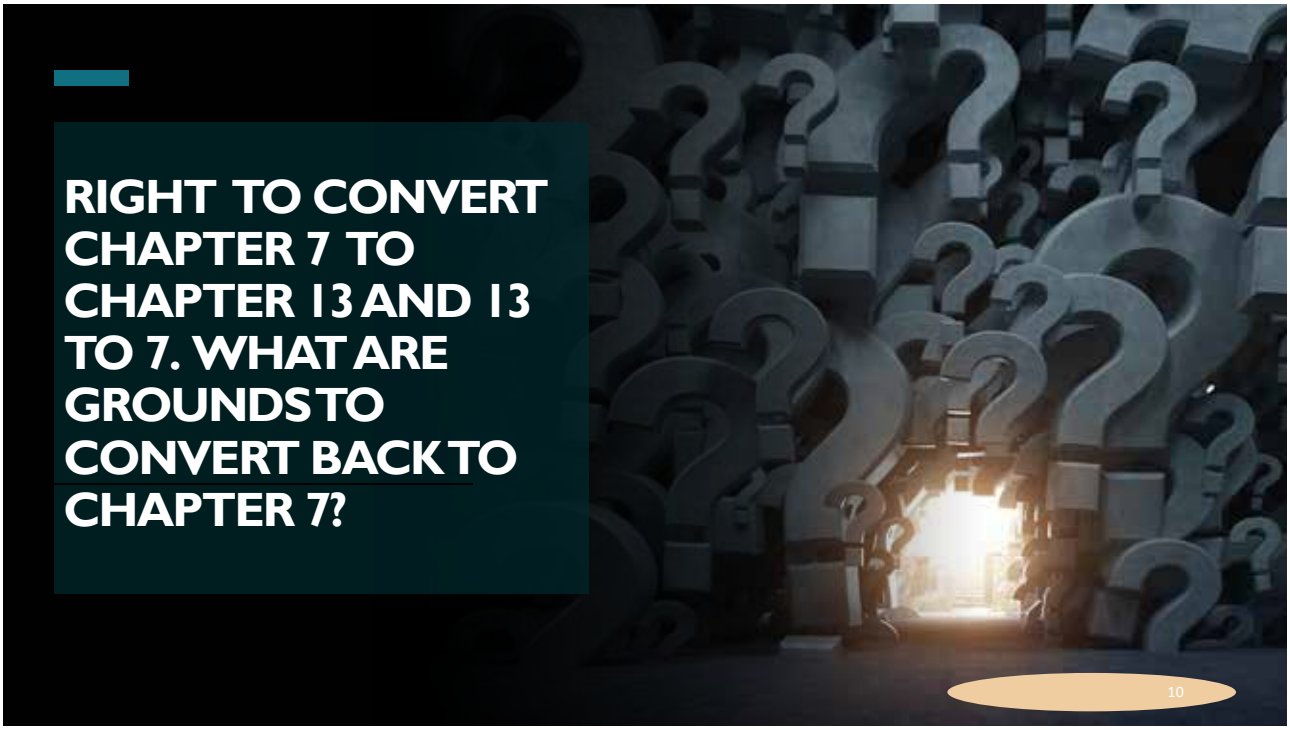
THE FUTURE OF THE DISMISSAL RIGHT

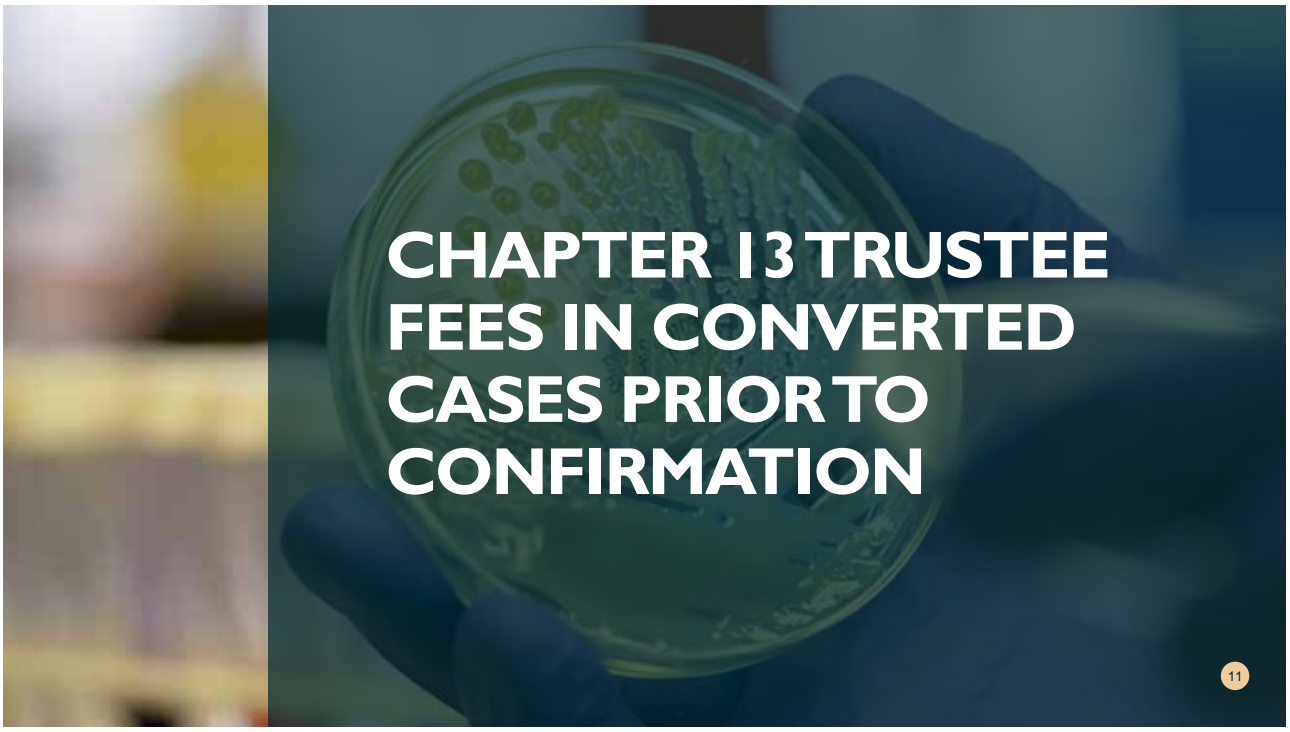
- Presumably, Congress will not address this option, although it's understandable why many involved in the bankruptcy system are offended by a statute that actually encourages what can only be identified as repugnant strategies by certain bankruptcy Debtors.

- Taking away the automatic dismissal right and ultimately forcing Debtors into Chapter 7 serves a purpose, while simultaneously discouraging certain Debtors from parking in Chapter 13.

- Separate and apart from this unexpected statutory change, undeserving Debtors can continue to seek haven in Chapter 13, knowing they can exit that Chapter at their own whim.

9





DOLL v. GOODMAN

Doll v. Goodman, 57 F. 4th 1129 (10h Cir. 2023)

MCCALLISTER v. EVANS

McCallister v. Evans, 69 F 4th 1101 (9th Cir. 2023)

IN RE SOUSSIS

In re Soussis 624 B.R. 559 (Bankr. E.D.N.Y. 2020), decision-on-appeal pending No. 22-155 (2d Cir.)

IN RE BAUM

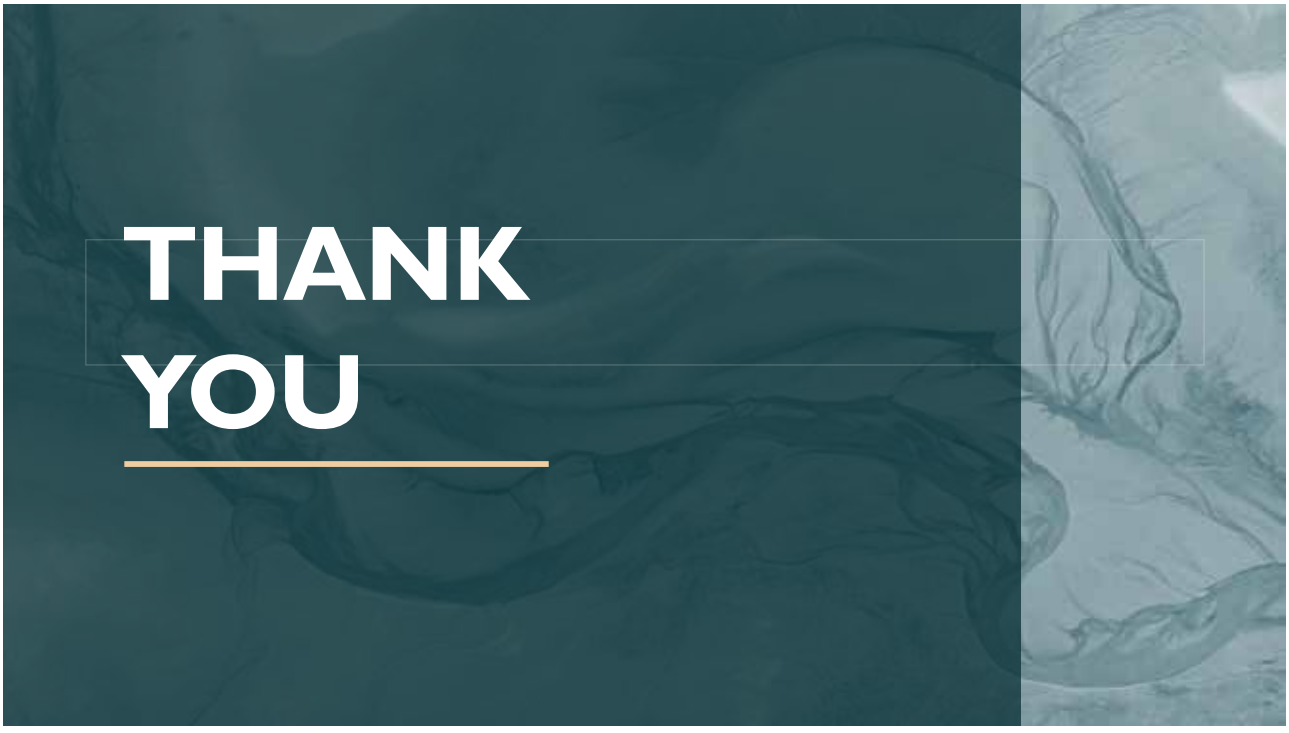
In re Baum, 650 B. R. 852 (Bankr. E.D. Mich. 2023

IN RE JOHNSON

In re Johnson, 650 B. R. 904 (Bankr. N.D. Ill. 2023). appeal pending, No. 23-2212 (7th Cir.)

12


POST-PETITION APPRECIATION – WHO OWNS IT?
13


THANK YOU

AMERICAN BANKRUPTCY INSTITUTE
August 29, 2023

Topic:

CHAPTER 7 / CHAPTER 13 CONVERSIONS

Trends, Considerations, Traps for the Unwary

By:

Randy Nussbaum

SACKS TIERNEY

Randy.Nussbaum@SacksTierney.com

4250 N. Drinkwater Road, Fourth Floor
Scottsdale, AZ 85251

480.212.1682

CHAPTER 13 DISMISSAL GUIDELINES

It is axiomatic of Chapter 13 law that a Debtor has an absolute right to dismiss a Chapter 13 proceeding. The basis behind this absolute right is presumably the premise that an individual Debtor should not be subject to involuntary servitude in having to pay back creditors, which would be the ramifications of depriving a Debtor of that option. At the same time, granting that automatic right encourages an individual to seek a Chapter 13 with the full knowledge that failing under that Chapter does not doom a Debtor to ultimately end up in Chapter 7.

Not surprisingly, until recently, especially in the Ninth Circuit, courts had found ways to circumvent what appears to be an automatic right. Courts had carved out exceptions to the statute to ensure that Debtors could not utilize Chapter 13 to engage in a variety of shenanigans while proceeding in bad faith.

Interestingly enough, from an equitable perspective, Bankruptcy Courts' desire to erode such a right made perfectly good sense. By its very nature, a Chapter 13 was a safe haven for certain individuals who, without question, were an unscrupulous lot. If you are facing foreclosure on your favorite piece of real estate and need to delay that process, Chapter 13 would serve that purpose. Even vigilant secured creditors normally would not be able to procure stay relief for a few months, while the Debtor retained control of the property for free. If one did not want to subject his non-exempt assets to the control of a Chapter 7 Trustee, Chapter 13 would eliminate that possibility. If one wanted to avoid the repercussions of an unfavorable property settlement agreement, Chapter 13 could allow you to do so while Chapters 7 and 11 would not. Finally, even in the face of certain statutory exceptions, Chapter 13 was a temporary safe harbor for multiple filers.

If therefore is not surprising that Bankruptcy Courts were hesitant to grant unfettered protection to individuals who simply did not appear to be deserving of such immunity.

However, judicial meddling ended abruptly with Nichols v. Marana Stockyard & Livestock Mkt., Inc. (In re Nichols), 10 F.4th 956 (9th Cir. 2021.

IMPACT OF NICHOLS

Nichols put to bed the concept that if a debtor was undeserving, an absolute statutory right would be abrogated. In Nichols, Chapter 13 debtors engaged in a number of blatant and offensive machinations which would have succeeded if the Debtors had been allowed to exercise their right to dismiss their case once their wrongdoing was exposed. Because the debtors were so unsympathetic, if anyone on the face of the Earth deserved to be deprived of this option, it was the Nichols. That is why both the trial court and the BAP denied their motion to dismiss.

Nevertheless, the Appellate Court in Nichols reversed both the trial court and the BAP by concluding that the pertinent statute, 11 USC§ 1307(b), did not contain any qualifications, conditions, or exceptions. Instead, the statute should be interpreted as it unequivocally read. It provided that a debtor had an absolute right to dismiss a Chapter 13 and that right was an unconditional one. If the debtor was a "bad player," Congress had to initiate steps to address that scenario. Otherwise, even offensive filers were granted that option.

Since that time, other cases have understandably followed Nichol's lead, and at least in the Ninth Circuit, has put this matter to bed once and for all.

So, why was the Debtor in the Colburn case not allowed to dismiss his case?

COLBURN

We would assume that in the face of such an unequivocal and simple statute, losing the right to dismiss would be impossible. Colburn demonstrates nothing could be further from the truth.

In Colburn, an unpublished Arizona Federal Court of Appeals Decision, the Chapter 13 Debtor was facing a strident effort by a disgruntled and a rather vexatious creditor to have the case converted to Chapter 7. For the time being, let's ignore the fact that Colburn was involved in the cannabis business and such individuals are normally ineligible for bankruptcy relief.

In response to that Motion filed under §1307 (c), the Debtor requested the case be dismissed if the court was inclined to convert it but did not specifically move under §1307(b). For reasons that are unclear, the Debtor did not move under the proper statute.

The Court found that the creditor's conversion request was appropriate and granted that request. For a variety of reasons, being parked in Chapter 7 was the absolute last place in the world the Debtor wanted to be so upon conversion, the Debtor appealed the conversion order.

The District Court affirmed the bankruptcy trial court on the basis that the absolute dismissal right required that the Debtor seek relief under that statute. One can only surmise that since the statute was favorable to a Debtor, even in the face of legitimate creditor complaints, that only a Debtor citing the proper statute would be entitled to it.

The Colburn case was especially intriguing because the Nichols case was decided while the issue was before the Bankruptcy Court, which had triggered a Motion for Reconsideration. Therefore, by the time the Court entered what became an appealable Order, the bankruptcy Judge was fully aware of the scope of the Nichol's decision. Nevertheless, and probably because Colburn was an individual of questionable credibility, the Judge was comfortable in not permitting Colburn to dismiss his proceeding.

WHEN IS THE RIGHT TO DISMISS NOT NECESSARILY AUTOMATIC?

Having just spelled out in detail why the right is automatic, one may think it would be inherently inconsistent to now suggest that there are times when the "automatic" right is not so automatic.

A Debtor does not have an automatic right to dismiss if the Chapter 13 case previously converted from a Chapter 7. The Bankruptcy Code drafters decided to differentiate between the automatic right to dismiss when a case starts in Chapter 13 and requires a Debtor to show cause why a case converted from Chapter 7 to 13 should be dismissed. The Bankruptcy Code drafters decided that once an individual decides to initiate a case in Chapter 7, which does not include any automatic dismissal rights, the same restrictions should apply if the case is converted to Chapter 13.

This difference is very important because in most cases, the very reasons motivating a party to dismiss a Chapter 13 are the ones motivating the conversion from Chapter 7. Once in Chapter 13, if the Debtor cannot perform under that Chapter, that Debtor is facing the very real possibility that the case could be converted back to Chapter 7. If that wasn't the case, then a Debtor in a converted case could circumvent the lack of an automatic

dismissal right by simply not performing in Chapter 13 to prompt his case being dismissed. Many unwary Debtors have tried to utilize that strategy just to see their case converted back to Chapter 7, which is exactly what Debtors seeking dismissal are trying to avoid.

A Debtor also has to consider whether he wants to exercise his automatic right to dismiss when that Debtor may actually end up in a much better situation by actually converting the case to Chapter 7. The policy and factual considerations as to why a conversion to Chapter 7 could be far superior will be discussed in another section of this presentation, but occasionally, in the zeal to dismiss a Chapter 13, a Debtor places himself in a potentially precarious situation, whereas a simple conversion to Chapter 7 would have been far more beneficial. This is especially the case in situations where an individual dismisses a case with an expectation to file a subsequent Chapter 7 at a later date but loses certain benefits by first dismissing his Chapter 13.

THE FUTURE OF THE DISMISSAL RIGHT

Presumably, Congress will not address this option, although it's understandable why many involved in the bankruptcy system are offended by a statute that actually encourages what can only be identified as repugnant strategies by certain bankruptcy Debtors. Taking away the automatic dismissal right and ultimately forcing Debtors into Chapter 7 serves a purpose, while simultaneously discouraging certain Debtors from parking in Chapter 13. Separate and apart from this unexpected statutory change, undeserving Debtors can continue to seek haven in Chapter 13, knowing they can exit that Chapter at their own whim.

Serving Southern California
36-915 Cook Street, Ste. 101
Palm Desert, CA 92211
Telephone: (760)884-4444
Fax: (760)341-3022
www.JDL.law
Los Angeles: (310)542-5151
San Diego: (619)363-8840

Conversion From 13 to 7 Checklist

DATE: _____

CLIENT: _____

DEADLINE/Why: _____

BILLED:

- ❒ Conversion Attorney Fee: $
- ❒ Conversion Filing Fee: $25.00
- ❒ Amendment (Sch. D-F) Filing Fee: $32.00

❒ Filed Chapter 13 - Complete Petition
❒ Filed Shell Chapter 13 Petition
❒ Debtor(s) Income Decreased
❒ Debtor(s) to Surrender
_____
❒ Update value/equity of home - any non-exempt equity?
_____
❒ How much of the mortgage did Debtor pay down? This may create more equity so use the most recent mortgage statement to determine equity.
_____
❒ Any other non-exempt property? *Review Schedule B
_____
❒ Ask Debtor about After Filing Acquired property/rights?
_____
❒ Date(s) of prior cases, eligible for discharge? (No BK filings in the last 8 years - file date to file date)
_____
❒ Has any new debt been incurred since filing?
_____
❒ Motion to Redeem necessary for any vehicles/property?
_____
_____
_____

Converting a Bankruptcy Case Checklist

This checklist is for use by a party seeking to convert a bankruptcy case to a case under another chapter of the Bankruptcy Code. This checklist can be used to guide attorneys representing a ***debtor*** or other *party in interest* in understanding the requirements for converting a bankruptcy case.

For related information, see *Converting from Chapter 11 to Chapter 7*. For additional resources, see *Conversion and Dismissal Resource Kit*.

Conversion Overview

A ***debtor*** may seek voluntary conversion of its bankruptcy case to another chapter under the Bankruptcy Code after ***filing***. A party in interest may also seek conversion of a bankruptcy case to another chapter. Each chapter under the Bankruptcy Code has its own:

- **Eligibility requirements.** The ***debtor*** must be ***eligible*** for any chapter that the ***debtor*** seeks to convert to. Eligibility requirements are listed in *Section 109 of the Bankruptcy Code*. *11 U.S.C. § 109*. Before seeking conversion, counsel should confirm that the ***debtor*** is ***eligible*** to be a ***debtor*** in the converted chapter.
- **Conversion rules.** Each chapter has its own rules for converting from or to other chapters. Specifically, *Sections 706*, *1112*, *1208*, and *1307 of the Bankruptcy Code* set forth the requirements for conversion under each chapter. *Bankruptcy Rule 1017(f)* provides additional procedural requirements for conversion under all chapters of the Bankruptcy Code. Counsel should review the requirements for conversion under the applicable Bankruptcy Code section and the Bankruptcy Rules.

Conversion of a case from one chapter to another chapter constitutes an order for relief under the chapter to which the case is converted; however, conversion does not change the *petition date*. *11 U.S.C. § 348(a)*. Conversion terminates the service of any *trustee* or *examiner* serving in the case prior to conversion. *11 U.S.C. § 348(e)*. A ***debtor*** must pay a ***filing*** or conversion fee when voluntarily converting its case. Check with your local rules for guidance on the amount and timing of the payment.

Voluntary conversion by the ***debtor*** to another chapter occurs for a variety of reasons and may occur in three ways, depending on the circumstances:

- ***Filing*** a notice of conversion
- ***Filing*** of a motion without the necessity of a hearing (pursuant to *Bankruptcy Rule 9013*) –or–
- ***Filing*** of a motion with an opportunity for a hearing (pursuant to *Bankruptcy Rule 9014*)

A party in interest (other than the ***debtor***) seeking conversion of a bankruptcy case must always ***file*** a motion with an opportunity for a hearing (pursuant to *Bankruptcy Rule 9014*). A party (including the ***debtor***) seeking conversion of a case that has previously been converted from another chapter must ***file*** and serve a motion in accordance with *Bankruptcy Rule 9014* (i.e., when requesting reconversion of the case to the ***previous*** chapter or conversion to another chapter).

Bankruptcy Rule 9013 states that a request for an order shall be (1) by written motion, (2) state with particularity the grounds therefor, and (3) set forth the relief or order sought. *Fed. R. Bankr. P. 9013*. *Bankruptcy Rule 9013* does not require an opportunity for a hearing. The rule requires the moving party to serve a motion to convert on the trustee or the ***debtor*** in possession and on "the entities the court directs." *Fed. R. Bankr. P. 9013*. Check your local rules for directions on serving motions to convert.

Bankruptcy Rule 9014 governs *contested matters* and provides that "relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded." *Fed. R. Bankr. P. 9014(a)*. Motions to convert ***filed*** under *Bankruptcy Rule 9014* are granted or denied at the discretion of the bankruptcy court and should be served upon the Chapter 7 trustee, the *U.S. trustee*, and all parties in interest. *Fed. R. Bankr. P. 9014*. *Bankruptcy Rule 2002(a)(4)* requires 21 days' notice of a hearing to convert a case under Chapter 7, 11, or 12 to another chapter. *Fed. R. Bankr. P. 2002(a)(4)*.

Converting a Bankruptcy Case Checklist

Chapter 7 Conversions

Section 706(a) of the Bankruptcy Code and *Bankruptcy Rule 1017(f)(2)* govern a ***debtor***'s voluntary request to convert its case. *Section 706(b) of the Bankruptcy Code* and *Bankruptcy Rule 1017(f)(1)* govern a non-***debtor*** party's motion to convert the ***debtor***'s *Chapter 7* case to a Chapter 11 case. For information on Chapter 7, see *Chapter 7 Liquidation*.

- ***Debtor*** **Voluntary Conversion from Chapter 7 to *Chapter 11*, 12, or 13.** Section 706(a) states that a Chapter 7 ***debtor*** may voluntarily convert to a Chapter 11, 12, or 13 case, at any time, if (1) he or she is ***eligible*** under the rules for those chapters and (2) the Chapter 7 case was not previously converted from a Chapter 11, 12, or 13 case. Any waiver of the right to convert under Section 706(a) is unenforceable. *11 U.S.C. § 706(a)*.
  - In the majority of cases, the right to convert pursuant to Section 706(a) is treated as an absolute right.
  - The Supreme Court limited the right to convert under Section 706(a) in cases of extraordinary bad faith by the ***debtor***. *Marrama v. Citizens Bank, 549 U.S. 365, 374 (2007)*.
  - The ***debtor*** must ***file*** a motion to convert under Section 706(a) and serve the motion in accordance with *Bankruptcy Rule 9013* (rather than initiation of a contested matter under *Bankruptcy Rule 9014*). *Fed. R. Bankr. P. 1017(f)(2)*. See ***Debtor***'*s Motion to Convert (Chapter 7 to Chapter 13)*, *Voluntary Conversion Order (Chapter 7 to Chapter 11)*, and *Voluntary Conversion Order (Chapter 7 to Chapter 12 or 13)*.
  - The motion should be served upon the *Chapter 7 trustee*, the U.S. Trustee, and any other parties directed by the court. *Fed. R. Bankr. P. 9013*.
  - The bankruptcy court may enter an order granting a motion to convert pursuant to Section 706(a) without a hearing. *Fed. R. Bankr. P. 9013*.
  - The bankruptcy court considers whether (1) the case has been previously converted, (2) the ***debtor*** is ***eligible*** for the chapter he or she seek to convert to, and (3) the conversion is sought in bad faith prior to entering an order on a motion to convert a Chapter 7 case.
- **Non-*debtor* Motion to Convert a Chapter 7 Case to Chapter 11.** *Section 706(b) of the Bankruptcy Code* states that the bankruptcy court may convert a Chapter 7 case to a Chapter 11 case on the request of a party in interest at any time after notice and a hearing. *11 U.S.C. § 706(b)*.
  - A non-***debtor*** party must ***file*** a motion to convert a Chapter 7 case to a Chapter 11 case under Section 706(b) and serve the motion in accordance with *Bankruptcy Rule 9014* (initiating a contested matter). *Fed. R. Bankr. P. 1017(f)(1)*. See *Involuntary Conversion Order (Chapter 7 to Chapter 11)*.
  - The motion should be served upon the Chapter 7 trustee, the U.S. Trustee, and all parties in interest. *Fed. R. Bankr. P. 9014*.
  - The ***debtor*** must be afforded an opportunity for a hearing on a motion to convert a Chapter 7 case to a case under Chapter 11 ***filed*** by a party in interest. *Fed. R. Bankr. P. 9014*.
  - *Bankruptcy Rule 2002(a)(4)* requires 21 days' notice of a hearing to convert a case under Chapter 7, 11, or 12 to another chapter. *Fed. R. Bankr. P. 2002(a)(4)*.
  - Conversion from a Chapter 7 case to Chapter 11 most commonly occurs in corporate cases. Requiring an individual Chapter 7 ***debtor*** to provide income sufficient to fund a Chapter 11 *plan of reorganization* raises questions of involuntary servitude.
  - A non-***debtor*** party seeking conversion of a Chapter 7 case to a case under Chapter 11 should be prepared to show that the ***debtor*** has sufficient disposable income with which to fund a plan of reorganization and pay Chapter 11 *administrative expense claims*.
  - The bankruptcy court will consider the best interests of creditors and the estate prior to ruling on a motion to convert a Chapter 7 case to one under Chapter 11.
- **Non-*debtor* Motion to Convert a Chapter 7 to a *Chapter 12* or 13.** Section 706(c) provides that a Chapter 7 case may not be converted to a Chapter 12 or Chapter 13 case unless the ***debtor*** consents to (or requests) such conversion. *11 U.S.C. § 706(c)*. Chapter 12 and Chapter 13 cases are both considered voluntary in nature.

- **Non-*debtor* Motion to Convert a Chapter 7 to a *Chapter 13* under Section 707(b).** *Section 707(b)(2) of the Bankruptcy Code* sets out a means test to determine whether a Chapter 7 case is presumed abusive for purposes of dismissal. For information on the means test, see *Chapter 7 Liquidation* and *Chapter 13 Bankruptcy*. See *Non-debtor's Motion to Dismiss or Convert (Chapter 7 to Chapter 13 Case)* and *Involuntary Conversion Order (Chapter 7 to Chapter 13)*.
    - A Chapter 7 case may only be converted under Section 707(b)(1) with the consent of the ***debtor***. Without the ***debtor***'s consent to conversion, a finding of a presumption of abuse results in dismissal of the Chapter 7 case.
    - A motion to dismiss or convert under Section 707(b)(1) must be ***filed*** within 60 days after the first date set for the meeting of creditors, unless the court extends the deadline. *Fed. R. Bankr. P. 1017(e)(1)*.
    - The motion should be served upon the ***debtor***, the Chapter 7 trustee, the U.S. Trustee, and all parties in interest. *Fed. R. Bankr. P. 9014*.

Chapter 11 Conversions

Section 1112(a) of the Bankruptcy Code and *Bankruptcy Rule 1017(f)(2)* govern a ***debtor***'s voluntary request to convert its case from Chapter 11 to Chapter 7. Section 1112(d) and *Bankruptcy Rule 1017(f)(1)* govern a ***debtor***'s voluntary motion to convert to Chapter 12 or 13. Section 1112(b) and *Bankruptcy Rule 1017(f)(1)* govern a non-***debtor*** party's motion to convert the ***debtor***'s Chapter 11 case to a Chapter 7 case. *Bankruptcy Rule 1009(a)* is used to convert a Chapter 11 to a small business case or a small business case proceeding under Subchapter V of Chapter 11. For more information, see *Converting from Chapter 11 to Chapter 7*, *Chapter 11 Small Business **Debtor*** and *Subchapter V Cases*. For related forms, see ***Debtor**'s Motion to Convert (Chapter 11 to Chapter 7)*, *Motion to Convert (Chapter 11 to Chapter 7)*, and *Conversion Order (Chapter 11 to Chapter 7)*.

- ***Debtor* Voluntary Conversion from Chapter 11 to Chapter 7.** Section 1112(a) states that a Chapter 11 ***debtor*** may convert its case to a case under Chapter 7 provided (1) the ***debtor*** is a ***debtor** in possession* (DIP), (2) the Chapter 11 case was commenced voluntarily, and (3) the case was not previously converted to a Chapter 11 case at the request of a party other than the ***debtor***. *11 U.S.C. § 1112(a)*.
    - The right to convert from Chapter 11 to Chapter 7 is generally treated as absolute, provided the ***debtor*** meets the requirements set forth in Section 1112(a).
    - Some courts refuse to permit conversion under Section 1112(a) if the request is made in bad faith, is an abuse of the bankruptcy process, or if it involves some gross inequity.
    - The ***debtor*** must ***file*** a motion to convert under Section 1112(a) and serve the motion in accordance with *Bankruptcy Rule 9013* (rather than initiation of a contested matter under *Bankruptcy Rule 9014*). *Fed. R. Bankr. P. 1017(f)(2)*. See ***Debtor**'s Motion to Convert (Chapter 11 to Chapter 7)*.
    - The motion should be served upon the *Chapter 11 trustee* (if any), the U.S. Trustee, and any other parties directed by the court. *Fed. R. Bankr. P. 9013*.
    - The bankruptcy court may enter an order granting a motion to convert pursuant to Section 1112(a) without a hearing. *Fed. R. Bankr. P. 9013*.
    - The bankruptcy court considers whether (1) a trustee has been appointed in the Chapter 11 case, (2) the Chapter 11 case was commenced as an *involuntary petition*, and (3) the Chapter 11 case was involuntarily converted to a Chapter 11 from another chapter prior to entering an order on a motion to convert a Chapter 11 case to a Chapter 7 case.
    - Some jurisdictions require that a proposed order be included with the motion requesting conversion pursuant to Section 1112(a). Counsel should check the local rules and forms for its jurisdiction.
- ***Debtor* Voluntary Conversion from Chapter 11 to Chapter 12 or 13.** Section 1112(d) states that the bankruptcy court may convert a Chapter 11 case to a case under Chapter 12 or Chapter 13 only if (1) the ***debtor*** requests the conversion, (2) the ***debtor*** has not been ***discharged*** under Section 1141(d), and (3) (for ***debtor*** conversion requests to Chapter 12), such conversion is equitable. *11 U.S.C. § 1112(d)*. See ***Debtor**'s Motion to Convert (Chapter 11 to Chapter 12)*, ***Debtor**'s Motion to Convert (Chapter 11 to Chapter 13)* and *Voluntary Conversion Order (Chapter 11 to Chapter 12 or 13)*.

○ The ***debtor*** must ***file*** a motion to convert under Section 1112(d) and serve the motion in accordance with *Bankruptcy Rule 9014* (initiating a contested matter). *Fed. R. Bankr. P. 1017(f)(1)*.

○ The motion should be served upon the Chapter 11 trustee (if any), the U.S. Trustee, and any other parties directed by the court. *Fed. R. Bankr. P. 9013*.

○ Parties in interest must be afforded an opportunity for a hearing on a motion to convert a Chapter 11 case to a case under Chapter 12 or Chapter 13. *Fed. R. Bankr. P. 9014*.

○ *Bankruptcy Rule 2002(a)(4)* requires 21 days' notice of a hearing to convert a case under Chapter 7, 11, or 12 to another chapter. *Fed. R. Bankr. P. 2002(a)(4)*.

○ To convert to a Chapter 13 case, a Chapter 11 ***debtor*** must show that the conversion is (1) sought in good faith and (2) in the best interest of creditors.

○ To convert to a Chapter 12 case, a Chapter 11 ***debtor*** must show that the conversion is equitable based upon:

— The substantial likelihood of a successful reorganization under Chapter 12

— The actions of the ***debtor*** in the Chapter 11 case

— The status of any Chapter 11 plan that has been ***filed***

— How recently the Chapter 11 case was ***filed***

— The effect conversion will have on parties in interest

- ***Debtor*** **Voluntary Conversion from Chapter 11 to a Small Business Case or a Small Business Case Proceeding under Subchapter V of Chapter 11.** When ***filing*** a bankruptcy *petition*, a small business can elect to proceed as (1) a small business ***debtor*** under Chapter 11 or (2) a small business ***debtor*** under Subchapter V of Chapter 11. *Bankruptcy Rule 1009(a)* provides that a ***debtor*** may amend a voluntary petition as a matter of course at any time before closing the bankruptcy case. *Fed. R. Bankr. P. 1009(a)*. For more information, see *Chapter 11 Small Business **Debtor*** and *Subchapter V Cases*.

  ○ A Chapter 11 ***debtor*** may amend its voluntary petition to re-designate its case as a small business case under Chapter 11 or a small business ***debtor*** under Subchapter V of Chapter 11.

  ○ To amend the petition, the Chapter 11 ***debtor*** must ***file*** the amendment and give notice to the U.S. Trustee and any other parties in interest. *Fed. R. Bankr. P. 1009(a)*.

  ○ Parties in interest may object to the amended designation no later than (1) 30 days after the ***filing*** of the amended petition or (2) 30 days after the Section 341 meeting, whichever is later. *Fed. R. Bank. P. 1020(b)*.

- **Non-*debtor* Motion to Convert a Chapter 11 Case to Chapter 7.** Section 1112(b) provides that a Chapter 11 case may be converted to a Chapter 7 case on the request of a party in interest for cause after notice and a hearing, provided that no unusual circumstances are present, and conversion is in the best interests of creditors. See *Motion to Convert (Chapter 11 to Chapter 7)* and *Conversion Order (Chapter 11 to Chapter 7)*.

  ○ A non-***debtor*** party must ***file*** a motion to convert a Chapter 11 case to a Chapter 7 case under Section 1112(b) and serve the motion in accordance with *Bankruptcy Rule 9014* (initiating a contested matter). *Fed. R. Bankr. P. 1017(f)(1)*.

  ○ The motion should be served upon the U.S. Trustee and all parties in interest. *Fed. R. Bankr. P. 9014*.

  ○ *Bankruptcy Rule 2002(a)(4)* requires 21 days' notice of a hearing to convert a case under Chapter 11 to another chapter. *Fed. R. Bankr. P. 2002(a)(4)*.

  ○ The ***debtor*** must be afforded an opportunity for a hearing on a motion to convert a Chapter 11 case to a case under Chapter 7 ***filed*** by a party in interest. *Fed. R. Bankr. P. 9014*.

  ○ The bankruptcy court must (1) commence a hearing on a motion made under Section 1112(b) no later than 30 days after ***filing*** of the motion to convert and (2) decide the motion no later than 15 days after commencement of the hearing, unless the movant expressly consents to a continuance for a specific period of time or compelling circumstances prevent the court from meeting the time requirements. *11 U.S.C. § 1112(b)(3)*.

Converting a Bankruptcy Case Checklist

○ A non-exhaustive list of items that constitute cause for conversion pursuant to Section 1112(b) is set forth in Section 1112(b)(4) and includes:

— Substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation

— Gross mismanagement of the estate

— Failure to maintain appropriate insurance that poses a risk to the estate or to the public

— Unauthorized use of *cash collateral* substantially harmful to one or more creditors

— Failure to comply with an order of the court

— Unexcused failure to satisfy timely any ***filing*** or reporting requirement established by the Bankruptcy Code or Bankruptcy Rules

— Failure to attend the *Section 341 meeting of creditors* or a *Bankruptcy Rule 2004 Examinations* without good cause shown by the ***debtor***

— Failure to timely provide information or attend meetings reasonably requested by the U.S. Trustee (or the bankruptcy administrator, if any)

— Failure to timely pay taxes owed after the date of the order for relief or to ***file*** tax returns due after the date of the order for relief

— Failure to ***file*** a *disclosure statement*, or to ***file*** or confirm a plan, within the time fixed by this title or by order of the court

— Failure to pay any fees or charges required

— Revocation of a *confirmation order* under *Section 1144 of the Bankruptcy Code*

— Inability to effectuate substantial consummation of a confirmed plan

— Material default by the ***debtor*** with respect to a confirmed plan

— ***Termination*** of a confirmed plan by reason of the occurrence of a condition specified in the plan

— Failure of the ***debtor*** to pay any domestic support obligation that first becomes payable after the date of the ***filing*** of the petition

11 U.S.C. § 1112(b)(4).

○ Once cause is established, the court must grant the relief unless the ***debtor*** (or other party in interest) demonstrates (and the bankruptcy court specifically identifies) unusual circumstances which establish that the relief requested is not in the best interests of creditors. *11 U.S.C. § 1112(b)(1)*.

○ The Bankruptcy Code is silent as to what constitutes unusual circumstances, but the term contemplates facts that are not common to Chapter 11 cases.

○ The bankruptcy court may not convert a Chapter 11 case to a Chapter 7 case if the court finds unusual circumstances which establish that the relief requested is not in the best interests of creditors and that:

— There is a reasonable likelihood that a Chapter 11 plan will be confirmed in the time frames set by the Bankruptcy Code.

— The grounds constituting cause for conversion are not based on a substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation.

— There is a reasonable justification for the act or omission giving rise to cause for conversion or dismissal which will be cured within a reasonable time set by the court.

11 U.S.C. § 1112(b)(2)(A)–(B).

- Counsel for a non-***debtor*** party seeking conversion of a Chapter 11 case to a Chapter 7 case should be prepared to demonstrate (1) cause pursuant to Section 1112(b)(4) and (2) no unusual circumstances present in the Chapter 11 case.
- Counsel for a Chapter 11 ***debtor*** opposed to conversion of its case should be prepared to demonstrate that creditors are best served by continuance of the Chapter 11 case.
- The bankruptcy court may not convert a Chapter 11 case to a Chapter 7 case if the ***debtor*** is a farmer or a corporation that is not a moneyed, business, or commercial corporation without the consent of the ***debtor***. *11 U.S.C. § 1112(c)*.

- **Non-*debtor* Motion to Convert a Chapter 11 Case to Chapter 12 or 13.** Section 1112(d) provides that a Chapter 11 case may not be converted to a Chapter 12 or Chapter 13 case unless the ***debtor*** requests such conversion. Chapter 12 and Chapter 13 cases are both considered voluntary in nature.
- **Non-*debtor* Conversion from Chapter 11 to a Small Business Case or a Small Business Case Proceeding under Subchapter V of Chapter 11.** *Bankruptcy Rule 1009(a)* provides that the bankruptcy court may amend the petition upon request by a party in interest after notice and a hearing.
  - A party in interest may seek to amend a Chapter 11 petition to designate the ***debtor*** as a small business case under Chapter 11 or a small business ***debtor*** under Subchapter V of Chapter 11.
  - An amendment to the petition requested by a non-***debtor*** party may be ordered after notice and a hearing.

Chapter 12 Conversions

Section 1208(a) of the Bankruptcy Code and *Bankruptcy Rule 1017(f)(3)* govern a ***debtor***'s voluntary request to convert its case from Chapter 12 to Chapter 7. *Bankruptcy Rule 1017(f)(1)* governs a ***debtor***'s voluntary motion to convert to Chapter 11 or 13. Section 1208(d) and *Bankruptcy Rule 1017(f)(1)* govern a non-***debtor*** party's motion to convert the ***debtor***'s Chapter 12 case to a Chapter 7 case. For information on Chapter 12, see *Chapter 12 of the Bankruptcy Code: Adjustment of Debts of a Family Farmer or Fisherman with Regular Annual Income*. For related forms, see *Notice of Conversion (Chapter 12 to Chapter 7)* and *Conversion Order (Chapter 12 to Chapter 7)*.

- ***Debtor* Voluntary Conversion from *Chapter 12* to Chapter 7.** Section 1208(a) states that a Chapter 12 ***debtor*** may convert to a Chapter 7 case at any time. *Bankruptcy Rule 1017(f)(3)* provides that a Chapter 12 ***debtor*** may voluntary convert its Chapter 12 to Chapter 7 case by ***filing*** a notice of conversion (i.e., without a motion). *Fed. R. Bank. P. 1017(f)(3)*. Any waiver of the right to convert under Section 1208(a) is unenforceable. *11 U.S.C. § 1208(a)*. See *Notice of Conversion (Chapter 12 to Chapter 7)*.
  - The right to convert from Chapter 12 to Chapter 7 pursuant to Section 1208(a) is an absolute right.
  - No order is required to convert a case from Chapter 12 to Chapter 7. *Bankruptcy Rule 1017(f)(3)* provides that a Chapter 12 case may be converted to a case under Chapter 7 upon the ***filing*** of a notice of conversion. The ***filing*** date of the notice of conversion is the date of the conversion. *Fed. R. Bank. P. 1017(f)(2)*.
  - The bankruptcy clerk transmits a copy of the notice of conversion to the U.S. Trustee. *Fed. R. Bankr. P. 1017(3)*.
  - Note that the property of the estate issues that arise in Chapter 13 conversion cases (discussed below) do not arise in Chapter 12 conversion cases. Section 348(f)(1)–(2) applies only to cases originating under Chapter 13.
- ***Debtor* Voluntary Conversion from Chapter 12 to Chapter 11 or 13.** There is no statutory language that permits or prohibits conversion of a Chapter 12 case to one under Chapter 11 or 13. Courts hold that such conversion requests may be permitted or denied at the discretion of the bankruptcy court.
  - The ***debtor*** must ***file*** a motion to convert a Chapter 12 case to a Chapter 11 or 13 case and serve the motion in accordance with *Bankruptcy Rule 9014* (initiating a contested matter). *Fed. R. Bankr. P. 1017(f)(1)*.
  - The motion should be served upon the *Chapter 12 trustee*, the U.S. Trustee, and all parties in interest. *Fed. R. Bankr. P. 9014*.

○ Parties in interest must be afforded an opportunity for a hearing on a motion to convert a Chapter 12 case to a case under Chapter 11 or Chapter 13. *Fed. R. Bankr. P. 9014*.

○ *Bankruptcy Rule 2002(a)(4)* requires 21 days' notice of a hearing to convert a case under Chapter 7, 11, or 12 to another chapter. *Fed. R. Bankr. P. 2002(a)(4)*.

○ A Chapter 12 ***debtor*** requesting conversion to a case under Chapter 11 or 13 should be prepared to demonstrate to the court that the ***debtor*** has acted in good faith throughout the Chapter 12 case and that the requested conversion will not materially prejudice creditors or other parties in interest.

• **Non-*debtor* Motion to Convert a Chapter 12 Case to Chapter 7.** Section 1208(d) provides that a Chapter 12 case may be converted to a Chapter 7 case after notice and a hearing only upon a showing of fraud committed by the ***debtor*** during the Chapter 12 case. *11 U.S.C. § 1208(d)*. See *Non-**debtor**'s Motion to Dismiss or Convert (Chapter 12 to Chapter 7)* and *Conversion Order (Chapter 12 to Chapter 7)*.

○ A non-***debtor*** party must ***file*** a motion to convert a Chapter 12 case to a Chapter 7 case under Section 1208(d) and serve the motion in accordance with *Bankruptcy Rule 9014* (initiating a contested matter). *Fed. R. Bankr. P. 1017(f)(1)*.

○ The motion should be served upon the Chapter 12 trustee, the U.S. Trustee, and all parties in interest. *Fed. R. Bankr. P. 9014*.

○ The ***debtor*** must be afforded an opportunity for a hearing on a motion to convert a Chapter 12 case to a case under Chapter 7 ***filed*** by a party in interest. *Fed. R. Bankr. P. 9014*.

○ *Bankruptcy Rule 2002(a)(4)* requires 21 days' notice of a hearing to convert a case under Chapter 7, 11, or 12 to another chapter. *Fed. R. Bankr. P. 2002(a)(4)*.

○ Note that Section 1208(d) specifically provides for a showing of fraud associated with the bankruptcy case, rather than a general fraud claim against the ***debtor***.

• **Non-*debtor* Motion to Convert a Chapter 12 Case to Chapter 11 or 13.** As with voluntary conversion from Chapter 12 (as discussed above), there is no statutory language that permits or prohibits conversion of a Chapter 12 case to one under Chapter 11 or 13. Courts hold that such conversion requests may be permitted or denied at the discretion of the bankruptcy court.

○ A non-***debtor*** party must ***file*** a motion to convert a Chapter 12 case to a Chapter 11 or 13 case and serve the motion in accordance with *Bankruptcy Rule 9014* (initiating a contested matter). *Fed. R. Bankr. P. 1017(f)(1)*.

○ The motion should be served upon the Chapter 12 trustee, the U.S. Trustee, and all parties in interest. *Fed. R. Bankr. P. 9014*.

○ Parties in interest, including the ***debtor***, must be afforded an opportunity for a hearing on a motion to convert a Chapter 12 case to a case under Chapter 11 or Chapter 12. *Fed. R. Bankr. P. 9014*.

○ *Bankruptcy Rule 2002(a)(4)* requires 21 days' notice of a hearing to convert a case under Chapter 7, 11, or 12 to another chapter. *Fed. R. Bankr. P. 2002(a)(4)*.

○ A party in interest seeking to convert a Chapter 12 case to a case under Chapter 11 or 13 should be prepared to demonstrate that the requested conversion is in the best interests of creditors and the bankruptcy estate.

Chapter 13 Conversions

Section 1307(a) of the Bankruptcy Code and *Bankruptcy Rule 1017(f)(3)* govern a ***debtor***'s voluntary request to convert its case from Chapter 13 to Chapter 7. Section 1307(d) and *Bankruptcy Rule 1017(f)(1)* govern a ***debtor***'s and non-***debtor***'s motion to convert from Chapter 13 to Chapter 11 or 12. Section 1307(c) and *Bankruptcy Rule 1017(f)(1)* govern a non-***debtor*** party's motion to convert the ***debtor***'s Chapter 13 case to a Chapter 7 case. For information on Chapter 13, see *Chapter 13 Bankruptcy*. For related forms, see *Notice of Conversion (Chapter 13 to Chapter 7)*, *Non-**Debtor** Motion to Dismiss or Convert (Chapter 13 to Chapter 7)*, and *Conversion Order (Chapter 13 to Chapter 7)*.

Converting a Bankruptcy Case Checklist

- ***Debtor*** **Voluntary Conversion from Chapter 13 to Chapter 7.** Section 1307(a) states that a Chapter 13 ***debtor*** may convert to a Chapter 7 case at any time. *Bankruptcy Rule 1017(f)(3)* provides that a Chapter 13 ***debtor*** may voluntarily convert its Chapter 13 to Chapter 7 case by ***filing*** a notice of conversion (i.e., without a motion). *Fed. R. Bank. P. 1017(f)(3)*. Any waiver of the right to convert under Section 1307(a) is unenforceable. *11 U.S.C. § 1307(a)*. See *Notice of Conversion (Chapter 13 to Chapter 7)*.
    - ○ The right to convert from Chapter 13 to Chapter 7 pursuant to Section 1307(a) is an absolute right.
    - ○ No order is required to convert a case from Chapter 13 to Chapter 7. *Bankruptcy Rule 1017(f)(3)* provides that a Chapter 13 case may be converted to a case under Chapter 7 upon the ***filing*** of a notice of conversion. The ***filing*** date of the notice of conversion is the date of the conversion. *Fed. R. Bank. P. 1017(f)(3)*.
    - ○ The bankruptcy clerk transmits a copy of the notice of conversion to the U.S. Trustee. *Fed. R. Bankr. P. 1017(3)*.
    - ○ If the conversion is ***filed*** in good faith, *property of the estate* is determined as of the petition date. *11 U.S.C. § 348(f)(1)(A)*. Post-petition wages held by the *Chapter 13 trustee*, but not yet distributed as of the conversion date, belong to the ***debtor*** as post-petition wages and are not considered property of the estate in Chapter 7 cases.
    - ○ If the conversion is ***filed*** in bad faith, property of the estate is determined as of the conversion date. *11 U.S.C. § 348(f)(2)*. Post-petition wages held by the Chapter 13 trustee, but not yet distributed as of the conversion date, belong to the bankruptcy *estate*.
- ***Debtor*** **Voluntary Conversion from Chapter 13 to Chapter 11 or 12.** Section 1307(d) states that the bankruptcy court may convert a Chapter 13 case to a case under Chapter 11 or Chapter 12 upon notice and hearing prior to confirmation of a Chapter 13 plan. *11 U.S.C. § 1307(d)*. Note that Section 1307(d) applies to both voluntary requests by the ***debtor*** to convert and involuntary requests by a non-***debtor*** party.
    - ○ The ***debtor*** must ***file*** a motion to convert a Chapter 13 case to a Chapter 11 or 12 case and serve the motion in accordance with *Bankruptcy Rule 9014* (initiating a contested matter). *Fed. R. Bankr. P. 1017(f)(1)*.
    - ○ The motion should be served upon the Chapter 13 trustee, the U.S. Trustee, and all parties in interest. *Fed. R. Bankr. P. 9014*.
    - ○ Parties in interest must be afforded an opportunity for a hearing on a motion to convert a Chapter 13 case to a case under Chapter 11 or Chapter 12. *Fed. R. Bankr. P. 9014*.
    - ○ Because no provision is made for notice of a hearing on conversion of a Chapter 13 case, the bankruptcy court will fix the time and manner of notice. *Fed. R. Bankr. P. 2002(f)(2)*. Check with your local rules as to the form and timing of the notice.
    - ○ The motion must be ***filed*** prior to confirmation of a Chapter 13 plan. *11 U.S.C. § 1307(d)*.
    - ○ Section 1307(d) does not specify the requirements necessary for converting a Chapter 13 case to one under Chapter 11 or 12. Some courts look to the good faith of the ***debtor*** in prosecuting the Chapter 13 case. Other courts look to whether conversion is in the best interest of all parties.
    - ○ A Chapter 13 ***debtor*** requesting conversion to a case under Chapter 11 or 12 should be prepared to demonstrate to the court that conversion is not meant to benefit the ***debtor*** at the expense of creditors.
- **Non-*debtor* Motion to Convert a Chapter 13 Case to Chapter 7.** Section 1307(c) provides that the bankruptcy court may convert a Chapter 13 case to a Chapter 7 case on request by a party in interest, after notice and hearing for cause.
    - ○ A non-***debtor*** party must ***file*** a motion to convert a Chapter 13 case to a Chapter 7 case under Section 1307(c) and serve the motion in accordance with *Bankruptcy Rule 9014* (initiating a contested matter). *Fed. R. Bankr. P. 1017(f)(1)*. See *Non-**debtor** Motion to Dismiss or Convert (Chapter 13 to Chapter 7)* and *Conversion Order (Chapter 13 to Chapter 7)*.
    - ○ The motion should be served upon the Chapter 13 trustee, the U.S. Trustee, and all parties in interest. *Fed. R. Bankr. P. 9014*.

○ Parties in interest, including the ***debtor***, must be afforded an opportunity for a hearing on a motion to convert a Chapter 13 case to a case under Chapter 7. *Fed. R. Bankr. P. 9014*.

○ Because no provision is made for notice of a hearing on conversion of a Chapter 13 case, the bankruptcy court will fix the time and manner of notice. *Fed. R. Bankr. P. 2002(f)(2)*. Check with your local rules as to the form and timing of the notice.

○ Section 1307(c) provides a non-exhaustive list of items that constitute cause for conversion including:

— Unreasonable delay by the ***debtor*** that is prejudicial to creditors

— Nonpayment of any fees and charges required

— Failure to ***file*** a Chapter 13 plan timely under *Section 1321 of the Bankruptcy Code*

— Failure to commence making timely payments under *Section 1326 of the Bankruptcy Code*

— Denial of confirmation of a plan under *Section 1325 of the Bankruptcy Code* and denial of a request made for additional time for ***filing*** another plan or a modification of a plan

— Material default by the ***debtor*** with respect to a term of a confirmed plan

— Revocation of the order of confirmation under *Section 1330 of the Bankruptcy Code*, and denial of confirmation of a modified plan under *Section 1329 of the Bankruptcy Code*

— ***Termination*** of a confirmed plan by reason of the occurrence of a condition specified in the plan other than completion of payments under the plan

— For U.S. Trustee requests, failure of the ***debtor*** to ***file***, within 15 days, or such additional time as the court may allow, after the ***filing*** of the petition commencing such case, the information required by paragraph (1) of *Section 521(a) of the Bankruptcy Code*

— For U.S. Trustee requests, failure to timely ***file*** the information required by paragraph (2) of *Section 521(a) of the Bankruptcy Code*

— Failure of the ***debtor*** to pay any domestic support obligation that first becomes payable after the date of the ***filing*** of the petition

○ Section 1307(e) requires the bankruptcy court to convert a Chapter 13 case to Chapter 7 (or dismiss the Chapter 13 case) upon request by a party in interest if the ***debtor*** fails to ***file*** a tax return as required under *Section 1308 of the Bankruptcy Code*.

○ Note that a Chapter 13 ***debtor*** may avoid conversion of his or her case by exercising his or her absolute right to dismiss the Chapter 13 case under Section 1307(b).

• **Non-*debtor* Motion to Convert a Chapter 13 Case to Chapter 11 or Chapter 12.** Section 1307(d) states that the bankruptcy court may convert a Chapter 13 case to a case under Chapter 11 or Chapter 12 upon notice and hearing prior to confirmation of a Chapter 13 plan. *11 U.S.C. § 1307(d)*.

○ A non-***debtor*** party must ***file*** a motion to convert a Chapter 13 case to a Chapter 11 or Chapter 12 case under Section 1307(d) and serve the motion in accordance with *Bankruptcy Rule 9014* (initiating a contested matter). *Fed. R. Bankr. P. 1017(f)(1)*.

○ The motion should be served upon the Chapter 13 trustee, the U.S. Trustee, and all parties in interest. *Fed. R. Bankr. P. 9014*.

○ Parties in interest, including the ***debtor***, must be afforded an opportunity for a hearing on a motion to convert a Chapter 13 case to a case under Chapter 11 or 12. *Fed. R. Bankr. P. 9014*.

○ Because no provision is made for notice of a hearing on conversion of a Chapter 13 case, the bankruptcy court will fix the time and manner of notice. *Fed. R. Bankr. P. 2002(f)(2)*. Check your local rules as to the form and timing of the notice.

- ○ The motion must be ***filed*** prior to confirmation of a Chapter 13 plan. *11 U.S.C. § 1307(d)*.
- ○ Section 1307(d) does not specify the requirements necessary for converting a Chapter 13 case to one under Chapter 11 or 12.
- ○ Non-***debtor*** parties seeking to convert a Chapter 13 case to a Chapter 7 case must demonstrate that conversion is in the best interest of creditors.
- ○ Note that a Chapter 13 ***debtor*** may avoid conversion of his or her case by exercising his or her absolute right to dismiss the Chapter 13 case under Section 1307(b).

Checklist of Items for Notices and Motions to Convert

Below is a list of items to include in the ***debtor***'s voluntary notices or motions to convert and non-***debtor***'s motions to convert.

- ***Debtor*** **Notices of Conversion.** The list below addresses a ***debtor***'s notice to convert a (1) Chapter 13 to Chapter 7 and (2) Chapter 12 to Chapter 7. The notice of conversion should contain the following items:
  - ○ Petition date
  - ○ Name of Chapter 13 trustee or Chapter 12 trustee, as applicable
  - ○ Short procedural status of the case
  - ○ Statement that the conversion is ***filed*** in good faith
  - ○ Statement that the ***debtor*** is ***eligible*** for relief under Chapter 7
  - ○ Statement regarding payment of the ***filing*** fee
- ***Debtor*** **Motions to Convert under** *Bankruptcy Rule 9013* **(No Hearing Required).** The list below addresses a ***debtor***'s motion to convert a (1) Chapter 11 to Chapter 7 and (2) Chapter 7 to Chapter 11, 12, or 13. The motion requesting conversion pursuant to Section 706(a) or Section 1112(a) should contain the following items:
  - ○ Petition date
  - ○ Procedural status of the case
  - ○ In Chapter 7 cases, the name of the Chapter 7 trustee
  - ○ In Chapter 11 cases, statement affirming that the ***debtor*** is the acting DIP
  - ○ Statement regarding the voluntary commencement of the case
  - ○ Statement affirming that the case has not been previously converted
  - ○ Statement that the conversion is ***filed*** in good faith
  - ○ Statement that the ***debtor*** is ***eligible*** for relief for the chapter for which conversion is requested
  - ○ Proposed order (Some jurisdictions require that a proposed order be included with the motion requesting conversion pursuant to Section 706(a) or Section 1112(a). Counsel should check the local rules and forms for its jurisdiction.)
- ***Debtor*** **Motions to Convert under** *Bankruptcy Rule 9014* **(Opportunity for Hearing Required).** The list below addresses a ***debtor***'s motion to convert a (1) Chapter 11 to Chapter 12 or 13, (2) Chapter 13 to Chapter 11 or 12, and (3) Chapter 12 to Chapter 11 or 13. The motion requesting a voluntary conversion under *Bankruptcy Rule 9014* should contain the following items:
  - ○ Petition date
  - ○ Name of trustee, if applicable, or statement regarding the DIP, in a Chapter 11 case
  - ○ Statement regarding the status of confirmation of any ***filed*** plan
  - ○ Statement that the ***debtor*** is ***eligible*** for relief for the chapter for which conversion is requested

- ○ Statement whether the case was voluntarily commenced
- ○ Statement affirming that the case has not been previously converted or the circumstances regarding any ***previous*** conversions
- ○ Procedural status of the case, including the issuance or non-issuance of a ***discharge***
- ○ Statement affirming that the conversion is ***filed*** in good faith and equitable
- ○ Statement affirming that creditors will not be materially prejudiced by the proposed conversion

• **Non-*debtor* Motions to Convert under *Bankruptcy Rule 9014* (Opportunity for Hearing Required).** The list below addresses a non-***debtor*** party's motion to convert (1) Chapter 11 to Chapter 7, 12, or 13; (2) Chapter 7 to Chapter 11, 12, or 13; (3) Chapter 13 to Chapter 7, 11, or 12; and (4) Chapter 12 to Chapter 7, 11, or 13. The motion requesting an involuntary conversion under *Bankruptcy Rule 9014* should contain the following items:

- ○ Petition date
- ○ Name of trustee, if applicable, or statement regarding the DIP, in a Chapter 11 case
- ○ Statement regarding the status of confirmation of any ***filed*** plan
- ○ Statement that the ***debtor*** is ***eligible*** for relief for the chapter for which conversion is requested
- ○ Procedural status of the case, including the issuance or non-issuance of a ***discharge***
- ○ Cause for conversion, including specific facts relevant to the pending case
- ○ Notice of hearing (Some jurisdictions require that a notice of hearing be included with the motion requesting conversion under *Bankruptcy Rule 9014*. Counsel should check the local rules, forms, and procedures for its jurisdiction and bankruptcy judge.)

End of Document

	CONVERSION STAFF DUTIES	
1	Prepare and file Form 3015-1.21.Notice.Convert.CH13 in Best Case. Attorney only signs, no order to lodge. Print mailing matrix & include new creditors (if necessary). MUST use filing event code BK>Other>Debtor's Notice of Conversion to Chapter 7	❑
2	Once case is converted, enter new trustee information, 341(a), & deadline dates in Outlook & BK case information tab.	❑
3	Prepare, mail ❑, and email ❑ Ch. 7 341(a) letter along with 341(a) packet to client.	❑
4	Prepare, file, & serve Final Report, Amendment cover sheet, Amended Sch. I&J, & Statement of Intention, if necessary, Amendment to Sch. D-F if new debt incurred (**must** disclose new creditors in Final Report). Serve new creditors with all the above. *See LBRs as to deadlines.*	❑
5	Prepare and send trustee docs. before new 341(a) date.	❑
6	Prepare file for 341 date.	❑

1. The debtor must file a statement of intention with respect to retention or surrender of property securing consumer debts within 30 days from the date of the filing the Debtor's Notice of Conversion or the first date set for the meeting of creditors, whichever is earlier.
2. Within 14 days from the date of the filing of the Debtor's Notice of Conversion, the debtor must file:
    a. A schedule of unpaid debts incurred after commencement of the chapter 13 case; and
    b. The statements and schedules required by FRBP 1019(1)(A) and 1007, and if this case commenced on or after October 17, 2005, a Chapter 7 Statement of Your Current Monthly Income (Official Form 122A−1), Statement of Exemption from Presumption of Abuse Under § 707(b)(2) (Official Form 122A−Supp), and Chapter 7 Means Test Calculation (Official Form 122A−2), if such documents have not already been filed.
3. Within 30 days from the date of the filing of the Debtor's Notice of Conversion:
    a. The chapter 13 trustee must file and transmit to the United States trustee a final report and account;
    b. The debtor must, if the case is converted AFTER confirmation of a plan, file:
    c. A schedule of all property not listed in the final report and account of the chapter 13 trustee which was acquired after commencement of the chapter 13 case but before the date of the filing of the Debtor's Notice of Conversion;
    d. A schedule of executory contracts and unexpired leases entered into or assumed after the commencement of the chapter 13 case but before the date of the filing of the Debtor's Notice of Conversion; and
    e. A schedule of unpaid debts not listed in the final report and account of the chapter 13 trustee which were incurred after the commencement of the chapter 13 case but before the date of the filing of the Debtor's Notice of Conversion.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In the Matter of: JOHN FELIX CASTLEMAN, Sr.; KIMBERLY KAY CASTLEMAN, *Debtors,* --- JOHN FELIX CASTLEMAN, Sr.; KIMBERLY KAY CASTLEMAN, *Appellants,* v. DENNIS LEE BURMAN, Chapter 7 Trustee, *Appellee.*	No. 22-35604 D.C. No. 2:21-cv-00829-JHC OPINION

Appeal from the United States District Court
for the Western District of Washington
John H. Chun, District Judge, Presiding

Argued and Submitted May 9, 2023
Seattle, Washington

Filed July 28, 2023

Before: Michael Daly Hawkins, Richard C. Tallman, and Sandra S. Ikuta, Circuit Judges.

Opinion by Judge Hawkins;
Dissent by Judge Tallman.

SUMMARY*

Bankruptcy

Affirming the district court's order, which affirmed the bankruptcy court's order, the panel held that post-petition, pre-conversion increases in the equity of an asset belong to the bankruptcy estate, rather than to debtors who, in good faith, convert their Chapter 13 reorganization petition into a Chapter 7 liquidation.

When debtors filed for bankruptcy, they listed their home among their assets. When they later converted to Chapter 7, the home had risen in value. Debtors argued that the home's increased equity belonged to them and not the bankruptcy estate under 11 U.S.C. § 348(f)(1)(A), which provides that "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."

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

On de novo review, the panel held that the plain language of § 348(f)(1)(A), coupled with the Ninth Circuit's previous interpretation of 11 U.S.C. § 541(a), compelled the conclusion that any appreciation in the property value and corresponding increase in equity belonged to the estate upon conversion. The panel looked to the definition of "property of the estate" in § 541(a), which addresses the contents of the bankruptcy estate upon filing under either Chapter 7 or Chapter 13, and the court's prior opinions holding that the broad scope of § 541(a) means that post-petition appreciation inures to the bankruptcy estate, not the debtor.

Dissenting, Judge Tallman wrote that the Bankruptcy Code as a whole established that post-petition, pre-conversion appreciation belonged to the debtors. He wrote that the majority's reading of § 348(f)(1)(A) created a circuit split and was inconsistent with the statute's structure, object, policies, and legislative history.

COUNSEL

Steven Hathaway (argued), Law Office of Steven C. Hathaway, Bellingham, Washington, for Appellants.

Peter H. Arkison (argued), Bellingham, Washington, for Appellee.

Russell D. Garrett, Jordan Ramis PC, Portland, Oregon, for Amicus Curiae National Association of Bankruptcy Trustees.

OPINION

HAWKINS, Circuit Judge:

We must decide whether post-petition, pre-conversion increases in the equity of an asset—i.e., the difference between a home's value and how much is owed on the mortgage, whether a result of market appreciation, payment of secured debt, improvements or otherwise—belong to the bankruptcy estate or to debtors who, in good faith, convert their Chapter 13 reorganization petition into a Chapter 7 liquidation.

Debtors John Felix Castleman, Sr. and Kimberly Kay Castleman (the "Castlemans") filed for Chapter 13 bankruptcy. They listed their home among their assets with a value of $500,000, a mortgage with an outstanding balance of $375,077, and a homestead exemption of $124,923. The bankruptcy court confirmed a Chapter 13 plan, but after roughly twenty months, which included a temporary job loss and deferral of mortgage payments due to the pandemic, Mr. Castleman contracted Parkinson's Disease, and the couple could no longer make their required payments. The Castlemans exercised their right to convert to Chapter 7. In the interim, their home had risen in value an estimated $200,000.[1] Dennis Burman, the Chapter 7 trustee ("Trustee"), filed a motion to sell the Castlemans' home to recover the value for creditors. The Castlemans objected and argued that the home's increased equity belongs to them and

[1] In this case, it appears the increase in equity was attributable primarily, if not exclusively, to market appreciation. Due to the deferral of mortgage payments during the pandemic, the Castlemans actually owed more at the time of filing for conversion ($390,763) than they did at the time of their initial filing.

not the bankruptcy estate under 11 U.S.C. § 348(f)(1)(A).[2]

Although courts are heavily divided on this question,[3] we conclude on de novo review, *Simpson v. Burkart (In re Simpson)*, 557 F.3d 1010, 1014 (9th Cir. 2009), that the plain language of § 348(f)(1)(A), coupled with this circuit's previous interpretation of § 541(a), compel the conclusion that any appreciation in the property value and corresponding increase in equity belongs to the estate upon conversion. We therefore affirm the decisions of the bankruptcy and district courts.

The purpose of the Bankruptcy Code is to grant a "fresh start to the honest but unfortunate debtor." *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007) (internal quotation marks and citation omitted). Individual debtors may petition for bankruptcy under Chapter 7 (liquidation) or Chapter 13 (reorganization). *Harris v. Viegelahn*, 575 U.S. 510, 513–14 (2015). Chapter 13 "allows a debtor to retain his property if he proposes, and gains court confirmation of, a plan to repay his debts over a three-to-five-year period." *Id.* at 514 (citing §§ 1306(b), 1322, 1327(b)). Chapter 13 can benefit the debtor and creditors: the former keeps his assets, and the latter "usually collect more under a Chapter 13 plan than they would have received

---

[2] Unless otherwise noted, all statutory references are to the Bankruptcy Code, 11 U.S.C. §101 et seq.

[3] *Compare In re Goins*, 539 B.R. 510, 515–16 (Bankr. E.D. Va. 2015), *In re Goetz*, 647 B.R. 412, 416–17 (Bankr. W.D. Mo. 2022), *In re Peter*, 309 B.R. 792, 794–95 (Bankr. D. Or. 2004), and *Potter v. Drewes* (*In re Potter*), 228 B.R. 422, 424 (B.A.P. 8th Cir. 1999), *with In re Barrera*, 22 F.4th 1217 (10th Cir. 2022), *In re Cofer*, 625 B.R. 194, 202 (Bankr. D. Idaho 2021), *In re Hodges*, 518 B.R. 445, 451 (E.D. Tenn. 2014), and *In re Niles*, 342 B.R. 72, 75 (Bankr. D. Ariz. 2006).

under a Chapter 7 liquidation." *Id.*

However, most debtors fail to successfully complete a Chapter 13 repayment plan, which is why "Congress accorded debtors a nonwaivable right to convert a Chapter 13 case to one under Chapter 7 'at any time.'" *Id*. (quoting § 1307(a)). The property of this converted Chapter 7 estate is defined by § 348(f), which provides in relevant part:

> (1) Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title-
>
> (A) property of the estate in the converted case shall consist of **property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion**;
>
> [. . .]
>
> (2) If the debtor converts a case under chapter 13 of this title to a case under another chapter under this title in bad faith, the property of the estate in the converted case shall consist of the property of the estate as of the date of conversion.

(emphasis added). The Trustee does not assert that the Castlemans converted in bad faith, and the Castlemans retained possession of the home on the date of conversion.

In interpreting the Bankruptcy Code, "the first step . . . is to determine whether the language [of a statute] has a plain and unambiguous meaning with regard to the particular

dispute." *Hawkins v. Franchise Tax Bd. of Cal.*, 769 F.3d 662, 666 (9th Cir. 2014). If the plain meaning is unambiguous, it controls. *Id.*; *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 125 (2016).

Section 348(f) does not define the word "property" or the phrase "property of the estate." However, "property of the estate" is a term of art which appears throughout the Bankruptcy Code. *See, e.g.*, §§ 541, 554(a), 726(a), 1306(a); *see also* Keith M. Lundin, *Lundin On Chapter 13* § 46.1 (2023) ("'Property of the estate' is a phrase of art that is fundamental to almost everything that happens in Chapter 13 practice."); 4 William L. Norton III, *Norton Bankruptcy Law and Practice* § 61:1 (3d ed. 2023) ("[F]or more than two centuries 'property of the estate' has become a term of art unique to bankruptcy law.").

"Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). We therefore look to the definitions of "property of the estate" set forth in other provisions of the Code itself. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.").

Under § 541(a)(1), filing for bankruptcy creates an estate which includes "all legal or equitable interests of the debtor in property as of the commencement of the case." The estate also includes all "[p]roceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor

after the commencement of the case." § 541(a)(6).

In *In re Goins*, the court found the trustee was entitled to any post-petition appreciation in assets of the estate, explaining: "[T]he equity attributable to the post-petition appreciation of the property is not separate, after-acquired property . . . The equity is inseparable from the real estate, which was always property of the estate under Section 541(a)." 539 B.R. at 516; *see also In re Goetz*, 647 B.R. at 416 (the broad definition of "property of the estate" in § 541(a) "captures the debtor's entire ownership interest in each asset that exists on the petition date without fixing the estate's interest to the precise characteristics the asset has on that date"). Other courts have held that any post-petition increase in the property's equity is the "proceeds, product, offspring, rents or profits" of the estate's original property under § 541(a)(6), and so became part of the estate when the case commenced. *See In re Potter*, 228 B.R. at 424; *In re Peter*, 309 B.R. at 794–95.

In this circuit, we have likewise concluded that the broad scope of § 541(a), and especially § 541(a)(6), means that post-petition "appreciation [i]nures to the bankruptcy estate, not the debtor." *Schwaber v. Reed* (*In re Reed*), 940 F.2d 1317, 1323 (9th Cir. 1991). We recently re-affirmed this in *Wilson v. Rigby*, noting that when a debtor files for bankruptcy, the "proceeds, product, offspring, rents, or profits" which become part of the estate under § 541(a)(6) "include[] the appreciation in value of a debtor's home." 909 F.3d 306, 309 (9th Cir. 2018). The Castlemans point out that *Wilson* was originally filed as a Chapter 7 case, but the definition of property of the estate in § 541(a) applies equally to Chapter 13. There is no textual support for concluding that § 541(a) has a different meaning upon conversion from Chapter 13. As the district court in this case

aptly summarized the significance of these prior Ninth Circuit decisions:

> It is well settled that in a Chapter 7 case, all property that the debtor acquires post-petition is excluded from the estate. *See, e.g., Harris*, 575 U.S. at 514 (citing § 541(a)(1)). Therefore, if appreciation were a separate, after-acquired property interest, it would have to inure to the debtor. The Ninth Circuit, in finding that appreciation inures to the estate under § 541(a)(6), has necessarily found that increased equity in a pre-petition asset cannot be a separate, after-acquired property interest. This logic applies with equal force in a conversion case.

Many of the courts who have reached a different conclusion regarding post-petition changes in equity have relied on various statements or examples in the legislative history surrounding § 348(f), which was enacted to clarify whether new property acquired during the course of Chapter 13 proceedings becomes property of the converted estate (under § 348(f)(2), this occurs only if the debtor was acting in bad faith). *See, e.g., In re Cofer*, 625 B.R. at 200–02; *In re Nichols*, 319 B.R. at 856. However, because we conclude the language of § 348(f), when read in conjunction with the remainder of the Bankruptcy Code, is not ambiguous, we do not look to legislative history for guidance. *Robinson*, 519

U.S. at 340 ("Our inquiry must cease if the statutory language is unambiguous.").[4]

Some courts have also relied on the implicit operation of § 1327(b), which provides: "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." Under this reasoning, equity increases from the time of the initial filing up until plan confirmation would inure to the estate, then from time of confirmation until conversion would vest in the debtor, and finally upon conversion, any additional post-conversion changes would benefit the estate. *See, e.g., In re Barrera*, 22 F.4th at 1223–24. However, we find it difficult to believe Congress envisioned this valuation and accounting process without making any explicit cross-reference to § 1327(b), and because in other instances where Congress wanted to exclude assets or certain interests of the debtor from the bankruptcy estate, it has done so with specificity. *See, e.g.,*

[4] We recognize that some courts have found § 348(f) to be ambiguous. However, the existence of a division of judicial authority does not itself establish ambiguity in the text. *See, e.g., Roberts v. Sea-Land Servs., Inc.*, 132 S. Ct. 1350 (2012) (holding provision of Longshore and Harbor Workers' Compensation Act is unambiguous despite disagreement between Fifth, Ninth and Eleventh Circuits); *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702 (holding term used in Torture Victim Protection Act was unambiguous despite disagreement among several circuits); *Reno v. Koray*, 515 U.S. 50, 64–65 (1995) ("A statute is not ambiguous for purposes of lenity merely because there is a division of judicial authority over its proper construction.") (internal quotation and citation omitted). As we have explained, even if § 348(f) in isolation might be ambiguous, when read in connection with the remainder of the bankruptcy statute as already interpreted by this circuit, its meaning becomes clear. *See United Sav. Ass'n of Tex.*, 484 U.S. at 371 ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme.").

§ 541(a)(6) (excluding post-petition earnings by an individual in a Chapter 7 case) and § 541(b) (excluding various specific items from the estate, such as funds used to purchase a 529 education plan). If, as the dissent suggests, Congress actually intended to exclude from the revived estate any increase in equity of an estate asset that may have occurred from the time of plan confirmation to conversion, it could have amended § 348(f) further to make this result clear. As written, § 348(f) only clarified that newly-acquired, post-petition property would not become part of the converted estate if the debtor had been acting in good faith.

In sum, the plain language of § 348(f)(1) dictates that any property of the estate at the time of the original filing that is still in debtor's possession at the time of conversion once again becomes part of the bankruptcy estate, and our case law dictates that any change in the value of such an asset is also part of that estate. In this case, that property increased in value. In other cases, the value might decline, or the value of one asset in the estate might increase while other property depreciates in value. This is simply a happenstance of market conditions, which sometimes will benefit the debtor and sometimes benefit the estate.[5] The district court and bankruptcy court correctly concluded that the Castlemans' home (including any post-petition, pre-conversion increase in equity) was again part of the bankruptcy estate pursuant

[5] Note that, for example, the debtor's homestead exemption is fixed as of the "snapshot" value on the date of the original filing. *See Hyman v. Plotkin (In re Hyman)*, 967 F.2d 1316, 1321 (9th Cir. 1992) ("Were we to accept the Hymans' argument that they're entitled to post-filing appreciation, we would also have to hold that a debtor is subject to post-filing *de*preciation, which would give debtors in falling property markets less than the [homestead exemption] guaranteed them by state law.").

to § 348(f)(1) and available to the Trustee for the benefit of the creditors.[6]

AFFIRMED.[7]

TALLMAN, Circuit Judge, dissenting.

As counsel for the trustee aptly put it, John and Kimberly Castleman "tried to do good and tried to pay off their bills" by petitioning for bankruptcy under Chapter 13 and proposing a plan to repay their creditors.[1] But, unable to complete the repayment plan, they were forced into a Chapter 7 liquidation. We now must decide whether appreciation in the value of their home during Chapter 13 proceedings becomes part of the converted Chapter 7 bankruptcy estate—an issue which has confounded judges all over the country. In holding that postpetition, pre-conversion increases in equity belong to the estate, the court both creates a circuit split and effectively punishes the Castlemans for filing under Chapter 13 with the forced sale

---

[6] As noted above, in this case it appears that the increased equity was attributable to market conditions. However, the district court indicated that the debtors could file an administrative priority claim for mortgage payments they had made in accordance with the confirmation plan for the benefit of the estate pursuant to § 503(b). *See In re Peter*, 309 B.R. at 795. The resolution of any such claim is not before us at this time.

[7] The motion filed by National Association of Bankruptcy Trustees for leave to file an amicus brief [Dkt. Entry No. 17] is granted. The amicus brief filed on January 9, 2023, is deemed filed.

[1] Oral Argument at 14:07, *Castleman, Sr., v. Burman*, No. 22-35604 (9th Cir. May 9, 2023), https://www.youtube.com/watch?v=_TBWjDPd10k.

of their home. Because that outcome is not the best reading of the Bankruptcy Code or our precedents, I respectfully dissent.

I

A

Upon filing for bankruptcy, a debtor's assets are immediately transferred to a bankruptcy estate. 11 U.S.C. § 541(a). However, the debtor may exempt some property—such as an equitable interest in real property used as a residence—from the estate. *See* § 522(b)(3)(A), (d)(1). This exemption is commonly referred to as the "homestead exemption." In 2019, Washington State allowed a maximum homestead exemption of $125,000. WASH. REV. CODE § 6.13.030 (2019). After creation of the estate, the bankruptcy court appoints a trustee to oversee it for the benefit of creditors and other interested parties. *See* 11 U.S.C. §§ 704, 1302. If, after accounting for encumbrances and exemptions, a particular asset is "of inconsequential value and benefit to the estate," a debtor may ask the court to "order the trustee to abandon" it. § 554(b).

Filing under Chapter 7 "allows a debtor to make a clean break from his financial past, but at a steep price: prompt liquidation of the debtor's assets." *Harris v. Viegalahn*, 575 U.S. 510, 513 (2015). The trustee will sell the non-exempt property of the estate and distribute the proceeds to creditors. *Id*. (citing §§ 704(a)(1), 726). But the Chapter 7 estate does not include wages earned or assets acquired by the debtor after filing for bankruptcy. *Id*. at 513-14. After liquidation, the debtor's pre-petition debts will generally be discharged. § 727(a). "Thus, while a Chapter 7 debtor must forfeit virtually all his prepetition property, he is able to make a

'fresh start' by shielding from creditors his postpetition earnings and acquisitions." *Harris*, 575 U.S. at 514.

A Chapter 13 estate works quite differently: the debtor retains possession of all property, § 1306(b), and proposes a plan to repay creditors over a three-to-five-year period. §§ 1321-22. If the bankruptcy court confirms the plan, confirmation "vests all of the property of the estate in the debtor" unless the plan or a court order says otherwise. § 1327(b). However, "property accumulated during the repayment period becomes part of the bankruptcy estate and is used to repay creditors." *Brown v. Barclay* (*In re Brown*), 953 F.3d 617, 620 (9th Cir. 2020). The Bankruptcy Code encourages Chapter 13 filings because they can "benefit debtors and creditors alike." *Harris*, 575 U.S. at 514. Debtors may keep assets, such as a home or car, and creditors "usually collect more under a Chapter 13 plan than they would have received under a Chapter 7 liquidation." *Id*.

When a debtor converts from Chapter 13 to Chapter 7 in good faith, the property of the converted estate is defined by § 348(f)(1)(A), which provides that the "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."[2] This statute removes a potential disincentive to Chapter 13 filings: if all assets acquired after filing of the Chapter 13 petition were available to creditors after conversion, the debtor would be "in a worse position than if the petition had been filed in Chapter 7 initially."

[2] If a debtor converts in bad faith, § 348(f)(2) makes postpetition, pre-conversion acquisitions available to creditors. Here, all agree the Castlemans converted in good faith due to a pandemic layoff and Mr. Castleman's unfortunate medical diagnosis.

Brown, 953 F.3d at 620. By limiting the converted estate to the property a debtor had at the time of the initial petition, § 348(f) "put[s] the debtor where he would have been, had he filed in Chapter 7 initially." *Id*.

B

On June 19, 2019, when the Castlemans petitioned for bankruptcy under Chapter 13, their home was worth an estimated $500,000. They claimed a homestead exemption of $124,923, which was only $77 less than the legally allowed maximum under then-existing Washington law. The Castlemans also reported that their home was encumbered by a secured mortgage of $375,077. The bankruptcy court confirmed their Chapter 13 plan on September 25, 2019, and the Castlemans made payments under the plan for twenty months, including a mortgage payment.

On January 12, 2021, with Mr. Castleman unable to work and facing a significant loss of income, the couple moved to convert their case to Chapter 7. After conversion, the Chapter 7 trustee hired a realtor, who estimated the Castlemans' Bellingham home was worth $700,000 as of April 19, 2021. Believing the home now had value to the estate, the trustee filed a motion to sell it so that the additional equity could be distributed to creditors. The Castlemans objected, arguing that postpetition, pre-conversion increases in equity are not "property of the estate" upon conversion under § 348(f)(1)(A). This is the question that divides our panel.

II

A

The Castlemans' reading of § 348(f) is correct. In interpreting the Bankruptcy Code, we must begin with the text. *Hawkins v. Franchise Tax Bd. of Cal.*, 769 F.3d 662, 666 (9th Cir. 2014). There is no debate that the phrase "property of the estate" in § 348(f) is a term of art in bankruptcy law or that the term should be defined by looking to the "broader context of the [Bankruptcy Code] as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). But the court errs in how it applies those principles here. By adopting the trustee's preferred interpretation of § 348(f), the majority sacrifices the text of the bankruptcy statutes on the altar of simplicity.

The court rightly begins by looking to § 541(a), which defines the property of the bankruptcy estate upon filing under either Chapter 7 or Chapter 13. Section 541(a)(1) declares that the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." It also includes all "[p]roceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case." § 541(a)(6). We have already held that in a Chapter 7 case, § 541(a)(6) means that "appreciation enures to the bankruptcy estate, not the debtor." *Schwaber v. Reed* (*In re Reed*), 940 F.2d 1317, 1323 (9th Cir. 1991). This is because in Chapter 7, the "proceeds, product, offspring, rents, or profits of or from property of the estate" under § 541(a)(6) "include[] the appreciation in value of a debtor's home." *Wilson v. Rigby*, 909 F.3d 306, 309 (9th Cir. 2018).

The majority decides that because we have held appreciation becomes part of the estate in a Chapter 7 case, the same must be true in Chapter 13.[3] Admittedly, this is a simple resolution to an issue that has vexed bankruptcy courts across the country.[4] But simplicity cannot take precedence over the text of the Bankruptcy Code, and if we read § 348(f) in light of the Code "as a whole"—rather than just § 541(a)—*Wilson* is not dispositive. *See Robinson*, 519 U.S. at 341. The remainder of the Bankruptcy Code clarifies that in Chapter 13 cases, "property of the estate" is defined differently. § 348(f)(1)(A).

As discussed, a Chapter 7 estate is short-lived: it sweeps in all the debtor's property upon filing and is promptly liquidated to pay creditors. § 541(a)(1); *Brown*, 953 F.3d at 620. But in Chapter 13, the debtor retains possession of all property, § 1306(b), and proposes a plan to repay creditors

---

[3] The trustee's briefing faults the Castlemans for not claiming the increase in equity as exempt. But property which does not become part of the converted estate belongs to the debtor regardless of exemptions. *See Harris*, 575 U.S. at 521.

[4] *Compare In re Goins*, 539 B.R. 510, 515-16 (Bankr. E.D. Va. 2015) (holding appreciation belongs to the estate), *In re Goetz*, 647 B.R. 412, 416-17 (Bankr. W.D. Mo. 2022) (same), *aff'd*, 651 B.R. 292 (B.A.P. 8th Cir. 2023), *In re Hayes*, Case No. 15-20727-MER, 2019 Bankr. LEXIS 4203, at *22, (Bankr. D. Colo. March 28, 2019) (same), *and In re Peter*, 309 B.R. 792, 794-95 (Bankr. D. Or. 2004) (same), *with In re Barrera* (*Barrera I*), 620 B.R. 645, 649-54 (Bankr. D. Colo. 2020) (holding appreciation belongs to the debtor), *aff'd*, *Barrera II*, No. BAP CO-20-003, 2020 WL 5869458 (B.A.P. 10th Cir. Oct. 2, 2020), *In re Cofer*, 625 B.R. 194, 202 (Bankr. D. Idaho 2021) (same), *In re Hodges*, 518 B.R. 445, 451 (E.D. Tenn. 2014) (same), *In re Niles*, 342 B.R. 72, 75-76 (Bankr. D. Ariz. 2006) (same), *In re Boyum*, No. 05–1044–AA, 2005 WL 2175879, at *2-3 (D. Or. Sept. 6, 2005) (same), *and In re Nichols*, 319 B.R. 854, 857 (Bankr. D. Ohio 2004) (same).

over a period of years. *See* §§ 1321-22. If the bankruptcy court confirms that plan, confirmation "vests all of the property of the estate *in the debtor*" unless the plan or a court order says otherwise. § 1327(b) (emphasis added).[5] Thus, upon confirmation of a Chapter 13 plan, the debtor is once again the owner of the property. *Cal. Franchise Tax Bd. v. Jones* (*In re Jones*), 420 B.R. 506, 514-15 (B.A.P. 9th Cir. 2009), *aff'd,* 657 F.3d 921, 928 (9th Cir. 2011); *see also Berkley v. Burchard* (*In re Berkley*), 613 B.R. 547, 552-53 (B.A.P. 9th Cir. 2020).

It follows that when a Chapter 13 plan has been confirmed, appreciation accrues to the debtor. In *Black v. Leavitt* (*In re Black*), our Bankruptcy Appellate Panel (BAP) considered a case where the debtor moved to sell a rental property after the bankruptcy court had confirmed a Chapter 13 plan revesting that property in the debtor. 609 B.R. 518, 521 (B.A.P. 9th Cir. 2019). The bankruptcy court ordered the debtor to turn over the proceeds of the sale to the trustee. *Id*. at 523. On appeal, the trustee argued that the proceeds and any postpetition appreciation in the property's value were part of the estate under §§ 541(a)(6) and 1306. *Id*. at 528. The BAP rejected that argument, holding that "the revesting provision of the confirmed plan means that the debtor owns the property outright and that the debtor is entitled to any postpetition appreciation." *Id*. at 529.

The Tenth Circuit reached a similar conclusion in *Rodriguez v. Barrera* (*Barrera III*), 22 F.4th 1217 (10th Cir. 2022). There, the debtors confirmed their Chapter 13 plan, sold their home, and then converted from Chapter 13 to Chapter 7 under § 348(f)(1)(A). *Id*. at 1221-22. Observing that "only proceeds 'of or from property of the estate'

[5] No such provision or order exists in this case.

become property of the bankruptcy estate" under § 541(a)(6), the Tenth Circuit concluded that section is "operative only before confirmation of the Chapter 13 plan because confirmation 'vests all of the property of the estate in the debtor.'" *Id.* at 1223 (quoting § 1327(b)). "Thus, proceeds generated from the debtor's property after confirmation do not become property of the estate as the underlying property no longer belongs to the estate." [6] *Id*.

The Tenth Circuit declined to decide whether postpetition, pre-conversion appreciation would be included in the converted estate when the property has not been sold before conversion. *Id*. at 1223 n.1. But while this case does not involve a pre-conversion sale, we have already held that postpetition appreciation—like the cash proceeds from the sale in *Barrera III*—is "proceeds" of estate property under § 541(a)(6). *Wilson*, 909 F.3d at 309. Here, the underlying property is the Castlemans' home, and their Chapter 13 plan was confirmed on September 29, 2019. When that occurred,

[6] The majority claims this interpretation of § 1327(b) would require a third valuation at confirmation because the trustee would be entitled to pre-confirmation appreciation. Op. at 10-11. But the Tenth Circuit did not adopt this approach, *see Barrera III*, 22 F.4th at 1223-24, and neither should we. In most Chapter 13 cases, the debtor must propose a plan within 14 days of the petition date, *see* FED. R. BANKR. P. 3015(b), and the creditors' meeting generally occurs within 50 days of the petition date, see FED. R. BANKR. P. 2003(a). A confirmation hearing must occur within 45 days of that. 11 U.S.C. § 1324(b). Thus, for most debtors, a Chapter 13 plan will either be confirmed within a few months of the initial petition, or else the case will be dismissed or converted. A property will virtually never significantly change in value in such a short period—in fact, the realtor hired in this case estimated the 2021 value of the Castlemans' home by reviewing sales of comparable homes over a period of six months. If we followed our sister circuit's approach, all postpetition appreciation would belong to the Castlemans.

the home was no longer "property of the estate" and therefore any appreciation in its value is not "[p]roceeds . . . of or from property of the estate."[7] § 541(a)(6). I would hold, consistent with the Tenth Circuit, that postpetition, pre-conversion appreciation belongs to the Castlemans rather than the converted Chapter 7 estate. *See United States v. Anderson*, 46 F.4th 1000, 1005 (9th Cir. 2022) ("In cases requiring statutory interpretation . . . we will not create a circuit split unnecessarily.").

B

While the text of the Bankruptcy Code as a whole establishes that postpetition, pre-conversion appreciation belongs to the Castlemans, the majority's reading of § 348(f)(1)(A) is also inconsistent with the statute's structure, object, policies, and legislative history. *See Hawkins*, 769 F.3d at 666; *Brown*, 953 F.3d at 623.

In the early 1990s, a circuit split developed on the question of what property should be included in a Chapter 7 estate upon conversion from Chapter 13. Some courts held that "upon conversion, all postpetition earnings and acquisitions became part of the new Chapter 7 estate, thus augmenting the property available for liquidation and distribution to creditors." *Harris*, 575 U.S. at 517 (citing *Calder v. Job* (*In re Calder*), 973 F.2d 862, 865-66 (10th Cir. 1992), and *In re Lybrook*, 951 F.2d 136, 137 (7th Cir. 1992)). However, the Third Circuit had taken the opposite view in

[7] The court implies this approach would mean that debtors must bear the risk of depreciation as well. Op. at 11. But depreciation in a home's value would not change the amount of the debtor's homestead exemption, *see Law v. Siegel*, 571 U.S. 415, 424-25 (2014), and a trustee would probably abandon any asset which depreciated such that it had no value to the estate. *See* § 554(a).

Bobroff v. Continental Bank (*In re Bobroff*), 766 F.2d 797, 802-03 (3d Cir. 1985), and held that a tort claim which accrued during Chapter 13 proceedings was not part of a Chapter 7 estate upon conversion and belonged to the debtor.

Congress resolved this dispute in the Bankruptcy Reform Act of 1994, which added § 348(f) to the Bankruptcy Code. *See* Pub. L. No. 103-394, § 311, 108 Stat. 4106, 4138 (1994) (prior to 2005 amendment). The House Report on the Act made it clear Congress intended to adopt the Third Circuit's view:

> This amendment overrules the holding in cases such as *Matter of Lybrook*, 951 F.2d 136 (7th Cir. 1991) and adopts the reasoning of *In re Bobroff*, 766 F.2d 797 (3d Cir. 1985). However, it also gives the court discretion, in a case in which the debtor has abused the right to convert and 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.

H.R. REP. NO. 103-835, at 57 (1994), *reprinted in* 1994 U.S.C.C.A.N 3340, 3366. The report included a specific example:

> [Courts following the *Bobroff* approach] have noted that to hold otherwise would create a serious disincentive to chapter 13 filings. For example, a debtor who had $10,000 equity in a home at the beginning of the case, in a State with a $10,000 homestead exemption, would have to be counseled concerning the risk that

> after he or she paid off a $10,000 second mortgage in the chapter 13 case, creating $10,000 in equity, there would be a risk that the home could be lost if the case were converted to chapter 7 (which can occur involuntarily). If all of the debtor's property at the time of conversion is property of the chapter 7 estate, the trustee would sell the home, to realize the $10,000 in equity for the unsecured creditors and the debtor would lose the home.

Id. Clearly, Congress believed that home equity which accrued during Chapter 13 proceedings should not be included in the converted estate.

The example in the House Report discusses an increase in equity resulting from the paydown of a secured loan, but the court's decision today covers equity from any source and creates the same disincentive to Chapter 13 filings. When the Castlemans filed for bankruptcy, all of their home equity was exempt. Between that exemption and a secured mortgage, the home had no value to the estate. Had they filed under Chapter 7, they could have either resolved the case quickly or moved to force the trustee to abandon the property. *See* § 554(b); *Barrera I*, 620 B.R. at 655-54. Instead, the Castlemans committed themselves to a five-year Chapter 13 plan, paid creditors out of their postpetition income, and made payments on their mortgage. By the time they were forced to convert to Chapter 7, their home had appreciated in value, so the trustee sought to sell it. Allowing that sale leaves them "in a worse position than if the[ir] petition had been filed in Chapter 7 initially"—the

exact situation Congress sought to prevent. *Brown*, 953 F.3d at 620.

The majority refuses to consider this history because it finds the text of the Bankruptcy Code unambiguously shows that appreciation belongs to the estate. Op. at 9. I respectfully disagree. But that assertion is all the more remarkable in light of the Tenth Circuit's decision in *Barrera III*, 22 F.4th at 1223, and the majority's recognition that courts are "heavily divided" on the proper meaning of § 348(f).[8] Op. at 5. Indeed, even counsel for the trustee seemed to believe that § 348(f) was ambiguous: when asked at oral argument, he admitted the statute is poorly drafted and agreed that "there is no way to reconcile" the text of § 348(f) with § 541(a).[9] To be sure, legislative history is often unhelpful as an aid to statutory construction. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 376-78 (2012). But here, it is consistent with the text of the Bankruptcy Code, directly relevant to the case at hand, and unequivocally confirms that appreciation in the value of the Castlemans' home should not become part of the converted estate.

III

Because reasonable judicial minds disagree, there is—once again—a need for Congress to clarify the operation of § 348. Though I dissent from my colleagues' reading of the

[8] Certainly a division of authority, standing alone, does not establish ambiguity. But other courts have identified powerful arguments for a different reading of § 348(f), and the creation of a circuit split in particular is to be "avoid[ed] if at all possible." *Anderson*, 46 F.4th at 1008. We ought to employ the full panoply of statutory interpretation tools before departing from the Tenth Circuit's approach.

[9] Oral Argument at 24:06-24:52.

statute, it is far from unfounded. Whether Congress thinks postpetition, pre-conversion appreciation of an asset in the course of Chapter 13 proceedings should or should not become part of the converted Chapter 7 estate, it should amend § 348(f) to make the answer clear. At least one scholar has already proposed amendments to § 348(f) which would resolve the dispute. *See* Lawrence Ponoroff, *Allocation of Property Appreciation: A Statutory Approach to the Judicial Dialectic*, 13 WM. & MARY BUS. L. REV. 721, 756-57 (2022). States may also wish to amend their homestead exemptions. *See* § 522(b)(3)(A). For example, while the change came too late to help the Castlemans, Washington State responded to our decision in *Wilson* by allowing debtors to exempt "[a]ny appreciation in the value of the debtor's exempt interest in the property during the bankruptcy case." *See* Act of May 12, 2021, Ch. 290 § 5, 2021 Wash. Sess. Laws 2306-07 (codified at WASH. REV. CODE § 6.13.070(2) (2022)).

In the absence of legislative action, it remains our duty to read § 348(f) and say what the law is. I have no doubt that in holding that postpetition, pre-conversion appreciation becomes part of the converted bankruptcy estate, my colleagues in the majority have discharged that duty to the best of their abilities. But in striving to do the same, I find the text, structure, and history of the statute compel the opposite conclusion. Because I would hold that the appreciation belongs to the Castlemans, I respectfully dissent.

Help Center

American Bankruptcy Institute

Rochelle's Daily Wire

ABI EXCLUSIVE

AUGUST 2, 2021

A Motion to Dismiss as of Right Doesn't Bar the Court from Dismissing with Prejudice

Listen to Article 0:00 / 8:49

> Ninth Circuit BAP doesn't require a formal motion to dismiss with prejudice when a debtor files a voluntary motion to dismiss as of right under Section 1307(b).

A chapter 13 debtor filed a motion under Section 1307(b) for dismissal of right. Had he succeeded, the debtor would have been entitled to file again and attempt to discharge all his debts, because Section 349(a) says that dismissal does not bar discharging debts in a later case, unless the court orders otherwise for cause.

However, a creditor opposed the debtor's motion for dismissal without prejudice and asked for the dismissal to be made with prejudice. Significantly, the creditor never filed a cross motion seeking dismissal with prejudice under Section 1307(c).

Finding "egregious" conduct by the debtor, the Bankruptcy Judge Martin R. Barash of Woodland Hills, Calif., dismissed the chapter 13 case with prejudice. Dismissal with prejudice had the same effect as a denial of discharge of the debtor's then-existing debts.

Was there an error in dismissing with prejudice in the absence of a formal motion to that effect?

Writing for the Ninth Circuit Bankruptcy Appellate Panel on July 27, Bankruptcy Judge Christopher M. Klein found no error and upheld dismissal with prejudice.

Judge Klein's erudite opinion reads like a treatise, laying out everything there is to know about the proper procedures, standards, burdens of proof and burdens of persuasion when it comes to dismissal with or without prejudice.

The Misbehaving Debtor

The debtor had filed chapter 12 petitions in 2010 and 2012. The 2012 case converted to chapter 7 followed by the entry of discharge.

The debtor filed a chapter 13 petition in 2018. A creditor, whom Judge Klein called the debtor's nemesis, opposed confirmation of the debtor's plan. In the objection, the creditor said that the case should be either dismissed or converted. The creditor did not file a motion to dismiss or convert.

The bankruptcy court heard witnesses and took evidence at a two-day confirmation trial. The issues included the debtor's good faith, or lack of it.

In post-trial briefing, the creditor urged the court to dismiss with prejudice for bad faith. Again, the creditor did not file a motion to convert or dismiss with prejudice under Section 1307(c).

Conceding that his plan could not be confirmed, the debtor filed a motion to dismiss under Section 1307(b). The creditor filed an opposition to the motion to dismiss and asked for dismissal with prejudice under Section 349(a) for egregious bad faith. Again, the creditor did not file a motion to dismiss under Section 1307(c).

Section 1307(c) allows the U.S. Trustee or a party in interest to move for conversion or dismissal by showing "cause."

The bankruptcy court held another hearing and considered the entire record. Technically speaking, the only motion before the court was the debtor's motion to dismiss under Section 1307(b) and the creditor's opposition with a request for dismissal with prejudice under Section 349(a).

In his decision, Bankruptcy Judge Barash cited the four-part test in *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219 (9th Cir. 1999), *aff'g* 209 B.R. 935 (9th Cir. BAP 1997), as governing authority to determine whether the totality of the circumstances warranted dismissal with prejudice. Judge Barash dismissed with prejudice, after finding egregious and inequitable bad faith plus manipulation and abuse of the Bankruptcy Code.

The debtor appealed, to no avail.

Procedures for Dismissal with Prejudice Under Section 349(a)

For the BAP, Judge Klein surveyed the subtle differences about dismissal under Sections 1307(b), 1307(c) and 349. "The salient point," he said, "is that Section 349(a) is an independent question that applies to all forms of dismissal, including Section 1307(b)."

For example, Judge Klein explained how Section 349(a) and 1307(c) require "cause," while a debtor's motion under Section 1307(b) does not. "Unless the court, for cause, orders otherwise," Section 1307(b) says that "the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed. . . ."

There are different forms of dismissal with prejudice. The weak form, Judge Klein said, can contain a temporary refiling prohibition or provide that a new filing will not apply the automatic stay to a particular creditor. The strong form, he said, "is tantamount to denial of discharge" and is reserved "for egregious circumstances and necessitates that courts proceed with caution and pay attention to due process requirements consistent with denial of discharge."

The bankruptcy court properly applied *Leavitt*, Judge Klein said. Although *Leavitt* dealt with "cause" for dismissal under Section 1307(a), he saw "no principled reason" why it should not also apply to Section 1307(b) dismissals.

Procedurally speaking, Judge Klein ran into a problem. Although *Leavitt* may be the standard, the rules and the Code don't say when or how the Section 349(a) prejudice issue must be raised.

In the case on appeal, the procedures afforded due process consistent with complaints to deny discharge under Section 727. In addition, the creditor's opposition to the debtor's motion to dismiss without prejudice "was a correct procedure for presenting the Section 349(a) issue to the court."

Next, Judge Klein said that the bankruptcy court correctly treated the dispute as a Rule 9014 contested matter. He therefore found no error in the procedure leading to dismissal with prejudice.

Next, Judge Klein dealt with the burden of persuasion. The creditor, he said, has the burden because dismissal with prejudice is "tantamount to denying discharge."

With regard to how much evidence it takes to carry the burden of persuasion, Judge Klein said that the "quantum" required to overcome the presumption of discharge without prejudice "is likewise influenced by the emphasis on egregious circumstances and the similarity to the consequences of denial of discharge."

Even if the quantum for a strong form of dismissal with prejudice were more than the preponderance of the evidence, Judge Klein said that the creditor had proven "a 'huge' and egregious manipulation of bankruptcy process in bad faith." The evidence, he said, was "overwhelming."

The evidence and the findings were more than sufficient to justify dismissal with prejudice.

Given the findings, did the bankruptcy court abuse its discretion in dismissing with prejudice?

The bankruptcy court had employed the proper *Leavitt* standard and made findings supported by the record that were neither illogical nor implausible. Judge Klein thus concluded there was no abuse of discretion in dismissing with prejudice.

In short, "the debtor's 'right' to dismiss under §1307(b) does not immunize the debtor from the consequences of an adverse § 349(a) determination," Judge Klein said.

Observations

There is a split of circuit on the question of whether a court must dismiss when a debtor files a motion to dismiss under Section 1307(b).

Splitting with the Fifth and Ninth Circuits, the Sixth Circuit held in June that the bankruptcy court must dismiss a chapter 13 petition, even when the latest repeat filing was in bad faith. *See Smith v. U.S. Bank N.A. (In re Smith)*, 999 F.3d 452 (6th Cir. June 9, 2021). To read ABI's report, **click here**.

Smith and Judge Klein's opinion are not necessarily incompatible. If importuned and if the evidence were sufficient, a court could respond to a debtor's motion under Section 1307(b) by dismissing, except with prejudice.

If that's true, a debtor's motion to dismiss isn't a get-out-of-jail-free card, nor should it be.

On Language — Old Word Resurrected

Near the end of the opinion, Judge Klein said that the debtor's "Nemesis was not willing to let [the debtor] absquatulate."

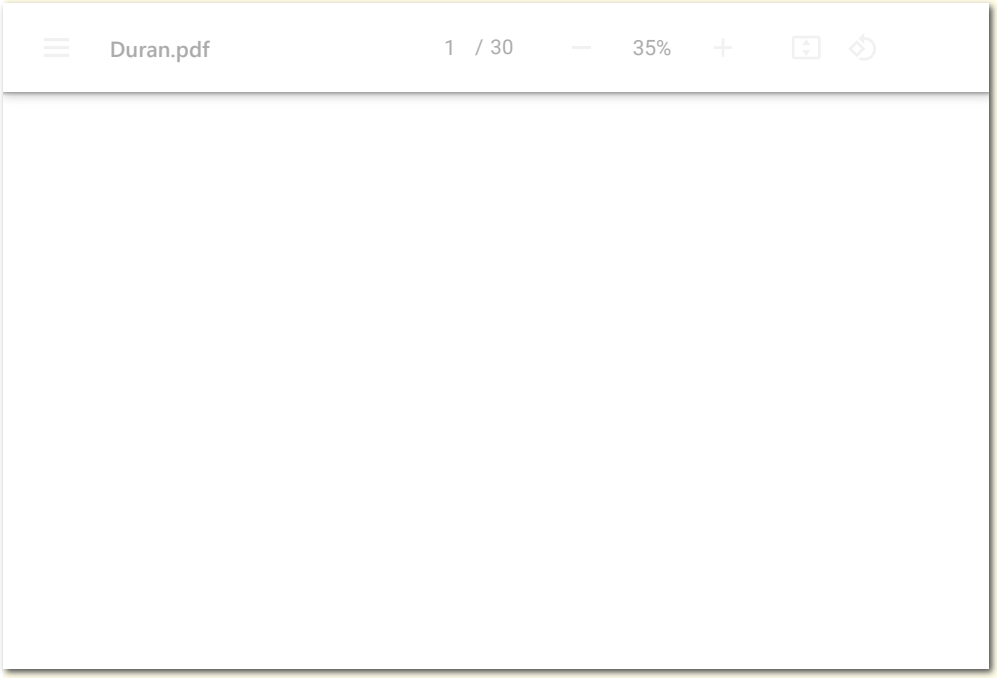
Quoting an academic, Judge Klein said that the word absquatulate was invented following the Panic of 1837:

> The newly independent Republic of Texas gained a reputation as a popular destination for dishonorable failures. . . . "Gone to Texas," abbreviated in "three ominous letters G.T.T.," became a shorthand symbol found on abandoned businesses. . . . Absconding to squat on western lands and perambulate from one property to another had

become so common a practice that writers invented a new verb to describe this process: to absquatulate.

Opinion Link

PREVIEW



https://abi-opinions.s3.amazonaws.com/Duran.pdf

Case Details

Case Citation	Duran v Gudino (In re Duran), 20-1045 (B.A.P. 9th Cir. July 27, 2021)
Case Name	Duran v Gudino (In re Duran)
Case Type	Consumer
Court	9th Circuit

Court	9th Circuit
Bankruptcy Tags	Practice and Procedure Consumer Bankruptcy Discharge/Dischargeability

FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re: GABINO F.A. DURAN, Debtor.	BAP No. CC- 20-1045-KTG Bk. No. 9:18-bk-11719-MB
GABINO F.A. DURAN, Appellant, v. LUZ GUDINO; ELIZABETH F. ROJAS, Chapter 13 Trustee, Appellees.	**OPINION**

Appeal from the United States Bankruptcy Court
for the Central District of California
Martin R. Barash, Bankruptcy Judge, Presiding

APPEARANCES:
Jerry Namba argued for appellant Gabino F.A. Duran; Paul F. Ready of Farmer & Ready argued for appellee Luz Gudino.

Before: KLEIN,* TAYLOR, and GAN, Bankruptcy Judges

* Hon. Christopher M. Klein, United States Bankruptcy Judge for the Eastern District of California, sitting by designation.

KLEIN, Bankruptcy Judge:

All roads to dismissal pass through Bankruptcy Code § 349(a).[1] The debtor moved to dismiss as of "right" under § 1307(b) and wound up with an order under § 349(a) that dismissal of his case be "with prejudice."

The debtor's motion to dismiss under § 1307(b) drew an allegation of "cause" under § 349(a) to order that dismissal be with prejudice. The court found the requisite § 349(a) "cause" and ordered that dismissal be with prejudice, but the record is ambiguous whether dismissal was premised on § 1307(b), § 1307(c), § 1307(e), § 105, or inherent authority. From the standpoint of the debtor, the moral of the story is that the § 1307(b) "right" to dismiss is not a get-out-of-chapter-13-free card.

We hold: (1) every dismissal, including a § 1307(b) motion to dismiss, triggers the § 349(a) issue whether "cause" exists to order that dismissal be with prejudice; (2) no particular procedure prescribes how or when to initiate a contest regarding § 349(a) "cause" so long as there is due process notice appropriate for denial of discharge and a hearing; and (3) the proponent of a § 349(a) prejudice determination has the burden of persuasion. We AFFIRM and publish because of the novelty of the issue.

---

1 Unless specified otherwise, chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, "Rule" refers to the Federal Rules of Bankruptcy Procedure, and "Civil Rule" refers to the Federal Rules of Civil Procedure.

FACTS

Gabino F.A. Duran, who formerly did business as Duran Farming and Duran Strawberry Services, filed his chapter 13 petition on October 18, 2018. He was no stranger to bankruptcy, having filed chapter 12 cases in 2010 and 2012, the latter of which ended with a chapter 7 discharge.

In his initial verified schedules, Duran portrayed himself as a farmhand employee of Rancho Bonita Farms, earning monthly gross wages of $4,283.17, who owned a fractional interest in his residence subject to a $175,249.38 mortgage and owed priority unsecured state tax debt of $4,497.33 and unsecured debt of $101,901.04.

Gradually a different picture emerged. Duran thrice amended his schedules over seven months under pressure from Nemesis, played by creditor Luz Gudino, who had a pending unscheduled $141,944.04 lawsuit against Duran for contract farm labor.

The first two amendments added Gudino's pending lawsuit, a judgment debt of $134,676, as well as two assets and an increase of his proportionate interest in his residence.

The abrupt change occurred the day before the confirmation hearing when Duran filed his third verified amendment. In that peripeteia, Duran confessed that his gross income was not $0.00 in 2016 and 2017, as stated in his verified Statement of Financial Affairs, but rather respectively $1,345,074 and $1,424,611. He also revealed that 11 months before filing the

chapter 13 case he transferred all his farm equipment (worth more than $50,000), and his owned and leased farmland, including 20-acres planted by Gudino's farm laborers, to insider Clara Galvan Hernandez ("Galvan"),[2] who is the mother of his five children.

Galvan, operating under the name Rancho Bonita Farms, nominally became Duran's "employer" in November 2017.

Galvan's bank statements for the period February 5 to October 31, 2018, reveal revenues of $1,101,915.60.

Even before these revelations, there were objections to Duran's plan to pay a 00.5% dividend to unsecured creditors. Gudino objected, mined records of prior Duran cases to ferret out assets, and spared no effort to hold Duran to account.

Gudino's "Rebuttal" to Duran's reply to the objection to confirmation ended with the statement "this case should be either dismissed or converted to a Chapter 7 proceeding to allow a disinterested trustee to claw back the assets and funds that should be available for payment to the creditors of this estate." Bankr. Docket No. 38, at pp. 3-4. But Gudino did not make a motion to dismiss or convert under the procedure prescribed by Rule 1017(f)(1).

The chapter 13 trustee additionally objected that tax returns were missing and that the plan was not feasible.

---

2 The court ruled Galvan is a nonstatutory insider. 11 U.S.C. §§ 101(31)(A)(i), 102(3) & (5). Duran does not question that ruling.

At the two-day evidentiary hearing on plan confirmation, Duran and Galvan, among others, testified. The focus included issues of good faith, accounting for farming equipment, and the election to forego harvesting 20 acres of strawberries planted by Gudino's farm laborers but thereafter to farm the same land under the Rancho Bonita flag. During the hearing, Gudino did not assert that the case should be converted or dismissed.

The court ordered post-hearing briefs regarding confirmation, to include the essential element that the plan had been proposed in good faith, before submitting the matter for decision.

Gudino's post-hearing brief included an assertion that cause existed to dismiss the chapter 13 case with prejudice for bad faith. But Gudino did not at any time file and serve a motion to convert or dismiss under § 1307(c), under the procedure prescribed by Rules 1017(f)(1) and 9014.

Before the plan confirmation question was ripe for decision, the United States filed a surprise $638,198.19 proof of federal tax claim. Duran's sworn schedules suggested no federal tax debt existed.

The United States also filed a confirmation objection stating that Duran exceeded the § 109(e) chapter 13 debt limits, that the plan was not feasible, and that the case should be dismissed under § 1307(e). Although the objection stated the United States "will move" to convert or dismiss, it did not file a motion to convert or dismiss under § 1307(c) or § 1307(e), under the procedure prescribed by Rules 1017(f)(1) and 9014.

Duran responded to the court's order to address the federal tax claim, conceding the claim is valid and rendered him ineligible for chapter 13. Duran thereupon filed a motion to dismiss under § 1307(b), following the procedure prescribed by Rules 1017(f)(2) and 9013.

Gudino filed an "opposition" to Duran's § 1307(b) motion urging only that dismissal should be with prejudice under § 349(a) for egregious bad faith. But, Gudino did not make a motion to dismiss or convert under § 1307(c).

As evidence of egregious bad faith, Gudino relied on the evidence of chicanery provided at the confirmation hearing, the failures to disclose and misrepresentations in the sworn schedules, the false portrayal of Duran as a mere farmworker employee, and the apparently intentional failure to disclose the substantial federal tax debt.

Duran's defense amounted to equivocations about various problems in the case.

While Duran contended that dismissal with prejudice amounts to denial of discharge as to which he would not have the burden of proof, he did not contend that an adversary proceeding or further evidentiary hearing was necessary.

The bankruptcy court held a hearing at which it considered the entire record and at which Duran did not seek to present additional evidence. As Duran's motion to confirm plan had been eclipsed and implicitly mooted

by his § 1307(b) motion, the only formal motion before the court was Duran's § 1307(b) motion, coupled with Gudino's "opposition" that dismissal should be "with prejudice" under § 349(a).

The court's ruling had two phases. First, it explained why the by-then moot plan could not be confirmed, referring to (among other reasons) Duran's failure to meet his burdens to establish that the case and the plan were filed in good faith, as required by § 1325(a)(3) and (7). Second, the court focused on the § 349(a) question raised by Gudino, making findings of fact and conclusions of law orally on the record.

The court identified the governing § 349(a) standard as "totality of circumstances" under the law of the circuit established in *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219, 1224 (9th Cir. 1999), *aff'g* 209 B.R. 935 (9th Cir. BAP 1997). It considered the four objective *Leavitt* factors: (1) whether Duran misrepresented facts in his petition or plan, unfairly manipulated the Bankruptcy Code, or otherwise filed his Chapter 13 petition or plan in an inequitable manner; (2) Duran's history of bankruptcy filings and dismissals; (3) whether Duran only intended to defeat state court litigation; and (4) whether egregious behavior is present.

It then considered Duran's bankruptcy history, his litigation with Gudino, the falsities in his schedules, and the degree of Duran's missteps. The court determined that: (1) Duran's prepetition transfer of farmland, crops, and equipment to Galvan was part of a scheme to evade his debt to

Gudino; (2) not harvesting the 20-acre strawberry crop planted with Gudino's contract farm labor was inexcusable waste; and (3) the chapter 13 petition, the misrepresentations, omissions, and misstatements under penalty of perjury cumulatively constituted egregious and inequitable bad faith conduct, as well as what the court described as "huge" unfair manipulation and abuse of the Bankruptcy Code.

As to credibility, the court explicitly disbelieved Duran's and Galvan's testimony. Their excuses for the prepetition transfers were rejected as not credible and not supported by evidence. Likewise, their spin on postpetition misrepresentations was deemed incredible.

The court concluded that the totality of circumstances strongly militated in favor of ordering that the effect of dismissal be with prejudice. Nothing suggests that the court was dismissing the case on any basis other than Duran's § 1307(b) motion to dismiss "of right." The court did not evaluate whether conversion or dismissal was in the best interests of creditors and the estate as required by § 1307(c) and § 1307(e). Nor did the court indicate that it was denying Duran's motion to dismiss in favor of dismissing on some other theory, such as § 105(a) abuse of process.

Although the only procedurally correct motion to dismiss in the record was Duran's § 1307(b) motion to dismiss as of "right," the form of dismissal order prepared by Gudino's counsel and signed by the court referred to a nonexistent dismissal motion by Gudino, for which required

findings were not made, and then purported to deny Duran's § 1307(b) motion and dismiss with prejudice under § 349(a).

Duran timely appealed.

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C. § 158.

ISSUES

1. What standards apply to determination of the issue that dismissal be with prejudice pursuant to 11 U.S.C. § 349(a)?
2. What procedure is entailed in presenting the issue that dismissal be with prejudice pursuant to 11 U.S.C. § 349(a)?
3. Who has the burden of persuasion for imposing a condition that dismissal be with prejudice under 11 U.S.C. § 349(a)?
4. Did the bankruptcy court abuse its discretion when it ordered that Duran's bankruptcy case be dismissed with prejudice?

STANDARDS OF REVIEW

The determination of bad faith or egregious conduct for purposes of dismissal with prejudice is reviewed for clear error as a mixed question of law and fact as to which facts predominate. *See U.S. Bank Nat'l Ass'n ex rel CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge*, ___ U.S. ___, 138 S. Ct. 960, 967-68 (2018); *Leavitt*, 171 F.3d at 1222-23; *Eisen v. Curry (In re Eisen)*, 14 F.3d 469, 470 (9th Cir. 1994).

The decision to vary the § 349(a) effect of dismissal by imposing a condition such as "with prejudice" is reviewed for abuse of discretion. *Leavitt*, 171 F.3d at 1223, 1226; *Ellsworth v. Lifescape Med. Assocs., P.C. (In re Ellsworth)*, 455 B.R. 904, 922-23 (9th Cir. BAP 2011).

A bankruptcy court abuses its discretion if it applies the wrong legal standard or makes factual findings that are illogical, implausible, or without support in the record. *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc).

DISCUSSION

The novelty in this appeal is that the § 349(a) issue was prompted by the debtor's no-fault motion to dismiss as of "right" under § 1307(b). *Leavitt* and our existing § 349(a) chapter 13 precedents involve only § 1307(c). Sorting out the relationship among § 1307(b), § 1307(c), § 1307(e), and other authority for dismissal is not essential to the analysis. The salient point is that § 349(a) is an independent question that applies to all forms of dismissal, including § 1307(b).

I.
Applicable Statutes

The basic legal principles are settled, but questions of procedure and burdens of proof remain.

A. 11 U.S.C. § 1307

This chapter 13 case could have been dismissed under a variety of alternative theories.

The debtor's § 1307(b) motion to dismiss, which was the only formal motion to dismiss actually before the court, is a dismissal nominally as of "right" on the motion of the debtor under the procedure prescribed by Rules 1017(f)(2) and 9013. 11 U.S.C. § 1307(b).

Although § 1307(b) says that "Any waiver of the right to dismiss under this subsection is unenforceable," this "right" has been qualified in this circuit by an implied power of the court to override the debtor's wishes and convert a case to chapter 7. *Rosson v. Fitzgerald (In re Rosson)*, 545 F.3d 764, 773-75 (9th Cir. 2008); 11 U.S.C. § 1307(b); *Nichols v. Marana Stockyard & Livestock Mkt., Inc. (In re Nichols)*, 618 B.R. 1, 10-12 (9th Cir. BAP 2020), *appeal argued & submitted*, No. 20-60043 (9th Cir. July 9, 2021); *cf. Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 371 (2007) (§ 706(a)).

A § 1307(c) motion to dismiss or to convert to a case under chapter 7, "whichever is in the best interests of creditors and the estate," may be made by any party in interest or the United States trustee for "cause." 11 U.S.C. § 1307(c). The requisite procedure is prescribed by Rules 1017(f)(1) and 9014.

A § 1307(e) motion to dismiss or to convert to a case under chapter 7, "whichever is in the best interests of creditors and the estate," may be

made by any party in interest or the United States trustee for failure of the debtor to file a tax return under § 1308. 11 U.S.C. § 1307(e). The requisite procedure is prescribed by Rules 1017(f)(1) and 9014.[3]

B. 11 U.S.C. § 349(a)

This appeal involves the court's § 349(a) "for cause" power to impose conditions on every dismissal of a case, including § 1307(b) dismissals. To be clear, every § 1307(c) dismissal for "cause" necessarily implies a choice by the court to dismiss, rather than convert to chapter 7, as being "in the best interests of creditors and the estate." 11 U.S.C. § 1307(c); *Nelson v. Meyer (In re Nelson)*, 343 B.R. 671, 675 (9th Cir. BAP 2006).

In contrast, § 1307(b) does not require "cause." The question of the best interests of creditors and the estate would have arisen only if the court, per *Rosson*, was being asked by some party in interest to convert to chapter 7 under § 1307(c) or (e). That was not the case in this appeal.

II.
Standards Applicable to Dismissal "With Prejudice"

Identifying the standards to apply when determining whether to impose a condition of prejudice on a dismissal begins with being precise

---

3 The court probably also has the power to dismiss a chapter 13 case under § 105(a) to "prevent an abuse of process." 11 U.S.C. § 105(a); *Marrama*, 549 U.S. at 375. And, as the Supreme Court noted in *Marrama*, it may even have inherent authority to dismiss as an exercise of "the inherent power of every federal court to sanction 'abusive litigation practices.'" *Marrama*, 549 U.S. at 375-76. While no particular procedure is prescribed, basic due process principles dictate that there be notice and an opportunity for a hearing.

about § 349(a) nomenclature and the distinction between dismissal and the § 349(a) condition of prejudice.

A. Disaggregating Concepts of Dismissal and of § 349(a) "Cause" for Prejudice

At the outset, it is important to bear in mind that the commonly-used phrase "dismissal with prejudice" conflates distinct concepts.

First, there is dismissal itself, as governed by the various express dismissal provisions, including §§ 707, 1112, 1208, and 1307, as well as the court's implicit dismissal powers noted above.

Second, there is imposition of a consequence of prejudice for "cause" pursuant to § 349(a).

Similarly, multiple forms of "cause" are at play. "Cause" to impose a condition of prejudice on a dismissal is a more rigorous concept than "cause" to dismiss a case. Proof of "cause" to dismiss may be necessary to dismiss, but it is not sufficient to prove "cause" to impose a condition of § 349(a) prejudice.

We previously explored § 1307(c) "cause" to convert or dismiss relative to § 349(a) "cause" to order that dismissal be with prejudice and emphasized the need for due process notice. *Ellsworth*, 455 B.R. at 917-23. *Ellsworth*, however, left for another day the issue of burden of proof for purposes of § 349(a) dismissal with prejudice. *Id.*at 919. That day has arrived.

B. Nomenclature and Ambiguities

Words matter. The naked phrase "with prejudice" in connection with § 349(a) has been used in so many different ways that it is ambiguous unless a court is precise about what it means when it invokes the phrase. *Ellsworth*, 435 B.R. at 921; *accord*, *Colonial Auto Ctr. v. Tomlin (In re Tomlin)*, 105 F.3d 933, 938-39 (4th Cir. 1997).

1. "With Prejudice"

The § 349(a) power of the court "for cause" to "order otherwise" necessarily confers judicial discretion to impose a wide variety of consequences of dismissal regarding discharge of debts in the dismissed case and for filing future petitions.

Appellate courts have had to discern from facts what was intended when a bankruptcy court dismisses a case "with prejudice" without explanation. *E.g., Tomlin*, 105 F.3d at 940-41; *Casse v. Key Bank Nat'l Ass'n (In re Casse)*, 198 F.3d 327, 333-34 (2d Cir. 1999); *Leavitt*, 209 B.R. at 941 n.10; *see also* 3 Collier on Bankruptcy ¶ 349.02[3] (Richard Levin & Henry J. Sommer eds., 16th ed. 2021).

Courts have used § 349(a) "with prejudice" orders in different senses along a continuum that ranges from what we may describe as "Weak Form" to "Strong Form."

The "Weak Form" includes providing that in a subsequent case the automatic stay will not apply to a particular creditor unless the debtor

persuades the subsequent court to reimpose the stay. *E.g.*, *In re Greenberg*, 200 B.R. 763, 766-70 (Bankr. S.D.N.Y. 1996) (collecting cases); *cf.* 11 U.S.C. § 362(c)(3)-(4) (after 2005). And, it includes temporary prohibition of filing another case for a designated period. *E.g., Tomlin*, 105 F.3d at 938-40 (collecting cases). Standards of "cause" for imposing a "Weak Form" § 349(a) order are not at issue in this appeal.

The "Strong Form" of § 349(a) "with prejudice" is permanent prohibition of bankruptcy discharge for any debt that could have been discharged in the dismissed case. It is tantamount to denial of discharge under § 727. As such, it is a severe measure reserved for egregious circumstances and necessitates that courts proceed with caution and pay attention to due process requirements consistent with denial of discharge. *Leavitt*, 209 B.R. at 939-41 & n.6; *Tomlin*, 105 F.3d at 936-37; 3 Collier on Bankruptcy ¶ 349.02[2].

This appeal involves the "Strong Form" of § 349(a) "with prejudice."

2. "Bad Faith"

A second ambiguity is that there are two overlapping but distinct forms of "bad faith."

First, there is § 1307(c) "bad faith," which is recognized in this circuit as a "cause" to dismiss or convert a chapter 13 case, even though it is not formally listed as one of the ten circumstances enumerated at § 1307(c)(1)

through (10). *Eisen* 14 F.3d at 470. A determination of § 1307(c) "bad faith" does not require egregious behavior.

Then, there is § 349(a) "bad faith," which does require determination of egregious behavior. *Leavitt*, 171 F.3d at 1224.

In other words, § 1307(c) "bad faith" may be sufficient to dismiss but is not necessarily sufficient to establish the § 349(a) "bad faith" needed to dismiss "with prejudice."

C. Standard for § 349(a) "Bad Faith"

Our analysis of § 349(a) "cause" is driven by the Ninth Circuit decision in *Leavitt*, which set out a four-factor totality-of-circumstances inquiry for assessing § 349(a) "cause" for providing that a dismissal be determined, as a matter of discretion, to be with prejudice for bad faith and egregious conduct. *Leavitt*, 171 F.3d at 1223-26. In turn, *Leavitt* agreed with the Fourth Circuit's *Tomlin* analysis. *Id., citing Tomlin*, 105 F.3d at 937.

As the bankruptcy court correctly ruled, the governing standard for § 349(a) bad faith is totality of circumstances determined through a four-consideration matrix:

> (1) whether the debtor misrepresented facts in his petition or plan, unfairly manipulated the Bankruptcy Code, or otherwise filed his Chapter 13 petition or plan in an inequitable manner;
> (2) the debtor's history of filings and dismissals;
> (3) whether the debtor only intended to defeat state court litigation; and
> (4) whether egregious behavior is present.

Leavitt, 171 F.3d at 1224 (cleaned up).

Consideration of the totality of the circumstances means that these four considerations are not essential elements and need not be computed with arithmetic precision. For instance, a bankruptcy could be found to have been filed in § 349(a) "bad faith" even though the debtor had no prior bankruptcy case.

Nor is malice or fraudulent intent required. *Leavitt*, 171 F.3d at 1224-25. But, although not required, the presence of either malice or fraudulent intent could be probative of egregious behavior.

We agree with the bankruptcy court's observation that the application of the *Leavitt* analysis in Duran's case turned on objective factors that did not necessitate subjective fraudulent intent or ill will toward creditors.

Although the Ninth Circuit panel in *Leavitt* was focused on § 349(a) "cause" in the context of § 1307(c) and ignored the debtor's right to dismiss a chapter 13 case under § 1307(b), we perceive no principled reason why the *Leavitt* analysis of § 349(a) "cause" should not apply equally to all case dismissals, including § 1307(b) dismissals. *Leavitt*, 171 F.3d at 1223 (omitting reference to § 1307(d)). We so hold.

III.
Flexible Procedure for § 349(a) Issues

The § 349(a) "for cause" issue whether to provide that dismissal be with prejudice to future discharge of any debt that could have been

discharged in the dismissed case may surface in such a variety of circumstances that the rules of procedure leave much to the discretion of courts on a case-by-case basis.

A. Timing

The rules and statute are silent about when a § 349(a) prejudice issue must raised.

While the questions of dismissal and of imposing a condition of prejudice pursuant to § 349(a) ordinarily are, as in this instance, considered in tandem, it is conceivable that circumstances may warrant raising the § 349(a) question after the fact of dismissal. What such circumstances might be can be left to another day.

B. Due Process

A minimum requirement for every § 349(a) matter that would prevent future discharge is that there must be notice and an opportunity for a hearing.

It is axiomatic that notice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their views. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

The severity of a Strong-Form § 349(a) dismissal "with prejudice" dictates that bankruptcy courts proceed in such matters with the caution reserved for egregious circumstances and a full opportunity for hearing

consistent with consideration associated with a complaint to deny discharge under § 727. *Leavitt*, 209 B.R. at 941-42, *citing* 3 Collier on Bankruptcy ¶ 349.02[2]; *Ellsworth*, 455 B.R. at 920, 922-23.

C. Chapter 13 Dismissals

The rules of procedure govern § 1307(b) dismissals as of right. Rule 1017(f)(2) directs that a debtor who wishes to exercise the § 1307(b) "right" to dismiss a chapter 13 case must proceed by motion filed and served as required by Rule 9013. Fed. R. Bankr. P. 1017(f)(2).

The need for a § 1307(b) motion is two-fold. First, the motion needs to be screened for eligibility because § 1307(b) dismissal as of right is not permitted if the case previously was converted under §§ 706, 1112, or 1208. Second, the motion provides a platform for considering the § 349(a) question of the effect of the dismissal.[4]

A § 1307(b) motion is governed by Rule 9013 and "is not automatically a contested matter under Rule 9014." Fed. R. Bankr. P. 1017(f)(2), Advisory Committee Note to 1987 Amendment.

In contrast, a § 1307(c) motion to dismiss for "cause" is always a contested matter governed by Rule 9014. Fed. R. Bankr. P. 1017(f)(1). The § 1307(c) motion must be filed and served as a Rule 9014 contested matter.

---

4 In contrast, conversion to chapter 7 as of right under § 1307(a) is automatic upon filing a notice of conversion and does not require a motion or a court order. Fed. R. Bankr. P. 1017(f)(3). Mischief attendant to conversion from chapter 13 to chapter 7 can be policed by the chapter 7 trustee and through the provision of § 348(f)(2) regarding property of the estate after a bad faith conversion. 11 U.S.C. § 348(f)(2).

The rules do not prescribe any particular procedure for raising a § 349(a) issue varying the effect of the dismissal. In this instance, the filing of Gudino's opposition to Duran's § 1307(b) motion to dismiss in which Gudino advocated dismissal with prejudice under § 349(a) is what created the actual dispute that transformed the Rule 9013 motion proceeding into a Rule 9014 contested matter. Fed. R. Bankr. P. 9014, Advisory Comm. Note.[5]

Whatever procedural alternatives may exist for raising a § 349(a) issue in the various chapters and procedural postures that may apply (e.g., a separate contested matter motion, perhaps filed even after dismissal), Gudino's opposition to the debtor's § 1307(b) motion was a correct procedure for presenting the § 349(a) issue to the court.

The bankruptcy court thereafter treated the dispute as a Rule 9014 contested matter. This was also a correct procedure.

In deciding the dispute, the court was entitled to rely on the entire record. *Ellsworth*, 455 B.R. at 920.

---

5 At the time Rule 9014 was promulgated, the Bankruptcy Rules Advisory Committee explained:

> Whenever there is an actual dispute, other than an adversary proceeding, before the bankruptcy court, the litigation to resolve that dispute is a contested matter. For example, the filing of an objection to a proof of claim, to a claim of exemption, or to a disclosure statement creates a dispute which is a contested matter. Even when an objection is not formally required, there may be a dispute. If a party in interest opposes the amount of compensation sought by a professional, there is a dispute which is a contested matter.

Fed. R. Bankr. P. 9014, Advisory Comm. Note.

Duran elected to rest on the record that had been made throughout the case, including the two days of evidentiary hearing on the abortive chapter 13 confirmation. Moreover, he did not object to the procedure employed by the court.

In sum, we perceive no error in the procedure leading to the dismissal of Duran's case with prejudice.

IV.
Burdens

Duran contends that the objecting creditor had the burden of persuasion on the § 349(a) question of dismissal "with prejudice" because it is tantamount to denying a discharge under § 727. We agree.

A fair reading of the bankruptcy court's ruling reveals that the court, also, placed on Gudino the ultimate burden of persuasion and correlative risk of nonpersuasion. The court was persuaded.

A. Statutory Presumption in § 349(a)

Section 349(a) functions as a statutory presumption. Unless the court, for "cause," orders "otherwise," dismissal does not bar discharge in a later case of debts that were dischargeable in the case dismissed. 11 U.S.C. § 349(a); Fed. R. Evid. 301.

The § 349(a) "unless" clause creates such a powerful presumption that it routinely is observed in silence and need not be independently considered and expressly addressed by the court. The proponent of

ordering "otherwise" under § 349(a) has the burden of raising the issue of "cause" in the first instance.[6]

The proponent of an order "otherwise," thus, has the burden to produce evidence in the first instance to support the existence of "cause" to order that dismissal should bar future discharge of debts that were dischargeable in the case dismissed. In the absence of such evidence, the § 349(a) statutory presumption applies. *See* 21B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Evidence § 5122 (2d ed. 2020); *see also* 2 Barry Russell, Bankruptcy Evidence Manual § 301.71.

If evidence is produced sufficient in the view of the court potentially to constitute "cause" to vary the § 349(a) statutory presumption, then the burden of production shifts to the debtor to produce evidence to explain why dismissal should be without prejudice, i.e. to justify the debtor's conduct.

However, the ultimate burden of persuasion, as distinguished from the burden of producing evidence, reposes on the person opposing application of the statutory presumption for two reasons.

First, there is a direct analogy to the § 727 adversary proceeding that would produce the same result as the § 349(a) dismissal "with prejudice." In § 727 objections to discharge, the objector to discharge has the burden of

---

6 To be sure, the court may also act sua sponte. We express no view in this appeal regarding details of how to exercise the court's sua sponte power beyond the axiomatic requirement of notice and opportunity for a hearing.

persuasion. *Retz v. Samson (In re Retz)*, 606 F.3d 1189, 1196 (9th Cir. 2010), *citing Khalil v. Devs. Sur. & Indem. Co. (In re Khalil)*, 379 B.R. 163, 172 (9th Cir. BAP 2007), *aff'd*, 578 F.3d 1167, 1168 (9th Cir. 2009); Fed. R. Bankr. P. 4005.

Second, in § 349(a) issues, the emphasis on egregious conduct in decisions such as *Leavitt* and in the Collier treatise similarly implies allocating the ultimate burden of persuasion to the proponent of varying the § 349(a) statutory presumption.

B. Quantum of Evidence Required

The quantum of evidence required to vary the § 349(a) statutory presumption is likewise influenced by the emphasis on egregious circumstances and the similarity to the consequences of denial of discharge. In an adversary proceeding seeking to deny discharge under § 727, the plaintiff's burden of persuasion is preponderance of evidence. *Grogan v. Garner*, 498 U.S. 279, 289 (1991) (dicta); *Retz,* 606 F.3d at 1196; *Khalil*, 379 B.R. at 172.

Whether the egregious or bad faith requirements imply a quantum of evidence needed for § 349(a) dismissal with the Strong Form of "with prejudice" that would be greater than preponderance of evidence can be left for another day.

Here, the findings by the bankruptcy court as it applied the *Leavitt* totality of the circumstances analysis show that it was convinced by more

than a preponderance of evidence that Duran was responsible for what it determined to be a "huge" and egregious manipulation of bankruptcy process in bad faith. The evidence in this instance was overwhelming. We express no view regarding burdens for weaker forms of exercises of discretion under § 349(a).

C. "Good Faith" and "Bad Faith" Compared

An instructive coincidence in this case is that the bankruptcy court faced two different good faith/bad faith decisions at about the same time in circumstances that illustrate the contrast in burdens of proof.

The salient point is that good faith and bad faith are neither binary nor mutually exclusive. A party who does not prove good faith is not necessarily acting in bad faith. Conversely, a party who does not prove bad faith has not proved good faith.

The elements of chapter 13 plan confirmation required Duran, as the plan proponent, to prove that the plan was filed in good faith and not by any means forbidden by law and that Duran's action in filing the petition was in good faith. 11 U.S.C. § 1325(a)(3) & (7). The court was not persuaded that Duran carried that burden in either respect. However, Duran had abandoned his confirmation effort before a formal ruling was required.

The § 349(a) analysis, as Duran argues, required Gudino to prove bad faith and egregious conduct. Proof of bad faith did not necessarily follow

from the shortcomings of Duran's confirmation evidence addressed to § 1325(a)(3) and (7) good faith.

Rather, Gudino's burden was carried by overwhelming competent, admissible evidence in the overall record of the case, to which evidence there was no objection. The evidence, which included judicial notice of the record, was probative of misconduct including a scheme to shelter real and personal property assets by transfer to an insider, false presentation of the debtor as a mere farmhand, false statements denying prepetition transfers, false statements about prepetition income, false statements about nonexistence of federal tax debt, and false testimony.

Once Gudino presented that evidence, the burden of going forward shifted to Duran to provide evidence supporting his defense. But the ultimate burden of persuasion, and correlative risk of nonpersuasion, on the § 349(a) issues always reposed with Gudino. Fed. R. Evid. 301. The court, as trier of fact, was not persuaded that Duran's defense neutralized the force of Gudino's evidence and was persuaded that the totality of circumstances warranted findings of bad faith and egregious conduct worthy of dismissal "with prejudice," as permitted by § 349(a).

V.
Judicial Discretion

The question, thus, becomes whether the bankruptcy court abused its discretion when it dismissed Duran's case with prejudice.

As noted, a bankruptcy court abuses its discretion if it applies the wrong legal standard or makes factual findings that are illogical, implausible, or without support in the record. *Hinkson*, 585 F.3d at 1262. The legal standard is the totality of circumstances inquiry mandated by *Leavitt* for determining whether "cause" exists under § 349(a) to dismiss with prejudice. *Leavitt*, 171 F.3d at 1224.

Here, the court considered each of the four *Leavitt* factors separately in its oral findings.

Two of the factors, the history of filings and dismissals and whether the debtor intended only to defeat state court litigation, were regarded as neutral.

The other two factors, however, overwhelmingly favored dismissal "with prejudice." The debtor had misrepresented facts in his petition, schedules, and plan and unfairly manipulated the Bankruptcy Code in a "huge" and inequitable manner. The court ruled the debtor's conduct was egregious and in bad faith.

The bankruptcy court applied the correct legal standard. Its factual findings are supported by the record. Nor are they illogical or implausible.

It follows that the court did not abuse its discretion in ordering that there was cause under § 349(a) to order that the voluntary dismissal of the chapter 13 case requested by Duran pursuant to § 1307(b) be "with

prejudice" to any future effort to discharge any of the debts that might have been discharged in his dismissed chapter 13 case.

VI.
Harmless Errors in Order

The order dismissing the case contains two harmless errors worthy of note, but neither affects substantial rights.

The first error is the false recital that "Creditor Luz Gudino's Motion to Dismiss this case with prejudice as a bad faith filing had been pending under prior submission to the Court following evidentiary hearings before the Court on June 6, 2019 and June 20, 2019."

Nothing in the record reflects a Motion to Dismiss by Gudino. Any such motion would have had to have been made as a motion to dismiss for "cause" under § 1307(c) and Rule 1017(f)(1). What we have found are protestations about Duran's bad faith and arguments that the case should be dismissed. But argumentative fulminations, without making a procedurally correct motion, are no more than invitations for the court to act sua sponte. Gudino had no pending motion to dismiss.

Nor do the court's findings reflect consideration of the § 1307(c) analysis of the best interests of creditors and the estate. 11 U.S.C. § 1307(c); *Nelson*, 343 B.R. at 675. Since the facts of this case reveal plainly avoidable transfers potentially of significant value that a chapter 7 trustee might be able to capture, the court would have grappled with that problem if it had been acting under § 1307(c).

The error in the false recital is harmless because it does not affect any party's substantive rights. Fed. R. Civ. P. 61, *incorporated by* Fed. R. Bankr. P. 9005.

Gudino responded to Duran's § 1307(b) motion with an "opposition" under § 349(a) that any dismissal be with prejudice. Applying Rule 1001, we construe Gudino's "opposition" to constitute a motion under § 349(a) that any dismissal be ordered to have been with prejudice. Fed. R. Bankr. P. 1001.

At the time of the hearing, it was a foregone conclusion that the chapter 13 case would be dismissed. Nobody took a position contrary to dismissal. Rather, the focus of the hearing was on the *Leavitt* factors governing § 349(a) "cause" for imposing a condition of prejudice to the dismissal, which was the precise question raised by Gudino.

The second error is that the order purports to deny Duran's § 1307(b) motion and then, without invoking any alternative statutory authority, dismiss the case.

It was error to deny Duran's § 1307(b) motion. The court did not say in its oral findings that it was denying the § 1307(b) motion. That motion was procedurally correct, adequate to the task of dismissal, and threatened no abuse of process. No other motion was before the court, nor were the court's findings consistent with § 1307(c).

To be sure, it would also have been procedurally correct for the court to have asserted its own inherent authority to override Duran's §1307(b) motion. But, one would expect the court to have said it was so acting.

As with the erroneous recital, the error inherent in denying Duran's § 1307(b) motion does not affect any party's substantive rights. Hence, it constitutes harmless error.[7]

***

Duran, recognizing the futility of his effort to confirm a chapter 13 plan and conceding that the IRS proof of claim made him ineligible for chapter 13 relief, filed his § 1307(b) motion to dismiss as of right. But Nemesis was not willing to let Duran absquatulate.[8]

7 So long as errors are harmless in the sense that they do not affect substantive rights of any party, we may correct them without need to reverse or to remand.

Our authority to modify an order on appeal derives from Rule 9005, which incorporates Civil Rule 61, with the additional proviso that the court may order "correction of any error or defect or the cure of any omission which does not affect substantial rights." Fed. R. Bankr. P. 9005; Fed. R. Civ. P. 61.

We have on more than one occasion exercised this Rule 9005 authority. *E.g.*, *Lakhany v. Khan (In re Lakhany)*, 538 B.R. 555, 563 (9th Cir. BAP 2015); *Ruvacalba v. Munoz (In re Munoz)*, 287 B.R. 546, 551-52 (9th Cir. BAP 2002). While this is another occasion in which it might be appropriate to do so, we perceive no useful purpose in so acting because nobody is likely to be confused by the defective order.

8 The Panic of 1837 led to the Bankruptcy Act of 1841 and the verb, "absquatulate":

> The newly independent Republic of Texas gained a reputation as a popular destination for dishonorable failures. . . . "Gone to Texas," abbreviated in "three ominous letters G.T.T." became a shorthand symbol found on abandoned businesses. . . .

(continued...)

Gudino asked the court to find "cause" to order under § 349(a) that the dismissal be "with prejudice" to future discharge of any debt that could have been discharged in the case.

There was adequate notice and opportunity for hearing consistent with the ability to be heard in defense of an objection to discharge under § 727. The court, allocating the burden of persuasion to the creditor, applied correct procedure and analysis to conclude that the debtor's conduct was egregious, inequitable, and in bad faith for purposes of § 349 "cause." The evidence and the record reveal that the decision to dismiss "with prejudice" was not an abuse of discretion.

In the end, the debtor's "right" to dismiss under §1307(b) does not immunize the debtor from the consequences of an adverse § 349(a) determination.

AFFIRMED.

(...continued)

> Absconding to squat on western lands and perambulate from one property to another had become so common a practice that writers invented a new verb to describe this process: to absquatulate. Like shinning and dunning, absquatulation was a form of personal panic.

Jessica M. Lepler, The Many Panics of 1837, at 137 (Cambridge Univ. Press 2013).

See also "Absquatulate," The Oxford English Dictionary: "v. Also absquotilate. [A factitious word, simulating a L. form (cf. *abscond, gratulate*) of American origin, and jocular use.] To make off, decamp." 1 The Oxford English Dictionary 53 (J.A. Simpson & E.S.D. Weiner eds., 2nd ed. 1989). First printed example, 1837-40. *Id*.

Rochelle's Daily Wire

ABI EXCLUSIVE

OCTOBER 28, 2022

Even if Ineligible for Chapter 13, the Debtor Still Has an Absolute Right to Dismiss

> The Ninth Circuit BAP interprets circuit authority as giving a chapter 13 debtor the absolute right to dismiss.

Concluding that recent Ninth Circuit authority gives the debtor an absolute right to dismiss a chapter 13 case, the Bankruptcy Appellate Panel for the Ninth Circuit held "that ineligibility to be a chapter 13 debtor does not deprive the debtor of the near-absolute right to dismiss the chapter 13 case."

The debtor was sued by his former employer for breach of a noncompetition and nondisclosure agreement, along with misappropriation of trade secrets. The former employer won a judgment for about $215,000. The employer recorded the judgment to obtain a lien on the debtor's real property.

The debtor filed a chapter 13 petition, listing some $87,000 in unsecured debt plus $950,000 in secured debt, including $364,000 owing to the former employer.

The employer filed an adversary proceeding in bankruptcy court alleging that the debt was nondischargeable as a willful and malicious injury to property or a fraud while acting in a fiduciary capacity. The employer also alleged that the debtor transferred property fraudulently to his former wife, to shield assets from creditors. In addition, the employer objected to the debtor's homestead exemption alongside a motion to value the property.

The debtor responded by moving to dismiss the chapter 13 case under Section 1307(b). The former employer opposed dismissal, arguing that dismissal would further the debtor's wrongdoing.

Of greater weight, the former employer contended that the debtor had too much unsecured debt for chapter 13 and therefore should be considered a chapter 7 debtor, where dismissal is not automatic.

Bankruptcy Judge Natalie M. Cox of Las Vegas overruled the objection and permitted dismissal. The former employer appealed again, losing a second time in an October 21 opinion for the BAP by Bankruptcy Judge Robert J. Faris.

The Split on Dismissal

The controlling statute is Section 1307(b), which provides, "On request of the debtor at any time, . . . the court *shall dismiss* a case under this chapter." [Emphasis added.]

Interpreting that section, the Second, Sixth and Ninth Circuits give a chapter 13 debtor a seemingly absolute right to dismiss a chapter 13 case that has not been previously converted from chapters 7, 11 or 12. In the Ninth Circuit, the case is *Nichols v. Marana Stockyard & Livestock Market Inc. (In re Nichols)*, 20-60043, 2021 BL 368629, 2021 Us App Lexis 29302 (9th Cir. Sept. 1, 2021). To read ABI's report on *Nichols*, **click here**.

On the other side of the fence, the Fifth and Eighth Circuits held that dismissal under Section 1307(b) may be conditioned on the debtor's good faith. Those circuits rested their opinions in part on *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365 (2007), where the Supreme Court held under Section 706(a) that the bankruptcy court has discretion to deny conversion of a chapter 7 case to chapter 13 as a consequence of the debtor's bad faith. However, those decisions came down before *Law v. Siegel*, 571 U.S. 415 (2014), where the Supreme Court held that a bankruptcy court may not use its equitable powers under Section 105(a) to contravene express provisions of the Bankruptcy Code.

Arguably, *Law* cut the ground out from underneath the Fifth and Eighth Circuits' decisions on Section 1307(b).

Dismissal Notwithstanding Bad Faith

In the Ninth Circuit before *Nichols*, the governing authority had been *Rosson v. Fitzgerald (In re Rosson)*, 545 F.3d 764 (9th Cir. 2008), where the appeals court upheld denial of a motion to dismiss under Section 1307(b) and conversion to chapter 7.

Judge Faris pointed out that "the Ninth Circuit's recent *Nichols* decision overruled *Rosson* and made clear that chapter 13 debtors have an absolute right to dismiss their case at any time, so long as the case had not been previously converted." In other words, *Rosson* was no longer good law after *Law*.

Judge Faris held that the text of Section 1307(b) gives the debtor an absolute right to dismiss, if there has not been a prior conversion.

The employer contended that *Nichols* was not controlling because the debtor had too much debt for chapter 13. Judge Faris was willing to accept that contention, for the sake of argument.

If he were to deny dismissal because the debtor had too much debt for chapter 13, Judge Faris said that he "would create a new limitation, not found in

§ 1307(b), on the debtor's absolute right to dismiss a chapter 13 case. This is exactly what *Law* forbids."

Judge Faris added, "Nothing in the text of § 1307(b) limits voluntary dismissal to only "eligible" debtors." Because the debtor's case had not been converted, he affirmed the bankruptcy court for allowing dismissal.

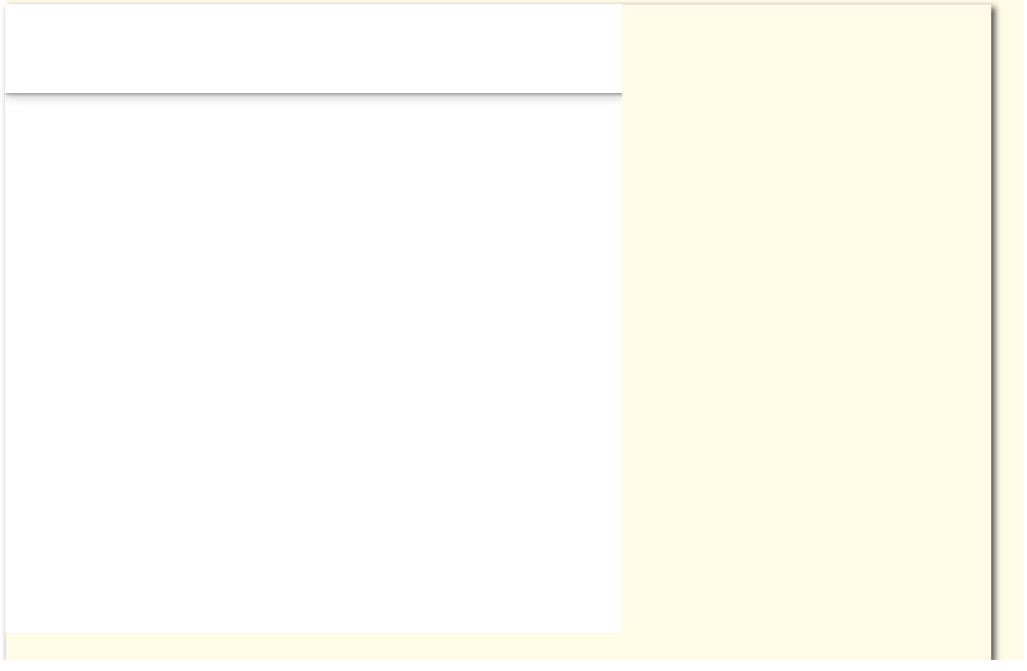
At the end of his opinion, Judge Faris alluded to the statement in *Nichols* that the bankruptcy court has "other tools" to deal with abuse. An example, he said, would be imposing a bar to refiling or other conditions under Section 105(a).

Observation

Could "another tool" be sanctions under Bankruptcy Rule 9011(c)(1)(A)?

Opinion Link

PREVIEW



https://abi-opinions.s3.amazonaws.com/Powell+9+BAP.pdf

Case Details

Case Citation	Tico Construction Co. v. Van Meter (In re Powell), 22-1014 (B.A.P. 9th Cir. Oct. 21, 2022).
Case Name	Tico Construction Co. v. Van Meter (In re Powell)
Case Type	Consumer
Court	9th Circuit
Bankruptcy Tags	Practice and Procedure Consumer Bankruptcy Discharge/Dischargeability

FILED

OCT 21 2022

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re: JASON PHILIP POWELL, Debtor.	BAP No. NV-22-1014-FLB Bk. No. 3:21-bk-50147-NMC
TICO CONSTRUCTION COMPANY INC., Appellant, v. WILLIAM ALBERT VAN METER, Chapter 13 Trustee; MELISSA HOOVEN, FKA Melissa Powell; JASON PHILIP POWELL, Appellees.	**OPINION**

Appeal from the United States Bankruptcy Court
for the District of Nevada
Natalie M. Cox, Bankruptcy Judge, Presiding

APPEARANCES:
Patrick Sean O'Rourke of Humphrey Law PLLC argued on behalf of appellant; Michael G. Millward of Millward Law, Ltd. argued on behalf of appellee Jason Philip Powell

Before: FARIS, LAFFERTY, and BRAND, Bankruptcy Judges.

FARIS, Bankruptcy Judge:

INTRODUCTION

Jason Philip Powell sought to dismiss his chapter 13[1] bankruptcy case. Judgment creditor TICO Construction Company, Inc. ("TICO") objected, arguing that Mr. Powell did not have an absolute right to dismiss his case because he was abusing the bankruptcy process and was not eligible to be a chapter 13 debtor. TICO argued that the bankruptcy court should instead convert the case to one under chapter 7. The bankruptcy court disagreed with TICO's analysis and dismissed the case.

TICO appeals. We discern no error and AFFIRM.

We publish to explain that ineligibility to be a chapter 13 debtor does not deprive the debtor of the near-absolute right to dismiss the chapter 13 case.

FACTS

A. Prepetition events

TICO previously employed Mr. Powell as a senior project manager. In May 2000, it sued Mr. Powell and others in state court, alleging that he breached non-compete and non-disclosure covenants in his employment contract. According to TICO, Mr. Powell misappropriated trade secrets and information belonging to TICO and shared that proprietary information

[1] Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

with a new company that he had formed while working for TICO. Following arbitration, the state court entered judgment against Mr. Powell totaling $215,149.86, and TICO recorded the judgment against all of Mr. Powell's property in Washoe County, Nevada.

B. Mr. Powell's chapter 13 petition

Mr. Powell filed a chapter 13 petition. He scheduled secured debt totaling $789,501.44, including $215,629.86 owed to TICO (of which $53,129.86 was unsecured). He scheduled $87,000 of priority unsecured debt due to the IRS; he also included twelve additional creditors holding nonpriority unsecured claims of "unknown" amounts. Later, Mr. Powell filed amended schedules and increased his secured debt to $947,843.68, including $364,066.51 owed to TICO. His unsecured debt remained unchanged at $87,000, with numerous "unknown" amounts.

TICO challenged Mr. Powell's chapter 13 filing. TICO filed a proof of claim based on the state court judgment debt. It also filed an adversary complaint seeking to have its debt declared nondischargeable under §§ 523(a)(4) and (6). Among other things, TICO alleged that Mr. Powell attempted to shield his assets from creditors by transferring real property prepetition to his ex-wife, Melissa Hooven, through a marital settlement agreement.

TICO objected to Mr. Powell's homestead exemption for numerous reasons. Mr. Powell opposed the objection. TICO also filed a motion to value collateral, which Mr. Powell also opposed.

C. Mr. Powell's motion to dismiss

According to Mr. Powell, at this point, he claimed that he had had enough of the bankruptcy litigation. He filed a Motion for Voluntary Dismissal ("Motion to Dismiss") pursuant to § 1307(b). He cited *Nichols v. Marana Stockyard & Livestock Market, Inc. (In re Nichols)*, 10 F.4th 956 (9th Cir. 2021), for the proposition that a chapter 13 debtor has an absolute right to dismiss his case under § 1307(b), even in the face of allegations of bad faith or abuse of the bankruptcy process, so long as the case has not been previously converted.

TICO opposed the Motion to Dismiss. It argued that Mr. Powell engaged in abusive practices, namely, a "sham" divorce from Ms. Hooven orchestrated to transfer all non-exempt assets to her. TICO contended that the bankruptcy court should not encourage further wrongdoing by allowing him to dismiss his chapter 13 case. TICO also argued that Mr. Powell had too much unsecured debt to be a chapter 13 debtor: it calculated that Mr. Powell's unsecured debt totaled $557,139.06 (exceeding the limit of $419,275).[2] It cited *Rosson v. Fitzgerald (In re Rosson)*, 545 F.3d 764, 772 (2008), for the proposition that, if the debtor's debt exceeded the

[2] On the petition date, § 109(e) provided that "[o]nly an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $419,275 and noncontingent, liquidated, secured debts of less than $1,257,850 . . . may be a debtor under chapter 13 of this title." § 109(e).

statutory limits, the court could convert the case rather than dismiss it.

TICO took the position that *Nichols* was a "non-final" decision that was inapplicable because it did not concern the issue of Mr. Powell's eligibility to be a chapter 13 debtor.

TICO requested that the bankruptcy court convert the case to chapter 7 or 11, rather than dismiss it outright. It argued that conversion was in the best interests of the estate and creditors, because Mr. Powell's bad faith and fraud demonstrated the necessity of a chapter 7 trustee to prevent dissipation of estate assets. Alternatively, it requested that the court sanction Mr. Powell for his "improperly maintained" bankruptcy case.

Mr. Powell responded that, even if TICO could prove its claims of bad faith, he was still entitled to dismiss his case as a matter of right under *Nichols*. He also argued that it was not necessary for the court to determine his eligibility under § 109(e); there was no authority supporting TICO's position that a chapter 13 debtor exceeding the debt limits loses his absolute right to dismiss his case. Finally, he argued that he did not engage in bad faith or otherwise abuse the bankruptcy process.[3]

The bankruptcy court held a hearing and agreed with Mr. Powell, holding that "[b]ad faith and debt limits are irrelevant" to the debtor's right to voluntarily dismiss his case. It granted the Motion to Dismiss and denied TICO's request for sanctions. In its written order, the bankruptcy court

[3] Separately, Ms. Hooven disputed TICO's allegations of a "sham divorce" and fraudulent transfers.

explained that it was bound by the Ninth Circuit's *Nichols* decision and concluded that Mr. Powell had an absolute right to dismiss his chapter 13 case.

TICO timely appealed.

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C. § 158.

ISSUE

Whether the bankruptcy court erred in granting Mr. Powell's motion to voluntarily dismiss his chapter 13 case.

STANDARD OF REVIEW

We review the bankruptcy court's decision to dismiss a case for an abuse of discretion. *See Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219, 1223 (9th Cir. 1999).

To determine whether the bankruptcy court has abused its discretion, we conduct a two-step inquiry: (1) we review de novo whether the bankruptcy court "identified the correct legal rule to apply to the relief requested" and (2) if it did, we consider whether the bankruptcy court's application of the legal standard was illogical, implausible, or without support in inferences that may be drawn from the facts in the record. *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc).

DISCUSSION

TICO urges us to reverse the bankruptcy court's decision allowing

Mr. Powell to voluntarily dismiss his chapter 13 case, because he was never properly a chapter 13 debtor. We disagree: *Nichols* makes clear that a chapter 13 debtor's absolute right to dismiss the case is subject only to the limitation set forth in § 1307(b); the statute does not limit that right based on chapter 13 eligibility.

A. Section 1307(b) affords chapter 13 debtors an absolute right to dismiss their case, subject to a statutory exception.

Mr. Powell sought to dismiss his case under § 1307(b). That section provides: "On request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court **shall** dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable." § 1307(b) (emphasis added).

There is a split of authority over whether § 1307(b) confers on debtors an absolute right to dismiss. Some courts have held that bad faith or an abuse of the bankruptcy process can preclude voluntary dismissal. *See Jacobsen v. Moser (In re Jacobsen)*, 609 F.3d 647, 660 (5th Cir. 2010) ("[A] bankruptcy court has the discretion to grant a pending motion to convert for cause under § 1307(c) where the debtor has acted in bad faith or abused the bankruptcy process and requested dismissal under § 1307(b) in response to the motion to convert."); *Mitrano v. United States (In re Mitrano)*, 472 B.R. 706, 710 (E.D. Va. 2012) ("This Court agrees with those courts holding that the right to dismissal upon request under § 1307(b) is limited to good-faith debtors."); *In re Johnson*, 228 B.R. 663, 668 (Bankr. N.D. Ill.

1999) ("[T]he better reasoned authorities hold that a debtor's right to voluntary dismissal of a Chapter 13 petition under § 1307(b) can be trumped under certain circumstances by a motion to convert under § 1307(c)."). Until recently, the Ninth Circuit adhered to this view. *In re Rosson*, 545 F.3d at 773 n.12 (holding that, under *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365 (2007), "even otherwise unqualified rights in the debtor are subject to limitation by the bankruptcy court's power under § 105(a) to police bad faith and abuse of process").

But, as the bankruptcy court correctly held, the Ninth Circuit's recent *Nichols* decision overruled *Rosson* and made clear that chapter 13 debtors have an absolute right to dismiss their case at any time, so long as the case had not been previously converted. In *Nichols*, the bankruptcy court denied the chapter 13 debtors' motion to dismiss, ruling that the debtors had abused the bankruptcy process by frustrating creditors during the pendency of criminal proceedings. 10 F.4th at 959. Instead, the court converted the case to chapter 7. We affirmed. *Id.*

On further appeal, the Ninth Circuit concluded that *Rosson*'s implied exception was no longer good law after the U.S. Supreme Court's decision in *Law v. Siegel*, 571 U.S. 415 (2014). It acknowledged *Law*'s holding that § 105 does not "allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code[.]" *In re Nichols*, 10 F.4th at 961 (quoting *Law*, 571 U.S. at 421). It concluded that *Law* clearly rejected the reasoning underpinning *Rosson*, so *Rosson* had been effectively overruled

and is no longer binding precedent. *Id.* at 961-62.

Accordingly, the Ninth Circuit held that "[s]ection 1307(b)'s text plainly requires the bankruptcy court to dismiss the case upon the debtor's request. There is no textual indication that the bankruptcy court has any discretion whatsoever." *Id.* at 963. It concluded that "§ 1307(b)'s text confers upon the debtor an absolute right to dismiss a Chapter 13 bankruptcy case, subject to the single exception noted expressly in the statute itself." *Id.* at 964.

B. The bankruptcy court did not err in holding that Mr. Powell had an absolute right to dismiss his chapter 13 case.

TICO argues that the bankruptcy court should not have allowed Mr. Powell to voluntarily dismiss his chapter 13 case because he exceeded the unsecured debt limit[4] and was not eligible to be a chapter 13 debtor with the absolute right to dismiss his case. Rather, TICO contends that the court should have treated Mr. Powell as a chapter 7 debtor and considered the best interests of the estate and creditors before it dismissed his case.

If accepted, TICO's arguments would create a new limitation, not found in § 1307(b), on the debtor's absolute right to dismiss a chapter 13 case. This is exactly what *Law* forbids. Nothing in the text of § 1307(b) limits voluntary dismissal to only "eligible" debtors. Rather, as discussed above,

[4] TICO argues that it presented the bankruptcy court with calculations showing that Mr. Powell's unsecured debt exceeded the unsecured debt limit in § 109(e). For purposes of this decision, we assume without deciding that Mr. Powell's unsecured debts exceeded the statutory debt limits.

Nichols makes clear that, absent the single statutory exception, a chapter 13 debtor has an absolute right to dismiss his case. Because Mr. Powell's case had not been converted from another chapter, the bankruptcy court did not err in allowing him to dismiss his case.

TICO offers no authority that directly supports its argument.[5] It relies on our decision in *FDIC v. Wenberg (In re Wenberg)*, 94 B.R. 631 (9th Cir. BAP 1988), *aff'd*, 902 F.2d 768 (9th Cir. 1990). But *Wenberg* cuts against TICO's position. It holds that § 109(e) eligibility is not jurisdictional, such that the bankruptcy court need not immediately dismiss an ineligible chapter 13 debtor's case; rather, an ineligible debtor may move to convert his case to chapter 7. *Id.* at 636-37. *Wenberg* does not limit a chapter 13 debtor's ability to convert his case under § 1307(a), so we see no reason why it would limit Mr. Powell's absolute right to dismiss his case under § 1307(b).[6]

---

[5] At least one court has denied a debtor's motion to dismiss based in part on his inability to qualify as a chapter 13 debtor under § 109(e). *In re Letterese*, 397 B.R. 507 (Bankr. S.D. Fla. 2008). But that ruling was based on the premise that § 109(e) eligibility goes to the question of bad faith. In that case, the bankruptcy court for the Southern District of Florida denied the debtor's motion to dismiss and granted the trustee's motion to convert because it determined in part that the debtor exceeded the statutory debt limit and lacked a regular income, so he did not meet § 109(e)'s eligibility requirements to be a chapter 13 debtor. *Id.* at 513. It held that "the Debtor was clearly not eligible to be a debtor in chapter 13 at the time of filing. This fact alone is *prima facie* evidence of bad faith." *Id.* at 514.

Unlike the Florida bankruptcy court, we are bound by *Nichols* and do not consider a chapter 13 debtor's alleged bad faith as a bar to voluntary dismissal.

[6] TICO relies on *In re Tatsis*, 72 B.R. 908 (Bankr. W.D.N.C. 1987), which we cited

TICO also cites a Fifth Circuit case, *Nikoloutsos v. Nikoloutsos (In re Nikoloutsos)*, 199 F.3d 233 (5th Cir. 2000), for the proposition that the court cannot allow a debtor to "invoke the provisions of Section 1307" if the court is on notice that the debtor exceeded the unsecured debt limit. However, *Nikoloutsos* does not concern voluntary dismissal of a chapter 13 case under § 1307(b), but rather conversion **from** chapter 7 **to** chapter 13. *Id.* at 237. That decision has nothing to do with a chapter 13 debtor's right to voluntarily dismiss his case.[7]

---

in *Wenberg*, for the proposition that a chapter 13 debtor's right to dismiss his case ends when a party files a motion to convert the case. But the Ninth Circuit's *Nichols* decision is binding on us, while *Tatsis* is not. Additionally, many courts reach the opposite conclusion as *Tatsis* and hold that a chapter 13 debtor may voluntarily dismiss his case at any time, even if a party has already moved to convert the case to chapter 7. *See, e.g.*, *In re Mills*, 539 B.R. 879, 884 (Bankr. D. Kan. 2015) (granting the debtor's motion to dismiss because there is "no 'implicit exception' to the debtor's unqualified right of dismissal" and denying the trustee's motion to convert as moot); *In re Patton*, 209 B.R. 98, 102 (Bankr. E.D. Tenn. 1997) (holding that "the court is confident that Congress intended to provide Chapter 13 debtors with an absolute right to dismiss their case notwithstanding a competing motion to convert. . . . [T]he court is satisfied that the plain language of the statute, the legislative history, and the objectives and policies underlying the Bankruptcy Code persuasively establish Congress' intent that a debtor's right of dismissal trumps a creditor's right to convert under such circumstances"); *In re Sanders*, 100 B.R. 338, 341 (Bankr. S.D. Ohio 1989) (recognizing the debtor's absolute right to dismiss his case and holding he "has the right to dismiss his chapter 13 case notwithstanding the trustee's motion to convert").

[7] Many of TICO's cited cases similarly concern the effect of § 109(e)'s debt limits on a debtor's ability to convert to chapter 13, or to convert from chapter 13, but not a chapter 13 debtor's ability to dismiss his case. TICO repeatedly cites *In re Kwiatkowski*, 486 B.R. 409 (Bankr. E.D. Mich. 2013), but that case does not support its position. In that case, the bankruptcy court determined that the debtor exceeded the debt eligibility limits and denied confirmation of his chapter 13 plan. The court decided that it would allow the debtor to choose between conversion to chapter 7 or dismissal with a one-year

Finally, we are not swayed by TICO's argument that we must punish Mr. Powell for bad faith and abuse of the bankruptcy process. Recognizing that *Nichols* forecloses such an argument, TICO attempts to disclaim it; nevertheless, it repeatedly accuses Mr. Powell of bad faith. *Nichols* dictates that bad faith or abuse of the bankruptcy process does not deprive a chapter 13 debtor of his right to voluntarily dismiss his case. *Nichols* also recognizes that the bankruptcy court has other tools to address such abuse. *See In re Nichols*, 10 F.4th at 964. For example, it could impose a bar on refiling or other conditions under § 105.

CONCLUSION

The bankruptcy court did not err in granting Mr. Powell's Motion to Dismiss. We AFFIRM.

---

bar on refiling. *Id.* at 421 ("[T]he Court will not deny Debtor the opportunity to convert this case to Chapter 7, if that is what Debtor decides he now wants to do. Nor will the Court deny the Debtor the opportunity to dismiss this bankruptcy case, if that is Debtor's choice."). The bankruptcy court was not considering a § 1307(b) voluntary motion to dismiss and did not prevent the debtor from dismissing his case.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Case No: 19 B 24926
	)	
Isidro Alcantar,	)	Chapter 7
	)	
Debtor.	)	Judge LaShonda A. Hunt

MEMORANDUM OPINION

Even though debtor Isidro Alcantar already received a chapter 7 discharge, he seeks to convert this case to a chapter 13 and fully repay his creditors. This change of heart came about not long after chapter 7 trustee Cindy Johnson commenced an adversary proceeding against Alcantar's wife to recover nearly $140,000 in funds he transferred to her a month before the bankruptcy filing. And so the Trustee objects to the conversion motion on a couple of grounds. First, she asserts that, as a matter of law, chapter 7 debtors cannot convert post-discharge or vacate their discharge orders. Second, she argues that Alcantar is acting in bad faith and trying to circumvent the fraudulent transfer claim against his wife. Alcantar counters that he is eligible to be a chapter 13 debtor, as the Bankruptcy Code does not expressly prohibit conversions after entry of the discharge order.

The parties fully briefed the motion and argued their positions at a hearing held on April 30, 2021. The court concluded that conversion after discharge is generally not allowed unless the debtor also moves to vacate the discharge order under Fed. R. Civ. P. 60(b), made applicable by Fed. R. Bankr. P. 9024, and advised that a written decision would be forthcoming. For the reasons discussed below, the motion to convert will be denied without prejudice.

Background

The following facts are taken from the pleadings and bankruptcy dockets, of which this court takes judicial notice.[1] In January 2019, Alcantar received $159,000 in proceeds from a 2017 worker's compensation case. But Alcantar never disclosed the existence of that pending lawsuit in his chapter 13 bankruptcy filed in November 2018 and dismissed a month later—Case No. 18bk30923. Nor did he list the funds received in either the schedules or Statement of Financial Affairs for the instant chapter 7 filed in September 2019—Case No. 19bk24926. These omissions are surprising, given that the same attorney represented Alcantar in both cases.

At the section 341 meeting of creditors in October 2019, Alcantar admitted to the Trustee that he had not only received the settlement a few months earlier but had also transferred $139,000 to his wife, Yesenia Flores, as payback for loans. She then used those funds to purchase a house and a vehicle titled in her name only. In addition, Alcantar stated that he paid unknown amounts to other family members who covered his expenses when he was injured. After the meeting, the Trustee requested that Alcantar produce information about the transfers and amend his SOFA to include every individual he repaid in the year before the chapter 7 filing. Alcantar eventually responded to the document request but only after the Trustee sought and the court entered a show cause order against him. Alcantar has never filed an updated SOFA. In this bankruptcy case, Alcantar listed $81,655 in unsecured debts and no secured debts. He received a discharge in March 2020.

Six months later, the Trustee initiated an avoidance action against Flores, seeking to recover the pre-petition transfers. Flores retained her own counsel, David Lloyd, and filed an

[1] *See Inskeep v. Grosso (In re Fin. Partners)*, 116 B.R. 629, 635 (Bankr. N.D. Ill. 1989).

answer denying the transfers were fraudulent. Shortly thereafter, Alcantar moved to substitute Lloyd as counsel in his bankruptcy case and filed the pending motion to convert.

Alcantar now claims that he reported receipt of the proceeds and the subsequent purchases by Flores to his prior attorney who either ignored the information or instructed him to not include those details in his bankruptcy filing. Concerning the reason for the transfer, Alcantar claims that he and Flores agreed she would be responsible for their finances going forward, with property placed in her name alone. Finally, Alcantar explained that he sought chapter 7 bankruptcy relief after being laid off from his job. But now, he has returned to full-time work and is able to fund a chapter 13 plan that will repay his discharged debts in full. However, Alcantar has not moved to vacate the previously entered discharge order.

JURISDICTION

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 151 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A).

DISCUSSION

At issue here is whether a chapter 7 debtor who has received a discharge but has not had his estate fully administered by the chapter 7 trustee is permitted to convert to a chapter 13 and repay discharged debts through a reorganization plan. After carefully reviewing the legal authorities and considering the arguments of the parties, the court concludes that Alcantar cannot qualify for conversion unless the discharge order is vacated.

I. Converting from chapter 7 to 13

Section 706(a) of the Code states that a "debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under

section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable." 11 U.S.C. § 706(a). This provision must be read in conjunction with section 706(d), which provides that "[a] case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter." 11 U.S.C. § 706(d).

Prior to 2007, courts were divided on the related question of whether section 706(a) granted debtors an absolute right to convert a case from chapter 7 to chapter 13, with a majority holding yes. *See e.g., In re Mosby*, 244 B.R. 79, 83-84 (Bankr. E.D. Va. 2000) (collecting cases). A minority restricted the right if conversion would perpetuate an abuse of the system or bad faith existed. *See e.g., In re Lesniak*, 208 B.R. 902, 905 (Bankr. N.D. Ill. 1997) (collecting cases).

The Supreme Court resolved the split in *Marrama v. Citizen's Bank of Massachusetts* and held that the right to convert is indeed limited. 127 S.Ct. 1105 (2007). Because section 706(d) conditions conversion on eligibility, a proposed chapter 13 debtor must meet the threshold requirements of section 109(e) *and* satisfy section 1307(c) governing dismissal or conversion of a case for cause. *Id.* at 1110. Significantly, *Marrama* affirmed that courts possess inherent authority under section 105 to deem individual debtors who engage in fraudulent or bad-faith conduct ineligible for relief afforded under the bankruptcy laws. *Id.* at 1111-1112.

While instructive on the rules governing chapter 7 to 13 conversions generally, *Marrama* does not squarely answer the question presented here—whether post-discharge conversion is permitted. No clear congressional intent can be discerned from the Code, as the statute does not express an absolute prohibition or explicit approval of the procedure. *See In re Young*, 237 F.3d 1168, 1173-1174 (10th Cir. 2001) (upholding conversion after discharge as "entirely proper"). The Seventh Circuit has not ruled directly on the issue. Bankruptcy courts in this district have taken varying approaches in pre-*Marrama* decisions. *Compare In re Lesniak*, 208 B.R. at 906

(imposing "a bright-line rule that would prohibit conversions from Chapter 7 to Chapter 13 if the request is made post-discharge") *with In re Starling*, 359 B.R. 901, 911 (Bankr. N.D. Ill. 2007) (holding that conversion is allowed but "the Debtors' Chapter 7 discharge must be set aside if they wish to subject the debts listed in their Chapter 7 case to terms of the Chapter 13 plan").

The Trustee urges the court to follow *Lesniak* and find that entry of the chapter 7 discharge bars conversion to chapter 13. However, imposing an absolute restriction on every chapter 7 debtor when the Code is silent on the point strikes this court as inconsistent with the premise of *Marrama*. That is, conversion is appropriate if the debtor satisfies statutory criteria. In that regard, *Marrama* holding is not only instructive but also applicable to this situation. Accordingly, to prevail on his request to convert, Alcantar must likewise demonstrate: (1) statutory eligibility; and (2) good faith. With an intact discharge order and under the circumstances presented here, Alcantar does not meet either of those standards.

A. Statutory Eligibility

Under section 706(a), the debtor's case may not have been previously converted from another chapter, a fact not disputed here. Under section 706(d), the debtor must also be eligible to proceed under chapter 13. Section 109 establishes who can be a debtor in bankruptcy, generally and under each specific chapter of the Code. Relevant to the analysis is section 109(e), that defines a chapter 13 debtor as "[o]nly an individual with regular income that owes . . . noncontingent, liquidated, unsecured debts. . .. 11 U.S.C. § 109(e). Alcantar filed updated Schedules I and J reflecting regular income to support a plan payment which the Trustee has not contested. Still, he has not shown that, in light of the discharge order, he actually owes unsecured pre-petition debts.

The Code defines "debt" as "liability on a claim." *See* 11 U.S.C. § 101(12). And "claim" means "(A) right to payment whether or not such right is reduced to judgment, liquidated,

unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment. . ..” 11 U.S.C. § 101(5). But the chapter 7 discharge “discharges the debtor from all debts that arose before the date of the order for relief.” 11 U.S.C. § 727(b). More importantly, the discharge order “operates as an injunction against the commencement or continuation of an action … to collect, recover, or offset any such debt as a personal liability of the debtor. . ..” 11 U.S.C. § 524(a). As such, only a debtor who still owes non-discharged debts would qualify for relief under chapter 13. *See e.g., Lesniak*, 208 B.R. at 905 (“In order to have debts to repay, debts must exist.”).

Starling involved a factually similar situation with debtors who received their chapter 7 discharge and then sought to convert to a chapter 13 to prevent the trustee from selling their home. 359 B.R. at 904-905. Prior to filing the case, the debtors obtained an appraisal that reflected no available equity to satisfy claims of unsecured creditors. *Id*. at 905. Sometime after entry of the discharge order, the trustee conducted his own appraisal that showed the house was worth more than the debtors believed. *Id*. When the trustee moved to sell the property, the debtors responded with a request to convert the case and to have the discharge vacated. *Id.* at 906.

In considering whether conversion is a viable option post-discharge, *Starling* focused on the language in section 109(e). The court noted that the discharge already absolved the debtors of personal liability for the same debts they were proposing to repay in a chapter 13 plan. *Id.* at 909-910. Consequently, the debtors had to establish that creditors possessed a “right to payment” *from the debtors* in order to demonstrate the existence of “claims” that could be subject to a chapter 13 reorganization plan. *Id.* at 910 (emphasis added). That requirement could not be satisfied unless the debtors moved to set aside the discharge order under Fed. R. Civ. P. 60(b). *Id.*

So too Alcantar does not meet the statutory criteria under section 109(e). His petition listed unsecured debts only, none of which were reaffirmed by agreement with creditors or deemed non-dischargeable by the court. Entry of the discharge order thus relieved Alcantar of personal liability on those debts. *See* 11 U.S.C. 524(a)(1); *Johnson v. Home State Bank*, 111 S.Ct. 2150, 2154-2155 (1991). As a result, those creditors no longer have a right to demand payment directly from Alcantar on their discharged debts. *See Johnson*, 111 S.Ct. at 2154 (defining a right to payment as "nothing more nor less than an enforceable obligation") (citation omitted). In other words, Alcantar "no longer has any meaningful debts to repay pursuant to a Chapter 13 plan." *Starling*, 359 B.R. at 911 (quoting *In re Marcakis*, 254 B.R. 77, 82 (Bankr. E.D.N.Y. 2000)). Without debts that survived the discharge and thus remain due and owing by Alcantar to creditors, he is ineligible to be a chapter 13 debtor.

B. Good Faith

Overcoming the hurdle of ineligibility under section 109(e) does not save the day here. Conversion would also be denied as an abuse of the bankruptcy process. Chapter 7 debtors must demonstrate that the resort to chapter 13 is made in good faith. *Marrama* recognized "the vast majority" of these debtors are "honest but unfortunate" and thus entitled to take full advantage of the chance to repay their debts. 127 S.Ct. at 1111 (citation omitted). However, certain behavior can lead to a forfeiture of that right. When that occurs, bankruptcy courts are not hamstrung from entering an "immediate denial of a motion to convert filed under § 706 in lieu of a conversion order that merely postpones the allowance of equivalent relief" and potentially gives debtors "an opportunity to take action prejudicial to creditors." *Id.* at 1111-1112.

Alcantar insists he is the typical chapter 7 debtor whose financial situation has improved such that he is able and willing to repay his debts in full. On its face, the plan he intends to propose

will be beneficial to creditors and thus unlikely to draw bad-faith objections to confirmation under section 1325(a)(3). However, the facts here suggest that Alcantar "is not motivated by a desire to repay [his] debts [or] to provide a greater dividend to creditors." *Lesniak*, 208 B.R. at 906. Instead, this is "simply an attempt by the debtor to evade his obligations under chapter 7. . .." *Mosby*, 244 B.R. at 85.

Tellingly, the request to convert was not made until the Trustee filed suit against Alcantar's wife to recover fraudulent transfers. Although Alcantar confessed at the section 341 meeting to transferring undisclosed sums to his wife and other friends and family, he then disregarded the Trustee's demand for additional information. Only the threat of contempt got his attention with respect to part of the request. To date, his SOFA remains incomplete, lacking any detail about the transfers Alcantar made within a year of filing.

Now that Alcantar is at risk of losing the home his wife intentionally purchased in her name with the transferred settlement proceeds, his defense is to blame the attorney he used for not one, but two bankruptcy filings. Alcantar's continued lack of transparency throughout the bankruptcy process as well as the timing of the request to convert calls into question the sincerity of his intentions. As in *Lesniak*, a case involving chapter 7 debtors with multiple discrepancies in their schedules who were trying to save property through a post-discharge conversion, it appears that Alcantar's motivation is "a desire to rid [himself] of the Chapter 7 Trustee and place [his] future in the hands of a Chapter 13 Trustee, who can neither take possession of [his] property nor file a Section 727(d) complaint to revoke discharge." 208 B.R. at 907. This evidence of bad-faith misconduct justifies denial of the conversion request.[2]

[2] The court's assumptions are based on the representations made by counsel in the written pleadings. Alcantar has never submitted sworn statements attesting to his good-faith motives. He can still request a hearing to present that evidence to the court for consideration but doing so would be pointless if the discharge order is not vacated.

II. Vacating the Discharge

Conversion cannot be considered here unless the discharge order is first vacated. Indeed, "conversion is pointless, where, as here, a pre-existing Chapter 7 discharge renders resort to Chapter 13 meaningless and the debtor cannot or will not obtain relief from that order." *See In re Tardiff*, 145 B.R. 357, 360 (Bankr. D. Me. 1992). As the court has already explained, a chapter 13 debtor must owe debts. Otherwise, there is no point in proposing a repayment plan. It is true that certain debts may survive the bankruptcy discharge. *Johnson*, 111 S.Ct. at 2154. Whether non-discharged debts could be treated in a converted chapter 13 plan is an open question that need not be resolved since Alcantar's debts were all unsecured and therefore discharged.

Alcantar has not asked to vacate the discharge order in accordance with Fed. R. Civ. P. 60(b), made applicable by Fed. R. Bankr. P. 9024. Rule 60(b) provides a narrow list of reasons to grant relief from a final judgment, order, or proceeding. The Seventh Circuit has affirmed that "[f]inal bankruptcy orders can be set aside under Bankruptcy Rule 9024. . . and nothing in the rule indicates that it does not apply to the revocation of discharges." *Disch v. Rasmussen*, 417 F.3d 769, 778 (7th Cir. 2005). Until the discharge is undone, Alcantar cannot proceed in a converted chapter 13. *Starling*, 359 B.R. at 912-913.

III. Promoting the Policies of the Code

Finally, Alcantar suggests that allowing him to convert and save his home would further the goals of the bankruptcy process. True, Congress' stated purpose in establishing chapter 13 was "to enable an individual, under court supervision and protection, to develop and perform under a plan for the repayment of his debts over an extended period of time." *Matter of Smith*, 848 F.2d 813, 816–17 (7th Cir. 1988) (quoting H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 118 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin.News 5963, 6079.). However, permitting chapter 7

debtors with no pre-petition debts to repay to convert to a chapter 13 would be contrary to that intent.[3]

Alcantar concedes that the discharge injunction relieved him of personal liability for his debts. He maintains that because the claims remain against the bankruptcy estate, there is no real difference between the Trustee repaying creditors and him standing in the shoes of a chapter 13 trustee to do the same. The court disagrees.

The chapter 7 trustee is charged with administering a bankruptcy estate comprised of all a debtor's property by "managing liquidation of the estate's assets and distribution of the proceeds." *Law v. Siegel*, 134 S.Ct. 1188, 1192 (2014). *See also* 11 U.S.C. §§ 704(a)(1), 726, 727. Chapter 13 trustees, on the other hand, neither collect nor liquidate property. 11 U.S.C. § 1302. Debtors can certainly choose to voluntarily repay any debt, discharged or not. *See* 11 U.S.C. § 524(k). But that does not necessarily mean they are entitled to do so using the protections of chapter 13, particularly after they have already received the benefit of a chapter 7 discharge.

The Trustee correctly observes that Alcantar is trying to avoid his end of the bargain here by terminating the chapter 7 case before his estate is fully administered. "A chapter 7 case involves a *quid pro quo*: debtors receive a discharge and in exchange, make full disclosure about their financial affairs, especially their assets, and surrender their nonexempt assets to the trustee" to liquidate and distribute among creditors. *In re Jeffrey*, 176 B.R. 4, 6 (Bankr. D. Mass. 1994).

[3] In *In re Sidebottom,* an analogous case, the Seventh Circuit held that a debtor could not concurrently maintain a chapter 13 case to address debts that were at issue in a pending chapter 7 proceeding—a "simultaneous chapter 20." 430 F.3d 893, 898-899 (7th Cir. 2007). The court acknowledged the right of debtors to initiate a chapter 7 case, and then after the case is closed, file a separate chapter 13 case to deal with debts that were not discharged in the preceding chapter 7—a "sequential Chapter 20." *Id.* at 896-897. Conversion is a distinct process that results in one case, albeit now administered under a different chapter. *See* 11 U.S.C. § 348(a). It does not fit neatly into either category. Nevertheless, since Alcantar's debts were discharged in the chapter 7 case, attempting to repay them in a converted chapter 13 arguably results in a scenario more akin to the prohibited "simultaneous chapter 20." Indeed, the debtor is essentially maintaining multiple actions with respect to the same debts.

Having failed to disclose pre-petition transfers exceeding $150,000 and then reluctantly cooperating with the Trustee's efforts to investigate his only assets of value, Alcantar proposes to repay debts as a last resort. But allowing conversion now "would have the effect of displacing the [t]rustee who was pressing debtor so hard in [chapter] 7" and leave "[t]he fate of the [chapter] 7 fraudulent-transfer actions in [chapter] 13. . . uncertain." *In re Spencer*, 137 B.R. 506, 515 (Bankr. N.D. Okla. 1992).

In chapter 7, the purpose is to allow the honest debtor who is forthcoming and surrenders all non-exempt assets for liquidation to take advantage of an immediate discharge to start anew. Alternatively, in chapter 13, the purpose is to use the "carrot" of a discharge down the road as a means of incentivizing the debtor to complete his plan payments while retaining all his property. Permitting Alcantar to keep the chapter 7 discharge *and* gain control of the action to recover fraudulently-transferred assets from his wife—with no requirement to finish the reorganization—is inconsistent with the goals of either of those chapters.

Alcantar offers to agree in advance to re-conversion rather than dismissal if the chapter 13 case fails. Converting now terminates the chapter 7 case and its estate. *See In re Rigales*, 290 B.R. 401, 407 (Bankr. D. N.M. 2003) ("When a case is converted to Chapter 13 before liquidation, the Chapter 7 estate ceases to exist and becomes instead, the debtor's property in Chapter 13."). If the case is later reconverted to a chapter 7, it would likely be too late at that point for the trustee to pursue those transfers. The debtor would have an intact discharge with no obligation to finish repaying his creditors and the estate would lack recoverable assets for the trustee to liquidate. Again, that would lead to an absurd result with a chapter 7 debtor essentially "regain[ing] his nonexempt property . . . and his debts have all been discharged." *Id.*

Moreover, the Code is clear that debtors who receive a chapter 7 discharge are ineligible to receive another discharge within a certain number of years. *See* 11 U.S.C. §§ 727, 1328. Alcantar should not be able to use conversion to achieve a result—a chapter 13 discharge—that he cannot obtain by filing a sequential chapter 20. To alleviate concerns about duplicate discharges of the same debts, Alcantar states that he will agree to forego a discharge in the converted chapter 13. Whether admirable or self-serving, the gesture is futile. Waiving a future discharge would not address the very real concern about debtors retaining chapter 7 discharges when they have not fulfilled their end of the bargain. If any discharge should be forfeited, it is the discharge Alcantar was granted in the chapter 7, not a discharge he has yet to earn for completing plan payments in a chapter 13.

CONCLUSION

For all the foregoing reasons, Alcantar's motion to convert from a chapter 7 case to a chapter 13 will be denied without prejudice. Alcantar must successfully vacate the discharge order and refute the lack of good faith to establish eligibility for conversion.

ENTER:

Dated: September 10, 2021

LaShonda A. Hunt

Hon. LaShonda A. Hunt
United States Bankruptcy Judge

NCBJ Panel Materials
January 2021 Consumer Bankruptcy Law
Honorable Brian D. Lynch

The Debtor's Right to Dismiss a Chapter 13 Case and Conditioning Dismissal*

A. The Debtor's Right to Dismiss Under § 1307(b)

A central policy of chapter 13 is that a debtor's filing is a wholly voluntary alternative to chapter 7.[1] Consistent with the voluntary nature of chapter 13, Bankruptcy Code section 1307(b) provides: "On request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter."[2] The issue of whether the right to dismiss is absolute arises from the language of § 1307(b) and two Supreme Court decisions: *Marrama v. Citizens Bank of Massachusetts*[3] and *Law v. Siegel.*[4]

Earlier this year, the Ninth and Sixth Circuits considered whether a debtor may voluntarily dismiss his or her chapter 13 case in the face of a pending motion to convert and allegations of bad faith. In *Nichols v. Marana Stockyard & Livestock Market, Inc.*,[5] the Ninth Circuit found that a chapter 13 debtor's right to dismiss his or her unconverted case is absolute, regardless of the bankruptcy court's determination that the debtor engaged in an abuse of the bankruptcy process. Under the plain language of § 1307(b), a debtor can dismiss his or her unconverted chapter 13 case at any time, and the bankruptcy court has no discretion to deny the debtor's request. The Circuit held that the Supreme Court's *Law v. Siegel*[6] decision effectively overruled the Ninth Circuit's previous holding in *Rosson v. Fitzgerald*[7] and reversed the BAP's holding in *Nichols.*[8] The Sixth Circuit reached the same conclusion that § 1307(b) is a mandatory provision that cannot be contravened by a bankruptcy court's inherent authority.[9]

---

*Judge Lynch acknowledges the assistance of his law clerk Katherine Culbertson in preparing these materials.

[1] 11 U.S.C. § 303(a); *see also Harris v. Viegalahn*, 575 U.S. 510 (2015).
[2] 11 U.S.C. § 1307(b).
[3] 549 U.S. 365 (2007).
[4] 571 U.S. 415 (2014).
[5] *Nichols v. Marana Stockyard & Livestock Mkt., Inc. (In re Nichols)*, 10 F.4th 956 (9th Cir. 2021).
[6] 571 U.S. 415 (2014).
[7] *Rosson v. Fitzgerald* (*In re Rosson)*, 545 F.3d 764 (9th Cir. 2008).
[8] *In re Nichols*, 618 B.R. 1 (B.A.P. 9th Cir. 2020).
[9] *Smith v. U.S. Bank N.A. (In re Smith)*, 999 F.3d 452 (6th Cir. 2021); *see also In re Fulayter*, 615 B.R. 808 (Bankr. E.D. Mich. 2020).

NCBJ Panel Materials
January 2021 Consumer Bankruptcy Law
Honorable Brian D. Lynch

The *Rosson* decision, which *Nichols* overturned, had relied on the Supreme Court's *Marrama* decision in holding that the right to dismiss is not absolute but qualified by the bankruptcy court's authority to deny dismissal on grounds of bad faith conduct or to prevent an abuse of process.[10] But *Nichols* relied on the subsequent Supreme Court decision in *Law v. Siegel*. In *Law v. Siegel*, the Supreme Court explained that, although a bankruptcy court possesses broad inherent authority under § 105(a)[11] to sanction a debtor's abusive practices, a debtor's bad faith is not sufficient to warrant deviation from the Bankruptcy Code's express confines.[12] The Supreme Court held that a bankruptcy court's general sanctioning powers are subordinate to explicit mandates of other Bankruptcy Code sections.[13] Both *Nichols* and the Sixth Circuit in *Smith* hold that § 1307(b) is such an explicit mandate.

B. Conditioning Dismissal with Bars to Refiling and Other Sanctions

In holding that the right to dismiss is absolute, the *Nichols* court noted that the Bankruptcy Code provides other "ample alternative tools to address debtor misconduct." Section 349(a) provides that the effect of dismissal prior to discharge is without prejudice, and the debtor is not barred from receiving a discharge in a subsequent case of those debts that were dischargeable in the dismissed case, "unless the court, for cause, orders otherwise . . . ." Section 349(a) goes on to add: "nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title."

Section 109(g), which defines the eligibility requirements to become a debtor under the Bankruptcy Code, also places limits on the ability of a chapter 12 or 13 debtor to refile for a period of 180 days if the case was dismissed for willful failure of the debtor to abide by orders of the court or to appear before the court in proper prosecution of the case.

---

[10] 545 F.3d at 774.
[11] "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." 11 U.S.C. § 105(a).
[12] 571 U.S. at 426.
[13] *Id.* at 421.

Relying on the text of these provisions, bankruptcy courts have concluded they maintain the authority to supplement the debtor's request to dismiss under § 1307(b) with remedial measures such as issuing a filing injunction. Two recent cases have looked closely at the interplay between §§ 349(a) and 1307(b).

In *In re Minogue*,[14] the Court concluded that the debtor's right to dismiss under § 1307(b) was absolute and then addressed what conditions and sanctions it could place on a debtor's voluntary dismissal when the debtor committed a number of acts constituting bad faith. The Court found "authority to issue remedial orders . . . to address a debtor's bad faith conduct or abuse of bankruptcy process"[15] under §§ 349(a) and 109(g) and approved an agreed order dismissing the case with prejudice to bar any subsequent bankruptcy case under any chapter for a two-year period.

The Ninth Circuit BAP recently held in *In re Duran*[16] that every dismissal, including one based on a § 1307(b) motion, triggers a § 349(a) issue of whether "cause" exists to order that dismissal be with prejudice. The Ninth Circuit follows a "totality of circumstances test" to consider whether sufficient cause exists to dismiss the debtor's case with prejudice.[17] Under *In re Leavitt*, the court considers the following factors: (1) whether the debtor misrepresented facts in his or her petition or plan, unfairly manipulated Bankruptcy Code, or otherwise filed his or her petition or plan in an inequitable manner; (2) the debtor's history of filings and dismissals; (3) whether the debtor only intended to defeat state court litigation; and (4) whether egregious behavior is present.[18] Considering the *Leavitt* factors, the Ninth Circuit BAP held that the chapter 13 debtor's right to dismiss does not immunize the debtor from the consequences of a dismissal with prejudice. The *Duran* court found that the creditor sustained their burden of proving the debtor's conduct was egregious, inequitable, and in bad faith under § 349 and affirmed the bankruptcy court's dismissal with prejudice.

The *Duran* court also held that there was no particular procedure prescribing how or when to initiate a contest regarding "cause" to order that dismissal be with prejudice so long as there is due process notice appropriate for denial of discharge and a hearing. In dicta, it offered that the hearing on "cause" might take place after the case was dismissed. It further held that the proponent of a § 349(a) prejudice

[14] 632 B.R. 287 (Bankr. D.S.C. 2021).
[15] *Id.* at 294.
[16] 630 B.R. 797 (B.A.P. 9th Cir. 2021).
[17] *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219 (9th Cir. 1999).
[18] *Id.* at 1224.

determination has the burden of proof.[19] *Duran* contains incisive discussions of the term "with prejudice" and "Weak Form" orders (e.g., temporary prohibition of filing another case for a designated period) and "Strong Form" orders (e.g., permanent prohibition of bankruptcy discharge tantamount to denial of discharge under § 727) under § 349(a).[20] *Duran* is on appeal to the Ninth Circuit.

[19] 630 B.R. at 804.
[20] *Id.* at 809.

Positive
As of: December 24, 2021 12:18 AM Z

Nichols v. Marana Stockyard & Livestock Mkt., Inc. (In re Nichols)

United States Court of Appeals for the Ninth Circuit

July 9, 2021, Argued and Submitted, Portland, Oregon; September 1, 2021, Filed

No. 20-60043

Reporter
10 F.4th 956 *; 2021 U.S. App. LEXIS 26366 **; 70 Bankr. Ct. Dec. 165

IN RE DONALD HUGH NICHOLS; JANE ANN NICHOLS, Debtors,DONALD HUGH NICHOLS; JANE ANN NICHOLS, Appellants, v. MARANA STOCKYARD & LIVESTOCK MARKET, INC.; THE PARSONS COMPANY; CLAY PARSONS; KAREN PARSONS; ARIZONA DEPARTMENT OF REVENUE; JILL H. FORD, Chapter 7 Trustee, Appellees.

Prior History: [1]** Appeal from the Ninth Circuit Bankruptcy Appellate Panel. BAP No. 20-1032. Taylor, Lafferty III, and Brand, Bankruptcy Judges, Presiding.

Disposition: REVERSED and REMANDED.

Core Terms

bankruptcy court, convert, bad faith, absolute right, right to dismissal, equitable, confers, motion to dismiss, voluntary dismissal, bankruptcy case, conversion, powers

Case Summary

Overview
HOLDINGS: [1]-In re Rosson, 545 F.3d 764 (9th Cir. 2008), had been effectively overruled by subsequent judicial precedent holding that that a bankruptcy court's equitable powers under 11 U.S.C.S. § 105(a) could not limit express language contained elsewhere in the Bankruptcy Code; [2]-11 U.S.C.S. § 1307(b)'s text conferred upon the debtor an absolute right to dismiss a Chapter 13 bankruptcy case, subject to the single exception noted expressly in the statute itself. Consequently, the bankruptcy court erred in denying the debtors' motion to dismiss based solely on its finding of abuse of the bankruptcy process.

Outcome
Decision reversed; matter remanded.

LexisNexis® Headnotes

Bankruptcy Law > ... > Bankruptcy > Case Administration > Bankruptcy Court Powers

HN1[] **Case Administration, Bankruptcy Court Powers**

Judicial precedent makes clear that a bankruptcy court may not use its equitable powers under *11 U.S.C.S. § 105(a)* to contravene express provisions of the Bankruptcy Code. *Section 105(a)* does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code, including *11 U.S.C.S. § 522(k)*'s express prohibition on charging a debtor's exempt property to pay the trustee's administrative expenses.

Bankruptcy Law > ... > Bankruptcy > Case Administration > Bankruptcy Court Powers

HN2[] **Case Administration, Bankruptcy Court Powers**

Judicial precedent firmly rejects the argument that judicial precedent must be understood to establish that a bankruptcy court's *11 U.S.C.S. § 105(a)* powers to punish bad faith conduct implicitly qualify language contained elsewhere in the Bankruptcy Code. On the contrary, judicial precedent most certainly did not endorse, even in dictum, the view that equitable considerations permit a bankruptcy court to contravene express provisions of the Code.

Governments > Courts > Judicial Precedent

HN3[] **Courts, Judicial Precedent**

Although a bankruptcy appellate panel is typically bound by the prior decision of another three-judge panel, it may depart from such precedent if a subsequent United States Supreme

Court opinion undercuts the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.

Bankruptcy Law > ... > Bankruptcy > Case Administration > Bankruptcy Court Powers

Governments > Courts > Judicial Precedent

HN4[] Case Administration, Bankruptcy Court Powers

The holding of *In re Rosson, 545 F.3d 764 (9th Cir. 2008)*, cannot stand absent the premise, ostensibly articulated in judicial precedent, that a bankruptcy court's equitable powers under *11 U.S.C.S. § 105(a)* can limit express language contained elsewhere in the Bankruptcy Code. Subsequent judicial precedent, however, clearly rejected such reasoning. In fact, subsequent precedent explicitly rejected the sweeping interpretation of prior precedent embraced in Rosson. Rosson and subsequent precedent are thus irreconcilable, such that Rosson has been effectively overruled.

Governments > Courts > Judicial Precedent

HN5[] Courts, Judicial Precedent

In re Rosson, 545 F.3d 764 (9th Cir. 2008), has been effectively overruled by subsequent judicial precedent and is no longer binding precedent in the Ninth Circuit.

Bankruptcy Law > ... > Bankruptcy > Conversion & Dismissal > Effects of Dismissal

Governments > Legislation > Interpretation

Bankruptcy Law > Conversion & Dismissal > Individuals With Regular Income

HN6[] Conversion & Dismissal, Effects of Dismissal

The term shall normally creates an obligation impervious to judicial discretion. *11 U.S.C.S. § 1307(b)*'s text plainly requires the bankruptcy court to dismiss the case upon the debtor's request. There is no textual indication that the bankruptcy court has any discretion whatsoever.

Bankruptcy Law > Conversion & Dismissal > Individuals With Regular Income

Bankruptcy Law > Conversion & Dismissal > Lack of Good Faith

HN7[] Conversion & Dismissal, Individuals With Regular Income

Although other circuits have disagreed with respect to the existence of a bad faith exception to a debtor's right to dismiss under *11 U.S.C.S. § 1307(b)*, there is no dispute that the statute's text, by its own terms, confers an absolute right to dismiss.

Bankruptcy Law > Conversion & Dismissal > Family Farmers

Bankruptcy Law > Conversion & Dismissal > Individuals With Regular Income

HN8[] Conversion & Dismissal, Family Farmers

The statutory text does not provide any support for the view that any other subsection in *11 U.S.C.S. § 1307*, such as *11 U.S.C.S. § 1307(c)*, limits the debtor's right to dismiss under *11 U.S.C.S. § 1307(b)*. Had it wished to provide for such an exception, Congress easily could have indicated the existence of one expressly. Indeed, *§ 1307(b)* does contain a single express exception to the debtor's right to dismiss, which bars dismissal where the debtor has already exercised his right to convert the case to Chapter 13 from Chapters 7, 11, or 12. That Congress codified an express exception to *§ 1307(b)*'s right to dismiss demonstrates that Congress considered the issue of exceptions and chose not to prescribe additional ones. The proper inference is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth.

Bankruptcy Law > Conversion & Dismissal > Individuals With Regular Income

HN9[] Conversion & Dismissal, Individuals With Regular Income

In the event of competing motions filed under *11 U.S.C.S. § 1307(b)* and *(c)*, one subsection will inevitably prevail at the expense of the other. Accordingly, the assertion that an absolute right under *§ 1307(b)* would nullify *§ 1307(c)* carries no weight since either party could make the same argument.

Bankruptcy Law > Conversion & Dismissal > Individuals With Regular Income

Governments > Legislation > Interpretation

HN10[] Conversion & Dismissal, Individuals With Regular Income

Far from conflicting with other sections of the Bankruptcy Code, the absolute right reading of 11 U.S.C.S. § 1307(b) is entirely consistent with the text and policy of 11 U.S.C.S. § 303(a), which is designed to ensure that Chapter 13 remains a wholly voluntary alternative to Chapter 7.

Bankruptcy Law > Conversion & Dismissal > Individuals With Regular Income

HN11[] Conversion & Dismissal, Individuals With Regular Income

11 U.S.C.S. § 1307(b)'s text confers upon the debtor an absolute right to dismiss a Chapter 13 bankruptcy case, subject to the single exception noted expressly in the statute itself.

Governments > Legislation > Interpretation

HN12[] Legislation, Interpretation

A court must adhere to a statute's clear mandate, regardless of practical difficulties that may ensue.

Summary:

SUMMARY*

Bankruptcy

The panel reversed the bankruptcy court's decision denying Chapter 13 debtors' motion to voluntarily dismiss their bankruptcy case pursuant to 11 U.S.C. § 1307(b), and remanded to the bankruptcy court for further proceedings.

Although § 1307(b) confers upon a Chapter 13 debtor the right to request dismissal "at any time," the bankruptcy court concluded that under In re Rosson, 545 F.3d 764 (9th Cir. 2008), there was an implied exception to § 1307(b) where the debtor had engaged in bad faith or abuse of the bankruptcy process. The bankruptcy court concluded that this exception applied, justifying denial of the motion to dismiss, and it then converted the case to a liquidation under Chapter 7.

The panel held that *Rosson* was effectively overruled by Law v. Siegel, 571 U.S. 415, 134 S. Ct. 1188, 188 L. Ed. 2d 146 (2014), which held that a bankruptcy court may not use its equitable powers under 11 U.S.C. § 105 to contravene express provisions of the Bankruptcy Code. The panel held that *Rosson* therefore is no longer binding precedent. Considering the question anew, and agreeing with the Second and Sixth Circuits, the panel held that a bankruptcy court is prohibited from invoking **[**2]** equitable considerations to contravene § 1307(b)'s express language conferring upon Chapter 13 debtors an absolute right to dismiss their case.

Counsel: German Yusufov (argued), Yusufov Law Firm PLLC, Tucson, Arizona, for Appellants.

D. Alexander Winkelman (argued) and Frederick J. Petersen, Mesch Clark Rothschild, Tucson, Arizona, for Appellees.

Judges: Before: Diarmuid F. O'Scannlain, Richard A. Paez, and Mark J. Bennett, Circuit Judges. Opinion by Judge O'Scannlain.

Opinion by: O'SCANNLAIN

Opinion

[*958] OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether debtors in a Chapter 13 bankruptcy have the right to dismiss their case, regardless of the bankruptcy court's determination that they engaged in an abuse of the bankruptcy process.

I

A

Appellants Donald Hugh Nichols and his wife, Jane Ann Nichols (collectively, "the Nicholses"), filed a Chapter 13 bankruptcy petition seeking to restructure their debts. After filing the petition, the Nicholses were indicted on federal criminal charges for their alleged participation in a scheme to defraud Appellee Marana Stockyard and Livestock Market, Inc. ("Marana").

To avoid disclosure of information that might compromise

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

their position in the criminal proceedings, the Nicholses declined to complete **[**3]** any of the steps required by the Bankruptcy Code to advance their case. They refused, *inter alia*, to hold a meeting with creditors, *cf.* 11 U.S.C. § 341; to file outstanding tax returns, *cf. id.* § 1308; or to propose an appropriate repayment plan, *cf. id.* § 1322. Their bankruptcy case thus languished for months without resolution.

Marana, which had filed a claim in the Nicholses' bankruptcy case seeking to recover losses from the alleged fraud, moved pursuant to 11 U.S.C. § 1307(c) for the case to be converted to a liquidation under Chapter 7 of the Bankruptcy Code. [1] In **[*959]** response, the Nicholses requested a stay of the bankruptcy case during the pendency of the criminal proceedings.

The bankruptcy court denied the motion to stay. At the same time, the bankruptcy court determined that conversion of the case to a Chapter 7 liquidation was justified "for **[**4]** cause" under § 1307(c) due to the Nicholses' delays, which the court deemed to be unwarranted. The bankruptcy court also determined that conversion to Chapter 7 would have been proper, in the alternative, under § 1307(e), insofar as the Nicholses had failed to file tax returns for several years. [2]

B

The Nicholses requested another opportunity to remain in Chapter 13, however. The bankruptcy court acceded to their request and postponed by 30 days the entry of an order converting the case to Chapter 7. The bankruptcy court required the Nicholses to file outstanding tax returns and to submit a confirmable repayment plan to the Chapter 13 trustee before expiration of the 30-day period.

The Nicholses did not comply with the bankruptcy court's requirements. Before the expiration of the 30-day period, the Nicholses moved to dismiss voluntarily their bankruptcy case pursuant to § 1307(b). [3]

C

Although § 1307(b) confers upon a Chapter 13 debtor the right to request dismissal of his case "at any time," the bankruptcy court denied the Nicholses' motion to dismiss. Relying upon our decision in In re Rosson, 545 F.3d 764 (9th Cir. 2008), the bankruptcy court understood there to be an implied exception to § 1307(b) where the debtor has engaged in bad faith or abuse of the bankruptcy process. The bankruptcy court concluded that the Nicholses had "used Chapter 13 to hide from creditors during the pendency of the criminal proceedings" and that "[s]uch conduct constitutes an abuse of the bankruptcy process, justifying denial of the . . . Motion to Dismiss." The bankruptcy court thereupon converted the case to a liquidation under Chapter 7.

The Nicholses timely appealed the bankruptcy court's order to the Ninth Circuit's Bankruptcy Appellate Panel ("BAP"). The BAP affirmed the bankruptcy court's order. The Nicholses then timely appealed the BAP's decision to this court.

II

The Nicholses now argue that the bankruptcy court erred by **[**6]** relying upon *Rosson*'s implied "bad faith or abuse of process" exception to § 1307(b) to deny their request for voluntary dismissal. According to the Nicholses, *Rosson* has been effectively overruled by the Supreme Court's subsequent decision in Law v. Siegel, 571 U.S. 415, 134 S. Ct. 1188, 188 L. Ed. 2d 146 (2014), which, they contend, must be understood to prohibit a bankruptcy court from invoking equitable considerations to contravene § 1307(b)'s express language conferring upon a Chapter 13 debtor an absolute right to dismiss his case. The **[*960]** narrow question before us is whether *Rosson* has been implicitly abrogated by *Law*.

A

1

Rosson concerned a Chapter 13 debtor who was ordered by

---

[1] Section 1307(c) provides, in relevant part:

> [O]n request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including—
>
> (1) unreasonable delay by the debtor that is prejudicial to creditors;
>
> . . .

[2] Section 1307(e) provides:

> Upon the failure of the debtor to file a tax return under section 1308, on request of a party in interest or the United States trustee and after notice and a hearing, the court shall dismiss a case or convert a case under this chapter to a case under chapter 7 of this title, whichever is in the best interest of the creditors and the estate.

[3] Section 1307(b) provides:

> On request **[**5]** of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

the bankruptcy court to deposit the proceeds of an expected arbitration award with the Chapter 13 trustee. 545 F.3d at 768. When the bankruptcy court was informed that the debtor had received the anticipated payment, but had not deposited it as instructed, the bankruptcy court determined *sua sponte* to convert the case to Chapter 7. *Id*. Before the conversion order could be entered, however, the debtor moved to dismiss under § 1307(b). *Id*. The bankruptcy court denied the motion to dismiss and converted the case, stating that it would be a "gross miscarriage of justice" to allow the debtor to "abscond" with assets of the **[**7]** estate. Id. at 769. The debtor appealed to the district court, which affirmed. *Id*.

2

On subsequent appeal to this court in *Rosson*, we acknowledged the existence of a circuit split regarding a debtor's right to dismiss under § 1307(b) while a motion to convert under § 1307(c) remains pending. Id. at 771-72 (comparing In re Barbieri, 199 F.3d 616 (2d Cir. 1999); with In re Molitor, 76 F.3d 218 (8th Cir. 1996)). We further recognized that the Ninth Circuit's BAP had previously concluded that § 1307(b) confers upon a Chapter 13 debtor an absolute right to voluntary dismissal of his case. Id. at 772 (discussing In re Croston, 313 B.R. 447 (9th Cir. BAP 2004); and In re Beatty, 162 B.R. 853 (9th Cir. BAP 1994)). We determined, however, that the BAP's interpretation of § 1307(b) was no longer tenable after the Supreme Court's decision in Marrama v. Citizens Bank of Massachusetts, 549 U.S. 365, 127 S. Ct. 1105, 166 L. Ed. 2d 956 (2007), which concerned the scope of a debtor's right to convert from Chapter 7 to Chapter 13 pursuant to 11 U.S.C. § 706(a). [4] *Id*. We understood *Marrama* to stand for the broad proposition that "even otherwise unqualified rights in the debtor are subject to limitation by the bankruptcy court's power under § 105(a) to police bad faith and abuse of process." Id. at 773 n.12.

Based on such interpretation **[**8]** of *Marrama*, we held that "the debtor's right of voluntary dismissal under § 1307(b) is not absolute, but is qualified by the authority of a bankruptcy court to deny dismissal on grounds of bad-faith conduct or to prevent an abuse of process." Id. at 774 (quotation marks and citation omitted). Accordingly, we affirmed the bankruptcy court's order denying the debtor's motion to dismiss and converting the case to Chapter 7 because of the debtor's bad faith conduct. Id. at 774-75.

B

1

Law, which was decided six years later, concerned a Chapter 7 debtor who perpetrated a fraud on the bankruptcy court by falsely reporting that a lien existed on his primary residence. 571 U.S. at 418-19. The trustee later determined that the alleged lien was a sham filed by the debtor to protect his interest in the home. Id. at 419. Accordingly, the trustee initiated an adversary proceeding to have the lien removed, and, after he prevailed, he sought to have his **[*961]** attorney's fees paid from the debtor's exempt property. Id. at 419-20.

Despite 11 U.S.C. § 522(k)'s express prohibition on the use of a debtor's exempt property to cover expenses associated with administering the estate, the bankruptcy court granted the trustee's request. [5] Id. at 420. On appeal, the BAP affirmed the order as a permissible exercise of **[**9]** the bankruptcy court's equitable powers. *Id*. Upon subsequent appeal to this court, we also affirmed. *Id*. In an unpublished memorandum disposition, we concluded that the surcharge was proper because it was "calculated to compensate the estate for the actual monetary costs imposed by the debtor's misconduct, and was warranted to protect the integrity of the bankruptcy process." *Id*. (quoting In re Law, 435 F. App'x. 697, 698 (9th Cir. 2011)).

2

HN1[] The Supreme Court reversed. In so doing, the Court made clear that a bankruptcy court may not use its equitable powers under § 105(a) to contravene express provisions of the Bankruptcy Code. 571 U.S. at 422-23. On behalf of a unanimous Court, Justice Scalia wrote that § 105(a) does not "allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code," including § 522(k)'s express prohibition on charging a debtor's exempt property to pay the trustee's administrative expenses. Id. at 421 (quoting 2 Collier on Bankruptcy ¶ 105.01[2] (16th ed. 2013)).

In doing so, HN2[] the Supreme Court firmly rejected the argument—advanced by the Solicitor General in an amicus brief—that *Marrama* must be understood to establish that a bankruptcy court's § 105(a) powers to punish bad faith conduct implicitly qualify language contained elsewhere in

---

[4] Section 706(a) provides:

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

[5] Section 522(k) provides, in relevant part: "Property that the debtor exempts under this section is not liable for payment of any administrative expense . . . ."

the Bankruptcy Code. *Id. at 425-26*. On the contrary, **[**10]** *Law* concluded that "*Marrama* most certainly did not endorse, even in dictum, the view that equitable considerations permit a bankruptcy court to contravene express provisions of the Code." *Id. at 426*.

C

1

HN3[] Although we are typically bound by the prior decision of another three-judge panel, we may depart from such precedent if a subsequent Supreme Court opinion "undercut[s] the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003)* (en banc). Here, we have no doubt that *Law* undercuts the reasoning of *Rosson.*

HN4[] The holding of *Rosson* cannot stand absent the premise, ostensibly articulated in *Marrama*, that a bankruptcy court's equitable powers under *§ 105(a)* can limit express language contained elsewhere in the Bankruptcy Code. *See 545 F.3d at 773 n.12*. *Law*, however, clearly rejected such reasoning. *See 571 U.S. at 426*. In fact, *Law* explicitly rejected the sweeping interpretation of *Marrama* that we embraced in *Rosson*. *See id*. *Rosson* and *Law* are thus irreconcilable, such that *Rosson* has been effectively overruled.

Marana argues, however, that *Rosson* is consistent with *Law* because *Rosson* did not limit the Chapter 13 debtor's right to dismiss based on *§ 105(a)*, but rather based on a "holistic interpretation" **[**11]** of *§ 1307*. According to Marana, *Rosson* **[*962]** stands for the proposition that, when faced with a bad-faith debtor's motion for voluntary dismissal under *§ 1307(b)*, a bankruptcy court may nevertheless heed its competing statutory mandate under *§ 1307(c)* to convert the case to Chapter 7 to promote the best interest of creditors.

Moreover, Marana contends that *Law*'s treatment of *Marrama* does not undermine *Rosson*. Marana argues that *Rosson* should be understood to rely on *Marrama* not for the sweeping proposition that express provisions of the Bankruptcy Code are limited by the bankruptcy court's *§ 105(a)* powers to punish bad faith, but rather for the far narrower principle that a debtor's bad faith is a "cause" justifying conversion to Chapter 7 under *§ 1307(c)*. Because, on Marana's view, *Law* rejected only the broad reading of *Marrama*, but otherwise left that precedent intact, Marana argues that *Rosson* remains similarly undisturbed.

Marana's arguments fail to persuade, however, because they mischaracterize the reasoning that we actually employed in *Rosson*. We did not rely on *§ 1307(c)*, nor did we discern in such statutory subsection any import for interpreting the mandate of *§ 1307(b)*. Rather, we primarily relied on the premise that *Marrama* had established **[**12]** "the important point" that "even otherwise unqualified rights in the debtor are subject to limitation by the bankruptcy court's power under *§ 105(a)* to police bad faith and abuse of process." *545 F.3d at 773 n.12*.

Our expansive reading of *Marrama* was a defensible one at the time. Indeed, in *Law*, the Solicitor General advanced the very same reading of *Marrama* that we adopted in *Rosson*. *See, e.g.*, Brief for the United States at 25, *Law v. Siegel, 571 U.S. 415, 134 S. Ct. 1188, 188 L. Ed. 2d 146 (2014)* (No. 12-5196) (citing *Marrama* for the principle that *§ 105(a)* empowers a bankruptcy court to disregard the express language of *§ 522(k)* in order to punish fraud, misrepresentation, or other misconduct by the debtor). We must recognize, however, that such a position was unanimously and unambiguously rejected in *Law*.

2

Consequently, we now hold that *HN5*[] *Rosson* has been effectively overruled by *Law* and is no longer binding precedent in this Circuit. Ever since our en banc opinion in *Miller v. Gammie, 335 F.3d 889 (9th Cir. 2003)*, in which we clarified the standard in this Circuit for departure from a prior three-judge panel's decision based on intervening Supreme Court precedent, we have not hesitated to overrule our own precedents when their underlying reasoning could not be squared with the Supreme Court's more recent pronouncements. [6] We follow the same course here.

III

Because **[**13]** we are no longer bound by *Rosson*, we must consider anew whether a Chapter 13 debtor's right to voluntary dismissal of his case under *§ 1307(b)* admits of an exception in the event of the debtor's bad faith or abuse of process. If not, the Nicholses were entitled to dismiss their case, regardless of the bankruptcy court's determination that conversion to Chapter 7 was warranted.

---

[6] *See, e.g., Langere v. Verizon Wireless Servs., LLC, 983 F.3d 1115, 1122 (9th Cir. 2020)*; *United States v. Baldon, 956 F.3d 1115, 1121 (9th Cir. 2020)*; *Dorman v. Charles Schwab Corp., 934 F.3d 1107, 1112 (9th Cir. 2019)*; *Murray v. Mayo Clinic, 934 F.3d 1101, 1105 (9th Cir. 2019)*; *United States v. Valencia-Mendoza, 912 F.3d 1215, 1222 (9th Cir. 2019)*; *Rodriguez v. AT & T Mobility Servs. LLC, 728 F.3d 975, 981 (9th Cir. 2013)*; *Phelps v. Alameida, 569 F.3d 1120, 1133 (9th Cir. 2009)*.

[*963] A

1

On this point, section 1307(b)'s text is unambiguous. The statute provides, in relevant part: "On request of the debtor at any time . . . the court shall dismiss a case under this chapter." HN6[] The term "shall" "normally creates an obligation impervious to judicial discretion." Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35, 118 S. Ct. 956, 140 L. Ed. 2d 62 (1998); *see also* Barbieri, 199 F.3d at 619 ("The term 'shall,' as the Supreme Court has reminded us, generally is mandatory and leaves no room for the exercise of discretion by the trial court."). Section 1307(b)'s text plainly requires the bankruptcy court to dismiss the case upon the debtor's request. There is no textual indication that the bankruptcy court has any discretion whatsoever.

HN7[] Although our sister circuits have disagreed with respect to the existence of a "bad faith" exception to a debtor's right to dismiss under § 1307(b), there is no dispute that the statute's text, by its own terms, confers an absolute **[**14]** right to dismiss. For example, the Fifth Circuit, which concluded, similarly to our holding in *Rosson*, that a debtor's right to dismiss is subject to an implied exception in the event of the debtor's bad faith conduct, nonetheless confirmed that "the plain language of . . . § 1307(b) can be read to confer an absolute right to dismiss." In re Jacobsen, 609 F.3d 647, 649 (5th Cir. 2010).

Indeed, the Fifth and Eighth Circuits' view—that the debtor's right under § 1307(b) is subject to an implied exception—is grounded, not on an alternative reading of the statutory text, but rather on the same, now-discredited theory of equitable powers that we had previously embraced in *Rosson*. *See* Jacobsen, 609 F.3d at 661 ("Proceeding from the propositions in *Marrama* that an apparently unqualified right is subject to an exception for bad faith and that bad faith justifies a bankruptcy court's exercise of its powers under § 105(a), we conclude that § 1307(b) is subject to a similar exception . . . ."); In re Molitor, 76 F.3d 218, 220 (8th Cir. 1996) (relying on the "broad purpose" of the Bankruptcy Code to arrive at an interpretation that protects bankruptcy courts from "a myriad of potential abuses").

As we have already discussed, the Supreme Court's decision in *Law* clearly rejected such reasoning. And, ever since *Law* was decided, no other Circuit has taken **[**15]** the position that there is an implied equitable exception to § 1307(b)'s right to dismiss. *Cf.* Smith v. U.S. Bank N.A., 999 F.3d 452, 456 (6th Cir. 2021) ("The command of 1307(b) is no mere procedural nicety, which is likely why no circuit court has accepted [the implied bad faith exception] argument since *Law* . . . ."). Accordingly, for the same reason that we dispensed with *Rosson*, we must also reject the approach previously adopted by the Fifth and Eighth Circuits, and instead hew to the "absolute right" approach articulated by the Second Circuit in Barbieri and followed, most recently, by the Sixth Circuit in Smith.

2

Furthermore, HN8[] the statutory text does not provide any support for the view that any other subsection in § 1307, such as § 1307(c), limits the debtor's right to dismiss under § 1307(b). Had it wished to provide for such an exception, Congress easily could have indicated the existence of one expressly. Indeed, § 1307(b) *does* contain a single *express* exception to the debtor's right to dismiss, which bars dismissal where the debtor has *already* exercised his right to convert the case to Chapter 13 from Chapters 7, 11, or 12. That Congress codified an express exception to § 1307(b)'s right to dismiss demonstrates that Congress **[*964]** considered the issue of exceptions and chose not to prescribe **[**16]** additional ones. *See* United States v. Johnson, 529 U.S. 53, 58, 120 S. Ct. 1114, 146 L. Ed. 2d 39 (2000) ("The proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth.").

Marana argues that an "absolute right" reading of § 1307(b) would effectively render § 1307(c) a nullity by depriving the bankruptcy court of discretion to convert a case to Chapter 7 for cause. But "that is no more significant than the fact that an order granting a creditor's motion to convert under § 1307(c) would foreclose dismissal under § 1307(b)." Barbieri, 199 F.3d at 620. HN9[] "In the event of competing motions filed under subsections (b) and (c), one subsection will inevitably prevail at the expense of the other." *Id.* (brackets omitted) (quoting In re Patton, 209 B.R. 98, 100 (Bankr. E.D. Tenn. 1997)). "Accordingly, the assertion that an absolute right under § 1307(b) would nullify § 1307(c) 'carries no weight since either party could make the same argument.'" *Id.* (quoting Patton, 209 B.R. at 104).

HN10[] Far from conflicting with other sections of the Bankruptcy Code, the "absolute right" reading of § 1307(b) is entirely consistent with the text and policy of § 303(a), which is designed to ensure that Chapter 13 remains a "wholly voluntary alternative to Chapter 7." Smith, 999 F.3d at 455 (quoting Harris v. Viegelahn, 575 U.S. 510, 514, 135 S. Ct. 1829, 191 L. Ed. 2d 783 (2015)); *see also* Barbieri, 199 F.3d at 620 (reasoning that the reading of § 1307(b) as conferring an absolute right to dismiss best reflects "the intention of Congress to create **[**17]** an entirely voluntary chapter of the

Bankruptcy Code").

B

HN11[↑] We conclude that § 1307(b)'s text confers upon the debtor an absolute right to dismiss a Chapter 13 bankruptcy case, subject to the single exception noted expressly in the statute itself. Consequently, the bankruptcy court here erred in denying the Nicholses' motion to dismiss based solely on its finding of abuse of the bankruptcy process.

We are confident that the Bankruptcy Code provides ample alternative tools for bankruptcy courts to address debtor misconduct. Even if such tools were lacking, however, it would be up to Congress to remedy the omission by way of appropriate legislation. HN12[↑] We must adhere to the statute's clear mandate, regardless of practical difficulties that may ensue.

IV

Accordingly, we **REVERSE** the decision of the bankruptcy court, and we **REMAND** this matter to the bankruptcy court for further proceedings in accord with this opinion. [7]

REVERSED and REMANDED.

End of Document

[7] Appellants' motion to strike portions of the Supplemental Excerpts of Record is denied as moot as our opinion does not rely on the contested portions of the record. Appellants' Mot. to Strike from Excerpts of Record Documents, *Nichols v. Marana Stockyard and Livestock Mkt.*, No. 20-60043 (9th Cir. Jan. 4, 2021), ECF No. 27.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEBRA LEA WILSON, *Appellant*, v. JAMES RIGBY; FIRST CITIZENS BANK, *Appellees*.	No. 17-35716 D.C. No. 2:16-cv-01684-RAJ OPINION

Appeal from the United States District Court
for the Western District of Washington
Richard A. Jones, District Judge, Presiding

Argued and Submitted June 8, 2018
Seattle, Washington

Filed November 27, 2018

Before: Jay S. Bybee and N. Randy Smith, Circuit Judges, and Paul C. Huck,* District Judge.

Opinion by Judge N.R. Smith;
Dissent by Judge Huck

* The Honorable Paul C. Huck, United States District Judge for the U.S. District Court for Southern Florida, sitting by designation.

SUMMARY**

Bankruptcy

The panel affirmed the district court's decision affirming the bankruptcy court's refusal to permit a Chapter 7 debtor to amend a bankruptcy schedule to reflect a post-petition increase in the value of property that was the subject of a homestead exemption under Washington law.

The panel held that the debtor's claimed exemption was limited to the amount to which she was entitled under Washington law as of the petition date because, whether claiming federal or state law exemptions, the value of the exemption is fixed by reference to the date of the filing of the bankruptcy petition. Declining to decide whether the definition of the value of exemptions in 11 U.S.C. § 522(a)(2) applies to state law exemptions as well as to federal ones, the panel concluded that § 541(a)(1) makes clear that the debtor's interests in property transfer to the bankruptcy estate as of the commencement of the bankruptcy action. Following this transfer, any appreciation enures to the bankruptcy estate. Distinguishing cases involving California's homestead statute, the panel held that, under Washington law, the debtor's exemption was limited to her equity in the property as of the date of her bankruptcy petition.

Dissenting, District Judge Huck wrote that binding Ninth Circuit precedent mandated that when a homestead appreciates in value post-petition, a debtor is entitled to

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

amend her homestead exemption claim to include a portion of that appreciation in order to exempt from the bankruptcy estate the maximum amount permitted by state or federal law applicable on the petition date. Judge Huck wrote that the only property subject to exemptions is that which becomes part of the estate. Because post-petition appreciation is an estate asset, it is subject to the maximum applicable homestead exemption irrespective of the amount of the exemption initially claimed by the debtor.

COUNSEL

Larry B. Feinstein (argued), Vortman & Feinstein, Bellevue, Washington, for Appellant.

Thomas S. Linde (argued) and Michael M. Sperry, Schweet Linde & Coulson PLLC, Seattle, Washington; Denice E. Moewes, Wood & Jones P.C., Seattle, Washington; for Appellees.

Jon Erik Heath (argued), San Francisco, California, for Amici Curiae National Association of Consumer Bankruptcy Attorneys and National Consumer Bankruptcy Rights Center.

OPINION

N.R. SMITH, Circuit Judge:

The filing date of a bankruptcy petition determines the law governing exemptions and freezes the value of the exemptions that the debtor may claim. Because Debra Wilson's amended bankruptcy schedules sought to claim

more than Washington law permitted her to claim as of the petition date, we affirm the district court's decision, limiting her claimed exemption to the amount she was entitled to under Washington law as of the petition date.

I.

Wilson filed her voluntary Chapter 7 petition for bankruptcy on December 18, 2013. In her initial Schedule C, Wilson elected to take the federal exemptions and listed the "wildcard" exemption. At the time the petition was filed, Wilson's one-bedroom condominium was valued at $250,000 and was subject to a $246,440 mortgage. Accordingly, Wilson listed the value of her exemption as $3,560, equal to the equity in her home as of the petition date. During the pendency of the bankruptcy, the value of the property increased. On July 18, 2016, Wilson amended her Schedule C, claiming "100% of fair market value, up to any applicable statutory limit," listing the value of the property at $412,500. The amended schedule listed Washington's homestead exemption as the basis for the amended exemption. The Trustee, James Rigby, and the Bank, First-Citizens Bank & Trust Co., opposed the amendments. After oral argument, the bankruptcy court held that an amendment to update the value of an exemption in light of post-petition changes in value was not permitted. Accordingly, the court held that Wilson could not claim more than $3,560 in the property. Wilson appealed to the district court, and the district court affirmed the bankruptcy court. This appeal timely followed.

II.

We review the scope of bankruptcy exemptions de novo. *See Lieberman v. Hawkins* (*In re Lieberman*), 245 F.3d 1090,

1091 (9th Cir. 2001). Likewise, we independently review the bankruptcy court's decision without deference to the district court's decision. *Rosson v. Fitzgerald* (*In re Rosson*), 545 F.3d 764, 770 (9th Cir. 2008).

III.

A debtor's exemptions have long been fixed at "the date of the filing of the [bankruptcy] petition." *White v. Stump*, 266 U.S. 310, 313 (1924); *Wolfe v. Jacobson* (*In re Jacobson*), 676 F.3d 1193, 1199 (9th Cir. 2012) ("Under the so-called 'snapshot' rule, bankruptcy exemptions are fixed at the time of the bankruptcy petition."). This rule determines not only what exemptions a debtor may claim, it also fixes the value that a debtor is entitled to claim in her exemptions. *Gebhart v. Gaughan* (*In re Gebhart*), 621 F.3d 1206, 1211 (9th Cir. 2010) (noting the well-settled holding in this circuit "that what is frozen as of the date of filing the petition is the value of the debtor's exemption, not the fair market value of the property claimed as exempt"); *see also Hyman v. Plotkin* (*In re Hyman*), 967 F.2d 1316, 1321 (9th Cir. 1992) ("Were we to accept the Hymans' argument that they're entitled to post-filing appreciation, we would also have to hold that a debtor is subject to post-filing *de*preciation, which would give debtors in falling property markets less than the $45,000 guaranteed them by state law. Nothing in the bankruptcy law compels (or even suggests) such a drastic interference with the operation of the state homestead exemption statute. In fact, our caselaw strongly suggests the opposite result." (emphasis in original)).

This rule is rooted not only in our precedent but in the bankruptcy code itself. It is expressly identified in 11 U.S.C. § 522(a)(2), which defines the "value" of exemptions for

purposes of § 522 as "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 property of the estate." *See id.* Amici assert that this definition of value applies only to the federal exemptions listed in § 522(d) and lien avoidance in § 522(f) and not to state law exemptions that may be claimed pursuant to § 522(b)(3)(A), because the term "value" is not used in § 522(b)(3)(A). We need not decide whether Amici are correct on this point, because 11 U.S.C. § 541(a)(1) makes clear that "all legal or equitable interests of the debtor in property" transfer to the bankruptcy estate "*as of the commencement of the case*." *Id.* (emphasis added). This transfer of interest is subject to the debtor's exemptions under § 522(b)(1), but the reference point for such exemptions is the commencement of the bankruptcy action. Following this transfer, all "[p]roceeds, product, offspring, rents, or profits" enure to the bankruptcy estate. *Id.* § 541(a)(6). This includes the appreciation in value of a debtor's home. *E.g.*, *Schwaber v. Reed* (*In re Reed*), 940 F.2d 1317, 1323 (9th Cir. 1991) (interpreting 11 U.S.C. § 541(a)(6) "to mean that appreciation enures to the bankruptcy estate, not the debtor"). Accordingly, whether claiming federal or state law exemptions, the value of the exemption is fixed by reference to the date of the filing of the bankruptcy petition.

IV.

However, Wilson and Amici assert that a closer look at the facts underlying earlier Ninth Circuit precedent reveals that we have consistently allowed debtors to benefit from the

post-petition appreciation of their homestead.[1] We have not; let us explain.

The first set of cases cited by Wilson and Amici involved California's homestead statute, which differs in material respects from Washington's statute. Under California law, every debtor is entitled to claim an exemption with a fixed dollar value, based on demographic criteria—not home equity. *See, e.g.*, *Alsberg v. Robertson* (*In re Alsberg*), 68 F.3d 312, 314 (9th Cir. 1995); Cal. Civ. Proc. Code § 704.730.[2] By contrast,

[1] The dissent makes these same arguments; we again reject them.

[2] The full text of California's current statute, which has only changed in terms of the value assigned to the various demographic categories since our decision in *Alsberg*, reads as follows:

> (a) The amount of the homestead exemption is one of the following:
>
> (1) Seventy-five thousand dollars ($75,000) unless the judgment debtor or spouse of the judgment debtor who resides in the homestead is a person described in paragraph (2) or (3).
>
> (2) One hundred thousand dollars ($100,000) if the judgment debtor or spouse of the judgment debtor who resides in the homestead is at the time of the attempted sale of the homestead a member of a family unit, and there is at least one member of the family unit who owns no interest in the homestead or whose only interest in the homestead is a community property interest with the judgment debtor.
>
> (3) One hundred seventy-five thousand dollars ($175,000) if the judgment debtor or spouse of the judgment debtor who resides in the homestead is at the

Washington applies a sliding scale in which "the homestead

> time of the attempted sale of the homestead any one of the following:
>
> (A) A person 65 years of age or older.
>
> (B) A person physically or mentally disabled who as a result of that disability is unable to engage in substantial gainful employment. There is a rebuttable presumption affecting the burden of proof that a person receiving disability insurance benefit payments under Title II or supplemental security income payments under Title XVI of the federal Social Security Act satisfies the requirements of this paragraph as to his or her inability to engage in substantial gainful employment.
>
> (C) A person 55 years of age or older with a gross annual income of not more than twenty-five thousand dollars ($25,000) or, if the judgment debtor is married, a gross annual income, including the gross annual income of the judgment debtor's spouse, of not more than thirty-five thousand dollars ($35,000) and the sale is an involuntary sale.
>
> (b) Notwithstanding any other provision of this section, the combined homestead exemptions of spouses on the same judgment shall not exceed the amount specified in paragraph (2) or (3), whichever is applicable, of subdivision (a), regardless of whether the spouses are jointly obligated on the judgment and regardless of whether the homestead consists of community or separate property or both. Notwithstanding any other provision of this article, if both spouses are entitled to a homestead exemption, the exemption of proceeds of the homestead shall be apportioned between the spouses on the basis of their proportionate interests in the homestead.

Cal. Civ. Proc. Code § 704.730.

exemption amount shall not exceed the *lesser* of (1) the total net value of the [homestead] . . . or (2) the sum of one hundred twenty-five thousand dollars . . . ." Wash. Rev. Code § 6.13.030 (emphasis added).

In both California and Washington, the value of the homestead must be fixed as of the date of the bankruptcy petition. In California, the value of the homestead is always a defined statutory figure. *See* Cal. Civ. Proc. Code § 704.730. However, in Washington, the value is tied to the equity in the debtor's home as of the date of the filing of the petition. *See* Wash. Rev. Code § 6.13.030. Because the value that can be claimed in California is determined by demographic criteria, the homestead amount claimed at filing may exceed home equity on that petition date. *See Alsberg*, 68 F.3d at 313–14 (noting that under California law "in effect at the time of filing [the debtor] was entitled to claim a homestead exemption of $45,000 on the residence" where the home equity at the time of filing was only $33,875). If the home subsequently appreciates, it enures to the California debtor up to the amount she was entitled to claim under California law *on the petition date*. *See id.* at 313–15 (affirming the BAP's determination that, upon the sale of the home, the California debtor was entitled to the full $45,000 exemption even though the equity at the time of the filing was less than this amount). Accordingly, our cases (that appear to allow California debtors to obtain post-petition appreciation) have merely allowed the debtors to receive the full value of the homestead exemption that they were entitled to claim *as of the petition date*. *See, e.g.*, *id.*; *Hyman*, 967 F.2d at 1321.[3]

[3] Some of the confusion in this area may stem from the language in our cases noting that the homestead exemption does not come into play until the time of a sale. *Alsberg*, 68 F.3d at 315 (citing *Hyman*, 967 F.2d

Applying Washington law, Wilson is again entitled to the full value of the homestead exemption she could legally claim as of the petition date. However, Washington, unlike California, limits a debtor's exemption to the equity in her home. Here, there is no dispute that the "net value" of Wilson's home at the time she filed bankruptcy was the $3,560. That amount was all that Washington's exemption statute permitted her to exempt. The fact, that some debtors in our California cases were permitted to exempt more than the equity in their homes on the date of their bankruptcy petitions, does not establish Wilson's entitlement to do the same in Washington. Each state is entitled to set the parameters for its homestead exemption, but in all cases a debtor is limited to the value that may lawfully be claimed on the petition date.

Wilson and Amici next cite *Klein v. Chappell* (*In re Chappell*), 373 B.R. 73 (B.A.P. 9th Cir. 2007), *aff'd sub nom. In re Gebhart*, 621 F.3d 1206. In *Chappell*, the BAP identified the rule that we reaffirm here, noting that "exemptions are determined on the date of the bankruptcy and without reference to subsequent changes in the character or value of the exempt property." *Id.* at 77 (alterations in original omitted) (quoting *Culver, LLC v. Chiu* (*In re Chiu*), 266 B.R. 743, 751 (B.A.P. 9th Cir. 2001), *aff'd*, 304 F.3d 905 (9th Cir. 2002)). The issue in *Chappell* did not involve the

---

at 1321). Wilson urges that this language means that the value that she is entitled to claim as exempt is determined by reference to the sale date, rather than the petition date. Wilson misreads our cases. We have been clear that, although a debtor only realizes the exempted value at the time of sale, her exemption is fixed by the petition date. *Hyman*, 967 F.2d at 1321 (noting that determining value as of the sale date would subject debtors in a down market to post-petition depreciation and holding that this would be inconsistent with our precedent).

debtor's entitlement to post-petition appreciation up to the statutory maximum, because the trustee had waived that issue. *Id.* at 78, 82. The case instead involved whether the bankruptcy estate retains an interest in the debtor's home where the value of the debtor's homestead exemption equals or exceeds the equity in the home. *See id.* at 75–76. Consistent with our cases, the BAP held that the debtor's interest in the home was limited to the dollar value exemption claimed. *See id.* at 83. Also, consistent with our cases, the BAP held that the bankruptcy estate retains an interest in the debtor's home such that post-petition appreciation enures to the bankruptcy estate. *See id.*

Lastly, Wilson and Amici rely on *Woodson v. Fireman's Fund Insurance Co.* (*In re Woodson*), 839 F.2d 610 (9th Cir. 1988). *Woodson* involved an entirely distinct issue from the one presented here, namely the difference between a debtor's right to exempt the ownership interest in a life insurance policy and the debtor's exemption rights in life insurance proceeds. *Id.* at 617–20. We expressly determined that the policy and the proceeds were two different assets governed by two different exemptions. *Id.* Because the proceeds asset did not exist at the time the petition was filed, the debtor was entitled to claim an exemption in the proceeds at the time he received them. *Id.* at 621 (permitting the debtor to retain only that portion of the proceeds, if any, that he was entitled to exempt under California law). Unlike the two distinct assets at issue in *Woodson*, Wilson's home is the only asset. The value of that asset may change over time, but it is not constantly subject to a new round of exemptions as the value goes up or down.

V.

Wilson asserts that our holding will lead to debtors routinely overvaluing their homes on their bankruptcy schedules. We remind Wilson that the debtor must act in good faith, and that nothing about the debtor's valuation of the home listed on the schedule is binding on the trustee. *Cf. Schwab v. Reilly*, 560 U.S. 770, 782–83 (2010) (Subsection 522(b) "does not define the 'property claimed as exempt' by reference to the estimated market value . . . ." (emphasis omitted)). If the homestead exemption at issue is tied to the equity in a home, the trustee will have the burden to examine the claimed amount to make certain that the trustee need not object and establish that the claimed exemption is improper.

Here, Wilson is barred from receiving a $125,000 exemption because the trustee timely opposed her amended exemption. The record is undisputed that the actual equity in her home on the petition date was $3,560. The date of the petition is the relevant time frame for valuing the exemption, and Washington law limits the homestead exemption to a debtor's equity.

AFFIRMED.

HUCK, District Judge, dissenting:

The majority's summation of the relevant facts is accurate and not in dispute. But the majority's conclusion that debtor Wilson's proposed amended bankruptcy schedules sought to claim more than Washington's homestead exemption law

permits is, in my view, an incorrect application of Ninth Circuit precedent. For this and other reasons, I would reverse.

This case presents two issues. First, may Wilson exempt a portion of her homestead property's appreciation which accrued postpetition by increasing her homestead exemption claim to the maximum amount authorized by Washington law? And second, if so, may she amend her existing homestead exemption claim in order to obtain a portion of that appreciation? Based upon this court's binding precedent, as well as the most fundamental bankruptcy principles applicable to establishing the extent of a debtor's homestead exemption, the answer to both questions is yes.

To begin, this court must analyze these issues through the prism of three fundamental principles: first, that bankruptcy's goal to grant the honest but unfortunate debtor a fresh start is best served by liberally construing homestead exemptions in favor of debtors, *see Schwab v. Reilly*, 560 U.S. 770, 791 (2010); second, that bankruptcy courts lack authority to deny an exemption for any reason not specified in the Bankruptcy Code ("Code"), *see Law v. Siegel*, 134 S. Ct. 1188, 1197 (2014); and third, that amendments to bankruptcy schedules, including those declaring homestead exemptions, are permitted as of right, *see Martinson v. Michael (In re Michael)*, 163 F.3d 526, 529 (9th Cir. 1998), *abrogated on other grounds by Law,* 134 S. Ct. at 1188. That these fundamental principles apply here is beyond dispute.

More importantly, binding and on-point Ninth Circuit precedent mandates that when a homestead appreciates in value postpetition, a debtor is entitled to amend her homestead exemption claim to include a portion of that appreciation in order to exempt from the bankruptcy estate

the maximum amount permitted by state or federal law applicable on the debtor's filing date. That precedent controls here and requires reversal.

I. Binding Precedent

A. *Alsberg*

Robertson v. Alsberg (In re Alsberg), 161 B.R. 680 (B.A.P. 9th Cir. 1993), affirmed by this court in *Alsberg v. Robertson (In re Alsberg)*, 68 F.3d 312 (9th Cir. 1995), is directly on point. In *Alsberg*, the debtor's homestead property was appraised at $259,000 when he filed for bankruptcy, which amount was less than the deed of trust lien ($225,125) and tax liens ($86,000) encumbering the property. At the time, California's maximum homestead exemption was $45,000. Apparently because Alsberg believed that there was no equity in the homestead, he did not claim a homestead exemption in his schedules. However, postpetition, the homestead appreciated in value and the trustee sold it, netting $121,000. After the sale, Alsberg amended his B-4 schedule to claim the $45,000 maximum California exemption. Alsberg then argued that the trustee was required to abandon the full $121,000 because at filing there was no equity in his homestead property for creditors, and therefore, the estate never had any interest in the property. Alsberg thus "asserted that he was entitled to any appreciation in the value of the Property during the pendency of the case." *In re Alsberg,* 161 B.R. at 682. On the other hand, the trustee asserted that Alsberg could not receive any exemption because there was no equity in the property when Alsberg filed or, alternatively, that Alsberg's exemption was capped at $33,875—less than the full $45,000 California homestead exemption—because at filing that was the amount of equity in excess of the deed

of trust.[1] The bankruptcy court disagreed with both parties and found that Alsberg was entitled to a full homestead exemption of $45,000, which amount included a portion of the property's postpetition appreciation, "**because the amount allowable as a homestead is determined when property is sold.**" *Id.* (emphasis added).

The bankruptcy appellate panel ("BAP") affirmed. *Id.* The BAP specifically framed the issue as "[w]hether the trial court correctly held that the appreciation in the value of the Property during the pendency of the bankruptcy case belonged to the estate, not to Alsberg." *Id.* Finding that postpetition appreciation initially vested in the estate, the BAP made the logical subsequent finding: to the extent an applicable exemption exists, postpetition appreciation, an estate asset, will be exempted back out of the estate. *Id.* at 683. Rejecting Alsberg's claim to all of the postpetition appreciation, the BAP held: "The Property did become property of Alsberg's estate. [Debtor's] claim of an exemption only allows him to take back out of the estate the property representing his exemption." *Id.* (alteration added). Then under the heading "Entitlement to Appreciation," the BAP discussed who is entitled to appreciation, and in what proportions, noting that there were three possible options:

> [W]e decide only how much of the remaining [sale] proceeds Alsberg is entitled to receive versus how much the estate is entitled to receive . . . . [The options are:]

[1] The bankruptcy court did not consider the tax liens in its calculation of Alsberg's homestead equity. *In re Alsberg*, 161 B.R. at 684 ("We are not deciding whether Alsberg's homestead exemption takes priority over either of the tax lien claims. That issue will be determined separately.").

> 1. Alsberg gets $33,875, the difference between the value of the Coast Savings lien and the value of the Property as of the date Alsberg filed bankruptcy;
>
> 2. Alsberg gets $45,000, the full statutory amount of his homestead exemption; or
>
> 3. Alsberg gets the full $121,000 because, when he filed bankruptcy, the Coast Savings lien plus his homestead exemption exceeded the value of the Property.
>
> Not surprisingly, the Trustee argues for option number 1 and Alsberg argues for option number 3. The trial court adopted option number 2 and we affirm.

Id. at 684. In relevant part, the BAP unequivocally held:

> We agree with the trial court's analysis of the Ninth Circuit's decisions in *In re Hyman*, 967 F.2d 1316 (9th Cir. 1992) and *In re Reed*, 940 F.2d 1317 (9th Cir. 1991), which hold that the bankruptcy estate, and not the debtor, is entitled to post-petition appreciation in estate assets ***and that the amount of the debtor's homestead exemption is determined when the subject property is sold rather than being fixed as of the date the debtor files bankruptcy***. *See Hyman*, 967 F.2d at 1321; *Reed*, 940 F.2d at 1323.

Id. (emphasis added) (footnote call numbers omitted).

As shown by the above quote, the BAP, affirmed by this court, relied on *In re Hyman*, 967 F.2d 1316 (9th Cir. 1992), to hold that the homestead exemption amount is determined at the time of sale. *Id*. In *Hyman*, the debtor contended that his homestead was not an estate asset because its full equity on his filing date was exempt. *In re Hyman*, 967 F.2d at 1321. In rejecting the debtor's contention, this court stated: "[t]he California statute gives the Hymans a $45,000 exemption as of the time of sale, not a $45,000 equity in the property . . . . ***The debtor's right to use the exemption comes into play not upon the filing of the petition, but only if and when the trustee attempts to sell the property***."[2] *In re Alsberg*, 68 F.3d at 314 (quoting *In re Hyman*, 967 F.2d at 1321) (emphasis added). Applying this principle, the *Alsberg* court explained: "Alsberg's California homestead exemption can be realized only from the net proceeds of sale received by the estate . . . . When Alsberg subsequently filed a claim for a $45,000 homestead exemption after the sale of the property, ***he became entitled to $45,000 of the proceeds***, and no more." *Id*.

The facts in *Alsberg* are materially and legally indistinguishable from the facts here. However, the majority challenges *Alsberg*'s authority, asserting that California's homestead exemption scheme is materially different from Washington's. The majority posits that California's exemption entitles every debtor to "claim an exemption with a fixed dollar value, based on demographic criteria—not home equity" and "is always the statutory figure." The

[2] And as will be discussed more fully below, the actual amount of a debtor's exemption, under California law, as with all capped exemption laws, will always be determined by the lesser of the exemption cap or the net proceeds from the sale.

majority asserts this is in contrast to Washington's homestead exemption, which is materially different because it is "tied to the equity in the debtor's home." This argument fails for at least three reasons.

First, the distinction which the majority draws between the Washington and California statutes is illusory because even though the wording used in each is somewhat different, that is a difference without legal significance. In fact, the majority's attempt to distinguish California's exemption because it is "based on demographic criteria—not home equity" seems to be fashioned from whole cloth. The majority cites no case, nor have I found any, that has even mentioned, much less relied on, such a distinction or any other meaningful distinction.

To the contrary, there is, in my view, no meaningful basis for treating California's capped homestead exemption scheme differently from the federal and other state capped schemes. More importantly, this court has consistently concurred in that view. Ninth Circuit caselaw is clear that the legal principles applicable to the treatment of the homestead's postpetition appreciation, which were first established in cases arising out of California's exemption statute, are equally applicable to all other capped exemption statutes.

In *In re Gebhart*, a consolidated appeal,[3] this court made clear that its precedential principles regarding how exempt property is defined and treated, including treatment of postpetition appreciation as an estate asset subject to the full homestead exemption, are not specific to or limited by any unique feature of the California exemption statute, as the majority contends. *See In re Gebhart*, 621 F.3d 1206, 1211 (9th Cir. 2010). Rather, these principles apply to "all statutes that limit the value of an exemption to an 'interest' in property capped at a dollar value," such as Arizona's, California's, Washington's, and the Code's. *Id.* Thus, all capped homestead exemption statutes do not exempt the homestead property itself, but rather a capped portion of its equity value, and are subject to the same homestead exemption principles and analysis. In full, this court explained:

> A number of our cases have held that, under the California exemption scheme, the estate is entitled to postpetition appreciation in the value of property a portion of which is otherwise exempt. *See Alsberg v. Robertson (In re Alsberg),* 68 F.3d 312, 314–15 (9th Cir.1995); *Hyman,* 967 F.2d at 1321;

[3] As discussed further below, in *Gebhart*, this court affirmed the BAP in one case and the district court in another case. *See Klein v. Chappell (In re Chappell)*, 373 B.R. 73 (B.A.P. 9th Cir. 2007), *aff'd sub nom In re Gebhart*, 621 F.3d 1206 (9th Cir. 2010); *see also Gebhart v. Gaughan (In re Gebhart)*, No. 07-CV-193-PHX-ROS (D. Ariz. Sept. 17, 2007), *aff'd* 621 F.3d 1206 (9th Cir. 2010). For purposes of this discussion, the underlying opinion in *Chappell* will be referred to as *Klein v. Chappell* and the underlying opinion in *Gebhart* will be referred to as *Gebhart v. Gaughan*. This court's opinion in the consolidated case will be referred to as *Gebhart*.

> *Schwaber v. Reed (In re Reed),* 940 F.2d 1317, 1323 (9th Cir.1991); *see also Viet Vu v. Kendall (In re Viet Vu),* 245 B.R. 644, 647–48 (9th Cir.BAP2000).
>
> **The fact that the cases cited above dealt with exemptions claimed under California's statutory exemption scheme does not limit their applicability to the cases at bench, where exemptions were claimed under Arizona and federal statutes.** *Reilly* has reaffirmed certain of the underlying principles in these cases and clarified that, with respect to how exempt property is defined, their reasoning is applicable not just to California's exemption scheme, but to all statutes that limit the value of an exemption to an "interest" in property capped at a dollar value. Moreover, this court's past position on postpetition appreciation is based not solely on the California statute defining exempt property but also on 11 U.S.C. § 541(a)(6) (including as property of the estate "[p]roceeds, product, offspring, rents, or profits of or from property of the estate ..."), which is equally applicable to the cases at issue here. *See In re Reed,* 940 F.2d at 1323; *In re Viet Vu,* 245 B.R. at 649.

Id. (emphasis added). Therefore, it cannot be that *Alsberg* and other Ninth Circuit cases involving California's homestead exemption scheme are legally distinguishable as the majority posits because, as acknowledged by *Gebhart*'s clear language, all capped homestead exemption schemes,

including Washington's, are treated the same. *See also Klein v. Chappell (In re Chappell)*, 373 B.R. 73, 75 (B.A.P. 9th Cir. 2007) ("Under well-settled Ninth Circuit law, any postpetition appreciation in value in the residence in excess of the maximum amount permitted by the exemption statute invoked inures to the benefit of the estate. The use of federal exemptions does not work to change that result."). The federal homestead exemption statute was at issue in *Klein v. Chappell* and the Arizona statute in *Gebhart v. Gaughan*, yet, on review, this Court relied on Ninth Circuit cases analyzing California's homestead exemption scheme to hold that these non-California debtors were entitled to retain the postpetition appreciation in their homesteads up to the statutory exemption caps. *See Gebhart*, 621 F.3d at 1211 (analyzing *Alsberg, Hyman, Reed,* and *Vu*). Thus, this court does not make the distinction which the majority posits.[4]

Indeed, this court, when discussing whether a California debtor may obtain postpetition appreciation beyond the statutory exemption cap, noted the obvious similarity among all capped exemption statutes by placing them in the same exemption category and without drawing any distinction among them: "Of the nine states in the Ninth Circuit, seven limit the dollar amount of the homestead allowance (Alaska, Arizona, California, Idaho, Montana, Nevada, and Washington), while two limit both the dollar and the acreage

[4] The demographic criteria in California's homestead exemption, upon which the majority places much emphasis, is irrelevant here because it merely sets forth different exemption caps based on the different characteristics of the individual or individuals claiming the exemption. Cal. Civ. Proc. Code. § 704.730. For instance, an unmarried California debtor may claim $75,000, *see* Cal. Civ. Proc. Code. § 704.730(a)(1), but an unmarried California debtor who is over 65 years old may claim $175,000, *see* Cal. Civ. Proc. Code. § 704.730(a)(3)(A).

amounts of the homestead allowance (Hawaii and Oregon)." *In re Hyman*, 967 F.2d at 1319 n.3.

The majority grounds its argument for treating Washington's exemption differently than California's on the ground that Washington exempts the lesser of either the homestead's equity or $125,000. Thus, argues the majority, while Washington's exemption is tied to the homestead's equity, California's is not. While it is true that the California statute does not specifically mention an equity limitation, that is of neither legal nor economical consequence. That is because in actual practice, and as a matter of basic economics, bankruptcy courts in California must, as do all states with a capped exemption, always cap the exemption at the lesser of the homestead's net equity or the designated maximum because the actual exempted amount will always be limited to, and can only be paid from, the net proceeds from the sale of the homestead. *See In re Bruton,* 167 B.R. 923, 926 (Bankr. S.D. Cal. 1994). Thus, California's exemption statute actually means, as does Washington's, that the debtor's exemption amount is the lesser of either the homestead's net proceeds at sale or the capped maximum amount.

In its attempt to distinguish Washington's exemption from California's, the majority also relies on dicta from *Hyman* stating that California *guarantees* debtors a specific homestead exemption amount. *In re Hyman*, 967 F.2d at 1321. Unlike taxes and death, however, nothing in California's homestead exemption scheme, nor in any other capped exemption scheme for that matter, guarantees any amount to the debtor. The only exemption guarantee in California, and again, as with all capped exemptions, is that debtors may only exempt and receive their homestead's

equity, if any, up to the maximum statutory exemption amount. This is obviously the case because regardless of the maximum exemption the law permits, a debtor may only receive the exemption amount from the net proceeds generated by the sale of the homestead. *In re Alsberg*, 68 F.3d at 315 ("Alsberg's California homestead exemption can be realized only from the net proceeds of sale received by the estate."); *see also In re Bruton,* 167 B.R. at 926 ("The amount that the debtor may claim as exempt for his homestead is $50,000 . . . . However, since Bruton has only $16,981 equity in the property absent HOA's lien, the available exemption for purposes of Bankruptcy Code § 522(f) is limited to $16,981."). Basic economic reality dictates that if the sale produces net proceeds in an amount less than the maximum homestead exemption, the debtor is limited to that lesser amount. Thus, *Hyman*'s statement, and the majority's reliance on it, that California debtors are *guaranteed* a $45,000 homestead exemption, aside from being pure dicta, cannot be accurate in the bankruptcy context.

Second, the majority's effort to distinguish Washington's homestead exemption statute from California's is also flawed because it ignores binding precedent involving exemption statutes other than California's. This precedent, arising in the consolidated *Gebhart* appeals involving federal and Arizona homestead exemption statutes, permits a debtor to increase the homestead exemption amount based on postpetition appreciation—as does California's statute. Like Washington's homestead exemption statute, the federal and Arizona statutes cap the homestead exemption at a specified maximum amount. As discussed in detail in the following section, the courts in both cases which *Gebhart* affirmed permitted debtors to claim increased homestead exemptions postpetition in order to take advantage of their properties' appreciation

under federal and Arizona statutes respectively. *See Gebhart,* 621 F.3d 1206. The federal homestead exemption statute is, like Washington's homestead exemption, clearly a "lesser of either" capped statute that limits the exemption to "aggregate interest, **not to exceed** $23,675 in value . . ." *See* 11 U.S.C. § 522(d)(1) (2018) (emphasis added) (footnote call number omitted). Arizona's homestead exemption statute, like Washington's, is also clearly a "lesser of either" capped statute as indicated by the phrase "not exceeding" preceding the specified cap. *See* Ariz. Rev. Stat. § 33-1101 (2018) ("Any person . . . who resides within the state may hold as a homestead exempt from attachment, execution, and forced sale, **not exceeding** one hundred fifty thousand dollars in value, any of the following . . .") (emphasis added).

This court is obligated to follow *Alsberg*, which clearly establishes that the amount of Wilson's homestead exemption is determined at sale, not at filing, and may include a portion of the homestead's postpetition appreciation regardless of what Wilson claimed in her initial schedules.

B. *Gebhart*

Two other precedential cases adhering to *Alsberg* were consolidated in *Gebhart*, specifically, *Klein v. Chappell* and *Gebhart v. Gaughan*. *See Klein v. Chappell*, 373 B.R. at 73; *see also Gebhart v. Gaughan*, No. 07-CV-193-PHX-ROS. Although the facts of *Klein v. Chappell* (involving the federal exemption statute) and *Gebhart v. Gaughan* (involving Arizona's statute) are somewhat different than here, the relevant legal principle is not—debtors may exempt postpetition appreciation from the estate up to the statutory amount, but no more.

In *Gebhart*, this court framed the "primary issue" as "whether the Trustee's failure to object to the homestead exemption claim within the period allowed by statute resulted in the homestead property being withdrawn from the bankruptcy estate at that point." 621 F.3d at 1209. The court noted that the consolidated debtors' respective schedules at filing represented that there was no equity in the homestead properties and that the trustees were entitled to rely on debtors' representations. Therefore, this court rejected the debtors' contention that because trustees failed to timely object to their exemptions debtors' entire homestead properties, which had subsequently appreciated in value, were excluded from the estates, as opposed to only the capped homestead exemption amounts. *Id.* at 1210. This court instead held that the applicable homestead exemptions removed a specific dollar amount from the estate, not the property itself, leaving each trustee entitled to sell the homestead property notwithstanding his failure to timely object to the homestead exemption claim. *Id.* To put it simply, the principal holding of *Gebhart* is that a trustee is not bound by the debtor's schedules, including the debtor's evaluation of the homestead property, and therefore that the debtor cannot prevent the sale of appreciated homestead property if it has equity in excess of the maximum exemption amount. And particularly relevant here, it is noteworthy that this court affirmed the lower courts, each of which held that even though the debtor was not entitled to exempt the homestead property itself, the debtor was entitled to the full homestead exemption amount, a portion of which was based on postpetition appreciation of the property, in line with *Alsberg*. *Id*.

A closer analysis of the underlying cases in *Gebhart* is instructive to the issues presented here. In *Klein v. Chappell*,[5] when the husband and wife debtors filed they claimed that their homestead's fair market value was $350,000 subject to liens of $328,488, leaving $21,512 of equity, which they claimed as their federal homestead exemption. Thus, debtors' claimed homestead exemption was lower than $36,900, the maximum permitted under the Code. *See* § 522(d)(1). Two years after debtors received their discharge, but while their case remained open, the debtors' mortgagee moved to foreclose on the homestead property because the debtors had defaulted. In response, the trustee moved the bankruptcy court for permission to sell the homestead property because he felt that its value had substantially appreciated. The debtors argued that the homestead could not be sold because they, upon filing their petition, had exempted the entire equity interest in the property, leaving nothing for creditors. The debtors contended that by doing so they "withdr[e]w the entire fee from bankruptcy administration." *Klein v. Chappell*, 373 B.R. at 77. The bankruptcy court found for the debtors, but the BAP reversed. The BAP held that the debtors were limited to, but also now entitled to, the maximum homestead exemption amount ($36,900) from the sale proceeds, even though at filing they had claimed only their homestead's then equity of $21,512 and that the estate retained the remaining sale proceeds. *Id.* at 83. In doing so, the BAP held, in accordance with *Alsberg*: "Under well-settled Ninth Circuit law, any postpetition appreciation in value in the residence **in excess of the maximum amount**

[5] In an effort to avoid the precedential value of *Klein v. Chappell*, the majority states that it is a BAP case that is not binding on this court. The majority fails to take into account that *Klein v. Chappell* was completely affirmed by this court in *Gebhart. In re Gebhart*, 621 F.3d at 1212.

permitted by the exemption statute invoked inures to the benefit of the estate. The use of federal exemptions does not work to change that result." *Id.* (emphasis added). Moreover, a footnote emphasizes that very point. As the BAP explained:

> In *Alsberg, Hyman, Reed* and *Vu* the debtors claimed the maximum amount allowable by the California exemption scheme. In our case, the debtors limited their exemption to the difference between the value stated and the consensual liens, which was an amount substantially less than the maximum exemption available. While postpetition appreciation in value of property inures to the benefit of the estate, ***the estate's interest in the appreciation must be limited by the ability of the debtors to obtain the maximum value of their federal exemptions***. As was conceded by the trustee at oral argument, the debtors are jointly entitled to up to $36,900 (plus any available wildcard amount).

Id. at 81 n.7 (emphasis added). Thus, *Klein v. Chappell*, an opinion affirmed by this court, again confirms Wilson's position. There should be no doubt that *Klein v. Chappell* reaffirmed that in the Ninth Circuit, while the homestead and any appreciation in the homestead initially becomes estate property, that property is subject to the debtor's full homestead exemption, regardless of the amount of the debtor's claimed exemption or the homestead's equity when the petition is filed.

The majority contends that *Klein v. Chappell* is not precedential in that it does not involve a debtor's entitlement

to postpetition appreciation up to the statutory maximum because the trustee had "waived" that issue. To the contrary, the trustee, in accordance with what the BAP accurately termed "well-settled Ninth Circuit law," "*conceded*" that the debtor was entitled to the maximum exemption permitted by law. *See Klein v. Chappell*, 373 B.R. at 78, 82–83 (stating, "As the trustee **concedes**, the maximum exemption available under § 522(d)(1) is $36,900 . . ." and "As was **conceded** by the trustee at oral argument, the debtors are jointly entitled to up to $36,900 . . .") (emphasis added). There is an obvious and meaningful difference between an informed concession and a waiver. A concession involves accepting something as true or acknowledging defeat. A waiver, by contrast, is a voluntary relinquishment of a right, claim, or privilege. That the trustee, in the face of "well-settled Ninth Circuit law," conceded that the debtors were entitled to the maximum federal homestead exemption is significant. *Id.*

Gebhart v. Gaughan, the other underlying case, involves an Arizona debtor who on his bankruptcy schedules claimed that his homestead had a fair market value of $210,000 with liens totaling $120,297.[6] On filing, the debtor claimed a homestead exemption pursuant to Arizona's homestead exemption laws for his property's then equity of $89,703, less than the $100,000 maximum exemption permitted by Arizona law. Thus, as did Wilson here, Gebhart initially claimed less than the maximum exemption permitted by Arizona law because at filing there was insufficient equity to provide

[6] These facts are taken from the district court's unpublished opinion, which was not made a part of the record before this panel. This court may take judicial notice of the district court's unpublished opinion. *See McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1094 n.2 (9th Cir. 2004) (taking judicial notice of unpublished district court dismissal order).

revesting of the full allowable amount from the estate's sale of the homestead. As in *Hyman*, because the schedule facially reflected no equity in the homestead property in excess of the exemption claim, the trustee did not object to Gebhart's claimed exemption.

Three years after filing, the trustee determined that Gebhart's homestead had substantially appreciated in value and sought to appoint a real estate broker to sell it. Gebhart objected, contending that he was entitled to the entire property because at filing he claimed as his exemption the full equity then existing in the property, thereby leaving nothing for the estate, and the trustee had failed to object. The bankruptcy court granted the trustee's request over Gebhart's objections, holding that "a chapter 7 trustee is entitled to the proceeds from the sale of the debtors' exempt homestead **in excess of the exempt amount**" and that "the excess belongs to the bankruptcy estate for the benefit of creditors." *Gebhart v. Gaughan*, Case No. 07-CV-193-PHX-ROS at 2. The district court affirmed:

> Because appreciation belongs to the estate, the bankruptcy court did not err in allowing the Trustee to proceed with the sale of Appellant's homestead. Appellant will receive his homestead exemption upon sale of the home but the value of the home above that amount will be administered by the Trustee. *See In re Hyman*, 967 F.2d 1316, 1321 (9th Cir. 1992) (stating debtor entitled to payment of **full homestead exemption upon sale of home**).

Id. at 3 (emphasis added). Following its precedent, this court affirmed. *In re Gebhart*, 621 F.3d at 1212.

By affirming both lower courts' holdings, *Gebhart* faithfully followed *Alsberg*'s unambiguous teaching that:

> Under *Reilly*, an exemption claimed under a dollar-value exemption statute is limited to the value claimed at filing. **At least when the total fair market value of the property is in fact greater than the exemption limit at the time of filing,** *see* note 4, *supra*, **any additional value in the property remains the property of the estate**, regardless of whether the extra value was present at the time of filing or whether the property increased in value after filing . . . .
>
> A number of our cases have held that, under the California exemption scheme, the estate is entitled to postpetition appreciation in the value of property **a portion of which is otherwise exempt**. ***See Alsberg v. Robertson (In re Alsberg)*, 68 F.3d 312, 314–15 (9th Cir.1995)**; *Hyman*, 967 F.2d at 1321; *Schwaber v. Reed (In re Reed)*, 940 F.2d 1317, 1323 (9th Cir.1991).

Id. at 1211 (emphasis added).

II. *Morgan*

Another case, *Straffi v. Morgan (In re Morgan)*, No. 14-36112 (KCF), 2017 WL 436257, at *1 (D.N.J. Feb. 1, 2017),

while obviously not binding precedent, is persuasive not only because it is so factually similar, but also because it thoroughly analyzed and, in my view, correctly ruled on both of the issues presented here: 1) whether a debtor is entitled to postpetition appreciation to fully fund a homestead exemption, and 2) whether a debtor has the right to amend her exemption claim by increasing it to take advantage of that appreciation. In *Morgan*, the debtor listed her homestead value at $125,000 and claimed a $5,601 exemption, the amount of equity remaining after subtracting a mortgage lien of $106,898 and estimated sales costs. Later, the trustee contended that the value of the property was $165,000. In response, the debtor filed an amended exemption claiming the maximum of $23,916 and adding another exemption under section 522(d)(5). The trustee objected to this amendment, arguing that the debtor may not amend her exemption to take advantage of the greater homestead value. In response, "[t]he [d]ebtor explained that, 'because the Trustee believes my home is worth more than $125,000.00, I amended my schedule to claim the maximum available of $23,916.00.'" *Id.* at 2. The debtor relied on *Law v. Siegel*, 134 S. Ct. 1188 (2014), to support her assertion that "she was able to amend her exemption at any time . . . ." *Id.* The bankruptcy court ruled in favor of the debtor, and the district court affirmed—finding no error in allowing the debtor to amend her exemption to claim and obtain the full exemption amount. *Id.* at *5.

III. Exemption Amount is Not Determined at Filing

While *Gebhart* plays a significant role in the resolution of this case, the majority's reliance on *Gebhart* to contend that exemption *amounts* are irrevocably fixed on the date of filing

is unjustified. To begin, and what is most important to understand *Gebhart*, is that in *Gebhart* this court affirmed the BAP in *Klein v. Chappell* and the district court in *Gebhart v. Gaughan*, both of which permitted each debtor to, postpetition, assert an amended maximum homestead exemption claim in an amount greater than the amount claimed in the initial schedules, which greater amount resulted from postpetition appreciation—precisely what Wilson seeks to do. *See In re Gebhart*, 621 F.3d at 1212.

The majority's contention that exemption amounts are irrevocably fixed on the filing date stems from this partial, out-of-context statement: "what is frozen as of the date of filing the petition is the value of the debtor's exemption, not the fair market value of the property claimed as exempt." *Id.* at 1211. However, the full statement, in context, reveals a different meaning:

> Under *Reilly*, an exemption claimed under a dollar-value exemption statute is limited to the value claimed at filing. **At least when the total fair market value of the property is in fact greater than the exemption limit at the time of filing,** *see* note 4, *supra*, any additional value in the property remains the property of the estate, regardless of whether the extra value was present at the time of filing or whether the property increased in value after filing.
>
> The debtors argue that this conclusion is inconsistent with the Bankruptcy Code's scheme for valuing exempt property. Under 11 U.S.C. § 522(a)(2), "'value' [of property

> sought to be exempt] 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 property of the estate." The debtors argue that this provision effectively freezes the value of property claimed as exempt as of the date of bankruptcy filing. This argument does not accord, however, with past holdings of this court, which establish that what is frozen as of the date of filing the petition is the value of the debtor's exemption, not the fair market value of the property claimed as exempt. *See Hyman v. Plotkin (In re Hyman)*, 967 F.2d 1316, 1320 n. 9 (9th Cir. 1992).

Id. (alteration and emphasis added).

The majority interprets the final partial sentence to support its conclusion that, under Washington's exemption scheme, a debtor's homestead exemption cannot exceed the amount that a debtor claimed on the filing date, based on the property's then-existing equity, even if the homestead appreciates in value. But the majority's posited interpretation cannot be correct for a number of reasons. First and most obvious, that interpretation stands in sharp contrast to, and is irreconcilable with, what the *Gebhart* court actually did. Rather than freeze the debtors' exemption amount to the properties' equity claimed upon filing, the court permitted the debtors to postpetition increase their exemption claims up to the statutory capped amounts and to use a portion of the properties' postpetition appreciation to fund those amounts. The majority's interpretation is also irreconcilable with

Alsberg, precedent upon which the *Gebhart* court relied in determining how postpetition appreciation is treated. *Id*.

Tellingly, the majority's interpretation of that partial statement ignores the court's full discussion indicating, in conformance with precedent, that when a homestead appreciates postpetition, the appreciation inures to the estate, but "a portion is otherwise exempt." *Id*. For example, the discussion preceding that partial statement informs as to its true meaning. There, the court observes that a dollar value exemption is limited to the exemption that debtor claimed at filing, but only "when the total fair market value of the property is in fact greater than the exemption limit at the time of filing . . . any additional value in the property remains the property of the estate regardless of whether the extra value was present at the time of filing." *Id.* In other words, when a debtor claims the maximum allowed exemption and at filing there is sufficient value to cover that amount, the debtor's exemption is frozen and he is not entitled to any of the property's appreciation. Conversely, it follows that if at filing there is insufficient value to meet the maximum exemption, the debtor is entitled to a portion of any appreciation up to the maximum exemption. This interpretation not only takes into account the *Gebhart* court's full discussion and what it actually did, but is also the only interpretation consistent with *Alsberg* and the other precedent which the *Gebhart* court cited with approval.

Moreover, the statement that exemptions are frozen on the filing date must be analyzed in the factual context in which it was made. Thus, it is important to note that the determinative issues in Wilson's case are different than those in *Gebhart*, keeping in mind that the court was discussing and ultimately rejecting the debtors' contention that section 522(a)(2)

"freezes the value of **property** claimed as exempt as of the date of the bankruptcy filing" so that the **estate** was not entitled to any postpetition appreciation. *Id.* (emphasis added). In both of *Gebhart's* two consolidated cases, the debtors contended that the trustees had effectively abandoned the homestead properties because the trustees did not object to debtors' homestead exemption claims which claimed all of the properties' purported equities at filing, which amounts were less than the maximum allowed homestead exemptions. Thereafter, the debtors claimed the appreciated properties themselves, the values of which had substantially increased to amounts greater than the statutory exemption cap. The ultimate issue in *Gebhart* was whether the trustees were entitled to the postpetition appreciation which exceeded the statutory cap such that they could sell the homestead properties or whether, instead, the debtors were entitled to all of the appreciation such that the trustees would have no interest in the homestead properties. In that different context, *Gebhart* held in both cases that the trustee did not have to object to the debtor's schedules which represented no value in the homestead property above the exemption claim, that the property was still estate property, and "the estate [was] entitled to postpetition appreciation in the value of property a portion of which [was] otherwise exempt." *Id.* at 1211 (citing *In re Alsberg*, 86 F.3d at 314–15). The court must read the full context of *Gebhart* together with pre-existing precedent and what the *Gebhart* court actually did in order to fully understand what the *Gebhart* court meant by the isolated statement, "what is frozen as of the date of filing the petition is the value of the debtor's exemption." *In re Gebhart*, 621 F.3d at 1211.

It is also noteworthy that the *Gebhart* court credits its statement to *Hyman*, where husband and wife debtors claimed

the maximum statutory exemption amount when initially asserting their homestead exemption and then postpetition claimed the appreciated property itself. *In re Hyman*, 967 F.2d at 1318. The court found for the trustee, holding that the debtors' interest was limited to their monetary interest permitted by the homestead exemption. *Id.* at 1321. Because the *Hyman* debtors had already claimed the maximum $45,000 homestead exemption, debtors were not entitled to exempt any more. *Id.* at 1318. That is, debtors' exemption was frozen at the statutory cap upon filing. As the court explained:

> The Hymans only claimed a $45,000 homestead exemption. See page 1318 *supra*. That figure is fixed "as of the date of the filing the petition." 11 U.S.C. § 522(a)(2). However, nothing in section 522, or anywhere else in the Bankruptcy Code for that matter, requires that *non-exempt assets* have their values frozen on the petition date.

Id. at 1320 n.9 (emphasis added). It is this language from *Hyman* to which *Gebhart* refers. The full context in which it was made clearly does not support the majority's view that Wilson may not benefit from postpetition appreciation in order to obtain her full exemption. To the contrary, context explains how the "fixed at filing" language is fully compatible with Wilson's position here. The estate is entitled to the homestead's appreciation that is not otherwise exempt, in line with this court's precedent, including *Alsberg* and *Gebhart*.

It is also significant that Washington's homestead exemption law, consistent with Ninth Circuit precedent,

provides that the relevant time to determine and disburse a debtor's homestead exemption amount is when the property is sold. *Sweet v. O'Leary*, 88 Wash. App. 199, 200 (1997) ("The homestead exemption creates an interest in property that attaches to the surplus proceeds from a nonjudicial foreclosure sale under a deed of trust such that a judgment creditor's claim is limited to funds in excess of the homestead, if any."). Washington's homestead exemption is capped at the lesser of "the total *net value* of the lands . . . or (2) the sum of one hundred twenty-five thousand dollars . . ." Wash. Rev. Code § 6.13.030 (emphasis added). Washington defines "net value" as "market value less all liens and encumbrances senior to the judgment being executed upon and not including the judgment being executed upon." Wash. Rev. Code § 6.13.010. Thus, Washington contemplates that the value of its homestead exemption is determined upon execution of a judgment against homestead property, or in the bankruptcy context upon trustee's sale, and is limited to the lesser of the net proceeds from the sale or $125,000. *Id.*; Wash. Rev. Code § 6.13.030. According to Washington law, then, the proper value of the exemption amount is determined at sale, not at filing. [7] Washington's approach is wholly consistent with this court's adoption of the general principle that exemption amounts are determined at sale rather than at filing. *In re Hyman*, 967 F.2d at 1318 (explaining that under California's homestead exemption scheme, "[i]f the sale price

[7] Washington's homestead exemption law exempts, upon sale, a maximum of $125,000 in homestead equity from judgment creditors' reach, and per *Hyman*, the same treatment applies in the bankruptcy context. *In re Hyman*, 967 F.2d at 1319 (concluding that pursuant to section 522(b)(3)(a)'s deference to state law homestead exemptions, bankruptcy petitioners under federal law are treated as judgment debtors and are entitled to exempt any "property qualifying under California's homestead exemption statute.").

does exceed [the total of the homestead exemption and encumbrances on the property] the homestead may be sold and the judgment debtor is entitled to a sum equal to his homestead exemption from the proceeds of the sale.") (alteration added). Thus,

> In the normal situation where section 704.800 is called into play—a sale of property to satisfy a judgment lien—the concept of an interest that fluctuates in value makes no sense because all the relevant events occur on the date of sale. Only in the bankruptcy context, where an appreciable period of time usually passes between filing of the petition and sale of the property, can the property rise or fall in value. Yet, we see no basis for treating a sale by a trustee in bankruptcy any different from a sale by a judgment lienholder. The debtor's right to use the exemption comes into play not upon the filing of the petition, but only if and when the trustee attempts to sell the property.

Id. at 1321. Consistent with *Hyman*, the *Alsberg* court held:

> Alsberg's California homestead exemption can be realized only from the net proceeds of sale received by the estate. The estate held an interest in the residence at all times after the petition was filed. Therefore, when the residence was sold, the proceeds of the sale vested in the estate. When Alsberg subsequently filed a claim for a $45,000 homestead exemption after the sale of the

> property, he became entitled to $45,000 of the proceeds, and no more.

In re Alsberg, 68 F.3d at 315; *see also In re Bruton*, 167 B.R. at 926.

In view of all this, the majority's overly literal interpretation of that out-of-context statement from *Gebhart* regarding freezing exemptions cannot be justified.

Further, here, unlike the *Gebhart* debtors, Wilson does not contend that the value of her homestead property was frozen upon filing or that she is entitled to all postpetition appreciation. Rather, Wilson agrees that the property's value has appreciated, and she seeks only the amount of her capped homestead exemption, not her homestead property nor its appreciated equity in excess of the exemption cap.

In the final analysis, section 522(b)(3)(A), which allows debtors to use state exemption statutes, must be construed liberally in favor of Wilson. *See Culver, LLC v. Chiu (In re Chiu),* 266 B.R. 743, 747 (B.A.P. 9th Cir. 2001), *aff'd*, 304 F.3d 905 (9th Cir. 2002) ("It is well-established that § 522 is to be interpreted liberally in favor of debtors in order to facilitate their 'fresh start.'"). A liberal construction of section 522(b)(3)(A) and Washington's homestead exemption statute requires that Wilson's exemption amount be fixed at sale, not at filing.

IV. Postpetition Appreciation Inures to the Estate

The majority also relies on the rather unremarkable principle that postpetition appreciation in estate property inures to the estate as support for not allowing Wilson to

amend her exemption schedule to claim a portion of that appreciation. Certainly, the principle that postpetition appreciation inures to the estate is well-established. *See Schwaber v. Reed (In re Reed)*, 940 F.2d 1317, 1323 (1991) ("We interpret [§ 541(a)(6)] to mean that appreciation inures to the bankruptcy estate, not the debtor."); *In re Alsberg*, 68 F.3d at 314–15; *In re Viet Vu*, 245 B.R. 644, 648 (B.A.P. 9th Cir. 2000) ("[T]he estate is entitled to postpetition appreciation"). In fact, a trustee's ability to sell appreciated homestead property stems from the concept that postpetition appreciation initially inures to the estate. *See In re Gebhart*, 621 F.3d at 1210. However, the majority draws a faulty conclusion from this limited principle.

The majority is correct that section 541(a)(1) defines one category of estate property to include, "all legal or equitable interests of the debtor in property as of the commencement of the case." However, the majority treats the estate's postpetition category of property defined in section 541(a)(6) differently by classifying it as property that may never be exempted from the bankruptcy estate, notwithstanding that section 541(a)(6) is part of the list of all properties which section 541(a) includes as "property of the estate." Section 541(a) states: "The commencement of a case under . . . this title creates an estate. Such estate is comprised of all of the following property, wherever located and by whomever held." Section 541(a)(6), the sixth category of that estate property, includes: "proceeds, product, offspring, rents, or profits of or from property of the estate . . ." The majority acknowledges that "proceeds, product, offspring, rents, or

profits," which without question includes appreciation,[8] are part of the bankruptcy estate, but curiously concludes that only the debtor's property that transfers to the estate at filing, rather than the debtor's property which transfers postpetition, is subject to exemptions under section 522.

The majority's position is not supported by statute or caselaw. To the contrary, as discussed above, prohibiting a debtor from exempting postpetition appreciation from the estate contravenes binding precedent.

To say that debtor's property, including its appreciation, vests in the estate, says nothing about the debtor's right to revestment of a portion of the net proceeds from the sale of that property pursuant to debtor's homestead exemption. This is because all of debtor's property, including appreciation, must initially inure to the estate before the proceeds from the sale of such property may ultimately be distributed to those claiming an interest in the estate property, e.g., creditors, and, of course, debtors, by virtue of exemption or abandonment. It is axiomatic that the only property subject to exemptions is that which becomes part of the estate, but no statute or caselaw limits a debtor's right to exempt only that property which entered the estate at the commencement of the bankruptcy proceeding. *See* 11 U.S.C. § 522(b)(1). Thus,

[8] *Gebhart* makes clear that postpetition appreciation becomes an estate asset pursuant to section 541(a)(6). *In re Gebhart*, 621 F.3d at 1211 ("[T]his court's past position on postpetition appreciation is based not solely on the California statute defining exempt property but also on 11 U.S.C. § 541(a)(6) (including as property of the estate '[p]roceeds, product, offspring, rents, or profits of or from property of the estate ...'), which is equally applicable to the [non-California] cases at issue here."). Thus, postpetition appreciation comes into the estate by virtue of section 541(a)(6).

"[t]he effect of an exemption is that the debtor's interest in the property is 'withdrawn from the estate (and hence from the creditors) for the benefit of the debtor.'" *In re Gebhart*, 621 F.3d at 1210 (quoting *Owen v. Owen*, 500 U.S. 305, 308 (1991)); *see also In re Morgan*, 2017 WL 436257 at *4 ("The *Orton* and *Gebhart* courts both held that postpetition appreciation was property of the estate and, therefore, may properly be exempted by a debtor."). Nothing in section 522 limits a debtor from exempting an interest in estate property acquired postpetition if an applicable exemption exists. *See* § 522.

It follows that because postpetition appreciation is an estate asset, it is then subject to the maximum applicable homestead exemption irrespective of the amount of the exemption initially claimed by debtor. *Gebhart,* in affirming both the lower courts, applies this principle, recognized by this court in *Alsberg*, when holding that: "the estate is entitled to postpetition appreciation in the value of property *a portion of which is otherwise exempt*." *In re Gebhart*, 621 F.3d at 1211 (emphasis added).

Applying these concepts here, Wilson's homestead property, with its postpetition appreciation, is unquestionably property of the estate, $125,000 of which should be revested to her by virtue of her allowable homestead exemption.

Because estate property, including its appreciation, is subject to exemptions, even though Wilson had not initially claimed Washington's maximum exemption amount, she may now claim the full exemption nonetheless. Thus, permitting Wilson to amend her schedules to assert Washington's full homestead exemption is required by the Code's text and this court's binding precedent. Moreover, permitting Wilson to

assert her full exemption on estate property, including its postpetition appreciation, fairly promotes the bankruptcy fresh start policy.

V. The "Snapshot" Rule

In what has been labeled the "snapshot rule" through caselaw, section 522(b)(3)(A) states that "exemptions must be determined in accordance with the state law 'applicable on the date of filing.'" *In re Jacobson*, 676 F.3d 1193, 1199 (9th Cir. 2012) (quoting § 522(b)(3)(A) (exempting from property of the estate "any property that is exempt under . . . State or local law that is *applicable* on the date of the filing . . .") (emphasis added)). The majority contends that the "snapshot rule" directly supports its position that the claimed *amount* of the exemption, as opposed to only the right to assert a specific exemption claim, is indelibly fixed at filing. The majority's interpretation of the snapshot rule is an unjustified extension of that rule as applied by the caselaw on which the majority relies. Moreover, that interpretation runs counter to the three basic principles applicable to exemption statutes: 1) exemption statutes must be liberally interpreted in favor of debtors; 2) an exemption may not be denied in the absence of an explicit provision to do so; and 3) courts must permit debtors to amend their bankruptcy schedules as a matter of course.

While it is accurate that the court in *Jacobson* stated that "[u]nder the so-called snapshot rule, bankruptcy exemptions are fixed at the time of the bankruptcy petition," 676 F.3d at 1199, *Jacobson* and *White v. Stump*, 266 U.S. 310 (1924), the other case upon which the majority relies, do not support the majority's extension of the snapshot rule. This is because in those cases the courts did not discuss, much less decide,

whether the *amount* of the debtor's exemption is fixed at filing, but rather only whether the debtor qualified for a particular homestead exemption in effect at filing.

As made abundantly clear in discussing the snapshot rule, this court, relying on section 522(b)(3)(A)'s specific mandate, explained that state homestead exemptions "must be determined in accordance with the state law 'applicable on the date of filing'" and that courts must look to that law to determine "whether an exemption applies." *In re Jacobson*, 676 F.3d at 1199 (quoting § 522(b)(3)(A)). In *Jacobson*, the debtors did not qualify for the exemption because they did not reinvest the proceeds from the sale of their homestead property within six months, as required by California law. *Id*. Because the debtors failed to comply with state law as it existed on the date of filing, the court found that they forfeited the exemption. *Id.* As with *Jacobson*, the majority overstates the actual, limited holding in *White*. There, the Supreme Court simply held that a debtor could not assert a homestead exemption when the property did not qualify for exemption at the time of filing. *White*, 266 U.S. at 314. *White* did not mention, much less rule on, whether the amount of an exemption is fixed at filing or whether a debtor could postpetition increase the dollar amount of a homestead exemption claim based on appreciation. *Id*.

Neither of the majority's cases speaks to the issues presented here. Tellingly, the majority cites no case, and I have found none, which has extended the snapshot rule to freeze the amount of an exemption at filing. And in my view, any such extension would be inconsistent with a liberal interpretation of section 522(b)(3)(A) in favor of the debtor. More to the point, the extension of the snapshot rule as posited by the majority—that the amount of debtor's

exemption claim at filing may not be amended to reflect postpetition appreciation—ignores this court's precedent to the contrary.

This court has explained that in applying a state homestead exemption statute, courts should look to "clearly defined rights with respect to" the statute. *Id.* With respect to Washington's exemption statute, it does not, nor does the Code for that matter, provide that a homestead exemption is limited to the amount claimed at filing or set a deadline for asserting the full exemption. To the contrary, as discussed above, Washington's homestead exemption is determined by and is applied to the "surplus proceeds from a . . . sale . . . such that a judgment creditor's claim is limited to funds in excess of the homestead, if any." *Sweet*, 88 Wash. App. at 200. The snapshot rule, as properly construed, is not relevant here because at the time Wilson filed her petition, the exemption for which she qualified read the same as it does today: "the homestead is exempt from attachment and from execution or forced sale for the debts of the owner up to the amount specified in RCW 6.13.030." Wash. Rev. Code § 6.13.070. Moreover, nothing in Washington's homestead exemption statute tethers the homestead exemption amount to the bankruptcy filing date. *See* Wash. Rev. Code § 6.13.030. Consequently, the majority's position that Wilson's homestead exemption was limited to $3,560 because exemption *amounts* are fixed at filing is flawed.

VI. Guiding Bankruptcy Principles

As indicated above, there are three undisputed fundamental principles which must guide the court's analysis here, none of which have been discussed, much less taken into account, by the majority or the courts below.

First, the overarching and well-established purpose of the bankruptcy scheme is to "grant a fresh start to the honest but unfortunate debtor." *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007) (internal quotations omitted). To that end, exemptions play a critical role. "[E]xemptions in bankruptcy cases are part and parcel of the fundamental bankruptcy concept of a 'fresh start.'" *Schwab*, 560 U.S. at 791 (citations omitted). This court dutifully recognizes the significance of exemptions and, consequently, adheres to a strong policy of interpreting exemptions "liberally in favor of debtors." *See In re Chiu,* 266 B.R. at 747 ("It is well-established that § 522 is to be interpreted liberally in favor of debtors in order to facilitate their 'fresh start.'"); *see also In re Arrol,* 170 F.3d 934, 937 (9th Cir. 1999) ("[W]e are mindful of the strong policy underlying both California law and federal bankruptcy law to interpret exemption statutes liberally in favor of the debtor.") (alteration added).

An analysis of the permissibility of Wilson's proposed postpetition amendment must be guided by the well-established fresh start and liberal-construction-of-exemptions mandates. How better to assist an honest but unfortunate debtor's fresh start than to permit her to claim the maximum applicable statutory homestead exemption amount? It is noteworthy that Wilson, unlike the debtors in *Hyman*, *Alsberg*, *Klein v. Chappell*, and *Gebhart v. Gaughan*, seeks to obtain no more than the full exemption amount which the homestead exemption statute permitted when she filed.

Second, bankruptcy courts may not deny a debtor's exemption on a ground not specified in the Code. *Law*, 134 S. Ct. at 1197. In *Law*, the Supreme Court, in finding that the bankruptcy court lacked authority to sanction a debtor by surcharging, and thus reducing, his homestead exemption

amount after the debtor committed overt fraud on the bankruptcy court, explained that: "A debtor need not invoke an exemption to which the statute entitles him; but if he does, the court may not refuse to honor the exemption absent a valid statutory basis for doing so." *Id.* at 1196. As discussed elsewhere, there is no valid statutory basis for not honoring Wilson's right to her full exemption.

Third, Federal Rule of Bankruptcy Procedure 1009 grants debtors the right to freely amend their bankruptcy petitions, including their exemption schedules. The rule states: "A voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed." Fed. R. Bankr. P. 1009. "This right to amend includes the right to amend the debtor's list of property claimed exempt." *In re Goswami*, 304 B.R. 386, 393 (B.A.P. 9th Cir. 2003) ("The approach we adopt in this case is consistent with the Ninth Circuit's policy of liberally allowing debtors to amend their exemption schedules so as to enhance their fresh start.") (citing *In re Michael*, 163 F.3d at 529). "The bankruptcy court has no discretion to disallow amended exemptions, unless the amendment has been made in bad faith or prejudices third parties." *In re Arnold*, 252 B.R. 778, 784 (B.A.P. 9th Cir. 2000). As the Supreme Court noted, "[T]o disallow an exemption [] or to bar a debtor from amending his schedules to claim an exemption . . . is much the same thing . . ." *Law*, 134 S. Ct. at 1196. Importantly, in *Michael*, this court expressly held that, pursuant to a debtor's right to freely amend under Bankruptcy Rule 1009(a), a debtor may amend her bankruptcy schedules to claim a homestead exemption for the first time postpetition. *In re Michael,* 163 F.3d at 528 (permitting debtors to amend bankruptcy schedules to claim homestead exemption more than one year after the date of filing).

The denial of Wilson's right to amend her exemption claim in order to obtain Washington's maximum homestead exemption to which she is entitled is an impermissible denial of a substantial portion of Wilson's homestead exemption. Nothing in the Code limits the amount of a debtor's state law homestead exemption to the amount of equity claimed in the property on the filing date. Moreover, denying Wilson's right to amend is inconsistent with *Michael* and Bankruptcy Rule 1009(a). In contrast to the majority's position that a debtor's exemption amount is always limited to the amount claimed at filing, this court in *Michael* was intent on "implement[ing] the policy of liberally allowing the debtors to amend their exemption claims in order to enhance their fresh start." *In re Michael*, 163 F.3d at 529. It is counterintuitive and an illiberal interpretation of the exemption laws to hold that a debtor may amend her bankruptcy schedules to claim a homestead exemption for the first time postpetition, as permitted in *Michael*, but to deny a debtor the right to amend her bankruptcy schedules to postpetition increase her homestead exemption claim. Both scenarios allow a postpetition amendment and a greater exemption for the debtor.

In an attempt to justify denying Wilson's full exemption, the majority relies on section 522(a)(2)'s term-of-art definition of "value" to support fixing the exemption amount to the equity amount claimed on the filing date. Such reliance is ill advised for a number of reasons, not the least of which is the section's clear language. While section 522(a)(2) provides that "**in this section**, 'value' means fair market value as of the date of the filing of the petition," the word "value" is noticeably absent from, and thus inapplicable to, section 522(b)(3)(A), which authorizes debtors to utilize state law exemptions rather than federal exemptions. § 522(a)(2)

(emphasis added). In contrast, section 522 includes the word "value" in several other irrelevant federal exemption sections, such as within section 522(d)(2), which federally exempts a "debtor's interest, not to exceed $3,775 in *value*, in one motor vehicle." § 522(d)(2). That the defined term "value" is present in some sections but not section 522(b)(3)(A), the only section relevant here, clearly indicates that the defined term "value" plays no role in Wilson's homestead exemption analysis. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). In fact, the only limitation in the Code on a debtor's right to exempt property under *state* law is that the exemption statute must be "applicable on the date of the filing of the petition to the place in which the debtor's domicile has been located" for a period of time prior to filing. § 522(b)(3)(A). Moreover, nothing in section 522 limits exemptions to property that entered the estate on the filing date, as opposed to property that entered the estate postpetition. *See gen.* § 522. Thus, nothing in section 522, or anywhere else in the Code, limits Wilson's right to amend her schedules to claim and receive her full homestead exemption amount, which may include some postpetition appreciation.

For all of these reasons, I would reverse to allow Wilson to amend her homestead exemption claim in order for her to obtain the full exemption to which she is entitled.

Questioned
As of: August 1, 2019 8:49 PM Z

Marrama v. Citizens Bank

Supreme Court of the United States

November 6, 2006, Argued ; February 21, 2007, Decided

No. 05-996

Reporter
549 U.S. 365 *; 127 S. Ct. 1105 **; 166 L. Ed. 2d 956 ***; 2007 U.S. LEXIS 2651 ****; 75 U.S.L.W. 4113; 57 Collier Bankr. Cas. 2d (MB) 1; Bankr. L. Rep. (CCH) P80,850; 47 Bankr. Ct. Dec. 221; 20 Fla. L. Weekly Fed. S 93

ROBERT LOUIS MARRAMA, Petitioner v. CITIZENS BANK OF MASSACHUSETTS, et al.

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Marrama v. Citizens Bank (In re Marrama), 430 F.3d 474, 2005 U.S. App. LEXIS 23512 (1st Cir., 2005)

Disposition: *430 F.3d 474*, affirmed.

Core Terms

convert, conversion, bankruptcy court, bad faith, liquidated, bankruptcy judge, provisions, provides, Appeals, good faith, noncontingent, requirements, reconversion, parties, notice, powers, absolute right, regular income, individual's, prepetition, qualify, bad-faith, equitable, conceal, courts, terms

Case Summary

Procedural Posture

Petitioner bankruptcy debtor filed a voluntary petition under Chapter 7 and made a number of statements about his principal asset, a house in Maine, that were misleading or inaccurate. The debtor filed a notice of conversion to Chapter 13 which was denied. On appeal, the U.S. Court of Appeals for the First Circuit rejected the debtor's argument that *11 U.S.C.S. § 706(a)* gave him an absolute right to convert to Chapter 13. Certiorari was granted.

Overview

In verified schedules attached to his bankruptcy petition, the debtor made a number of statements about his principal asset, a house in Maine, that were misleading or inaccurate. He later claimed that the misstatements were made in error, but the bankruptcy court rejected his argument. The Court held that the text of *11 U.S.C.S. § 706(d)* provided adequate authority for the denial of the debtor's motion to convert his Chapter 7 case to Chapter 13. Nothing in the text of either *11 U.S.C.S. § 706* or *11 U.S.C.S. § 1307(c)* (or the legislative history of either provision) limited the authority of the bankruptcy court to take appropriate action in response to fraudulent conduct by the debtor. The broad authority granted to the bankruptcy judge to take any action that was necessary or appropriate to prevent an abuse of process described in *11 U.S.C.S. § 105(a)*, was adequate to authorize an immediate denial of a motion to convert filed under *11 U.S.C.S. § 706*.

Outcome
The judgment was affirmed.

LexisNexis® Headnotes

Bankruptcy Law > ... > Bankruptcy > Conversion & Dismissal > Liquidations

HN1[] **Liquidations**

See *11 U.S.C.S. § 706(a)*.

Bankruptcy Law > ... > Bankruptcy > Conversion & Dismissal > Liquidations

HN2[] **Liquidations**

Sarah Little

See 11 U.S.C.S. § 706(a).

Bankruptcy Law > Conversion & Dismissal > Individuals With Regular Income

HN3[] **Individuals With Regular Income**

11 U.S.C.S. § 1307(c) provides that a Chapter 13 proceeding may be either dismissed or converted to a Chapter 7 proceeding for cause and includes a nonexclusive list of 10 causes justifying that relief. None of the specified causes mentions prepetition bad-faith conduct (although subparagraph 10 does identify one form of Chapter 7 error--which is necessarily prepetition conduct--that would justify dismissal of a Chapter 13 case). Bankruptcy courts nevertheless routinely treat dismissal for prepetition bad-faith conduct as implicitly authorized by the words "for cause." In practical effect, a ruling that an individual's Chapter 13 case should be dismissed or converted to Chapter 7 because of prepetition bad-faith conduct, including fraudulent acts committed in an earlier Chapter 7 proceeding, is tantamount to a ruling that the individual does not qualify as a debtor under Chapter 13. That individual, in other words, is not a member of the class of honest but unfortunate debtors that the bankruptcy laws were enacted to protect.

Bankruptcy Law > Conversion & Dismissal > Individuals With Regular Income

HN4[] **Individuals With Regular Income**

See 11 U.S.C.S. § 1307(c).

Bankruptcy Law > ... > Bankruptcy > Conversion & Dismissal > Liquidations

HN5[] **Liquidations**

The class of honest but unfortunate debtors who do possess an absolute right to convert their cases from Chapter 7 to Chapter 13 includes the vast majority of the hundreds of thousands of individuals who file Chapter 7 petitions each year.

Bankruptcy Law > ... > Bankruptcy > Conversion & Dismissal > Liquidations

HN6[] **Liquidations**

Nothing in the text of either 11 U.S.C.S. § 706 or 11 U.S.C.S. § 1307(c) (or the legislative history of either provision) limits the authority of the court to take appropriate action in response to fraudulent conduct by the atypical litigant who has demonstrated that he is not entitled to the relief available to the typical debtor. On the contrary, the broad authority granted to bankruptcy judges to take any action that is necessary or appropriate to prevent an abuse of process described in 11 U.S.C.S. § 105(a), is surely adequate to authorize an immediate denial of a motion to convert filed under 11 U.S.C.S. § 706 in lieu of a conversion order that merely postpones the allowance of equivalent relief and may provide a debtor with an opportunity to take action prejudicial to creditors.

Bankruptcy Law > ... > Bankruptcy > Case Administration > Bankruptcy Court Powers

HN7[] **Bankruptcy Court Powers**

See 11 U.S.C.S. § 105(a).

Lawyers' Edition Display

Decision

[*956]** Individual debtor, who had been found to have acted in bad faith, held to have forfeited his right under § 706(a) of Bankruptcy Code (11 U.S.C.S. § 706(a)) to convert case under Chapter 7 (11 U.S.C.S. §§ 701 et seq.) to Chapter 13 (11 U.S.C.S. §§ 1301 et seq.).

Summary

Section 706(a) of the Bankruptcy Code (11 U.S.C.S. § 706(a)) generally provided that a debtor could convert a case under Chapter 7 (11 U.S.C.S. §§ 701 et seq.) to some other chapters including Chapter 13 (11 U.S.C.S. §§ 1301 et seq.) "at any time" (if the case had not been converted under one of three specific provisions). Moreover, § 706(a) further provided that any waiver of this right to convert a case was "unenforceable."

However, § 706(d) of the Code (11 U.S.C.S. § 706(d)) said that notwithstanding any other provision of § 706, a case could not be converted to a case under another

chapter unless the debtor could be a debtor under such chapter. In addition, (1) § 1307(c) of the Code (11 U.S.C.S. § 1307(c)) provided that a Chapter 13 proceeding could be either dismissed or converted to a Chapter 7 proceeding "for cause"; and (2) § 105(a) of the Code (11 U.S.C.S. § 105(a)) authorized bankruptcy judges to take any action that was necessary or appropriate "to prevent an abuse of process."

An individual debtor filed a voluntary petition under Chapter 7. In verified schedules attached to his petition, the individual made a number of statements about his principal asset, a house in Maine, that assertedly were misleading or inaccurate. Later, the individual filed a notice of conversion to Chapter 13. The bankruptcy trustee, in objecting, (1) relied primarily on the individual's alleged attempt to conceal the Maine property from his creditors; and (2) contended that the request to convert was made in bad faith. The individual's principal **[***957]** creditor, a bank, opposed the conversion on similar grounds. A bankruptcy judge (1) ruled that the facts established a "bad faith" case; and (2) denied the request for conversion.

The Bankruptcy Appellate Panel for the First Circuit, in affirming, (1) rejected the individual's argument that he had an absolute right under § 706(a) to convert his case from Chapter 7 to Chapter 13; (2) expressed the view that § 706(a) created a conversion right that was absolute only in the absence of extreme circumstances; and (3) concluded that the record disclosed such circumstances (313 B.R. 525, 2004 Bankr. LEXIS 1317).

On appeal, the United States Court of Appeals for the First Circuit, in affirming, also rejected the argument that § 706(a) gave a Chapter 7 debtor an absolute right to convert to Chapter 13 (430 F.3d 474, 2005 U.S. App. LEXIS 23512).

On certiorari, the United States Supreme Court affirmed. In an opinion by Stevens, J., joined by Kennedy, Souter, Ginsburg, and Breyer, JJ., it was held that--if it were assumed, for the purposes of decision, that there was sufficient evidence for the bankruptcy judge's ruling that the individual had acted in bad faith--then the individual had forfeited his right to proceed under Chapter 13, as:

• The text of § 706(d) provided adequate authority for the denial of the individual's request for conversion, where in practical effect, a court's ruling, under § 1307(c), that a person's Chapter 13 case ought to be dismissed or converted to Chapter 7 "for cause" because of prepetition bad-faith conduct, including fraudulent acts committed in an earlier Chapter 7 proceeding, was tantamount to a ruling that the person did not qualify as a debtor under Chapter 13.

• Nothing in the text of either § 706 or § 1307(c) (or the legislative history of either provision) limited the authority of a court to take appropriate action in response to fraudulent conduct by the atypical litigant who had demonstrated that the litigant was not entitled to the relief available to the typical debtor.

• The broad authority granted to bankruptcy judges in § 105(a) was adequate to authorize an immediate denial of a § 706(a) motion to convert.

Alito, J., joined by Roberts, Ch. J., and Scalia and Thomas, JJ., dissenting, expressed the view that (1) under the clear terms of the Bankruptcy Code, a debtor who initially filed a petition under Chapter 7 had the right to convert the case to another chapter under which the case was eligible to proceed; and (2) the Supreme Court's holding--that such a debtor's conversion right was conditioned upon a bankruptcy judge's finding of "good faith"--imposed a condition that was inconsistent with the Code. **[***958]**

Headnotes

BANKRUPTCY §420.1 > BANKRUPTCY -- DENIAL OF CONVERSION FROM CHAPTER 7 TO CHAPTER 13 -- BAD FAITH > Headnote:
LEdHN[1A] [1A] LEdHN[1B] [1B] LEdHN[1C] [1C] LEdHN[1D] [1D] LEdHN[1E] [1E] LEdHN[1F] [1F] LEdHN[1G] [1G] LEdHN[1H] [1H] LEdHN[1I] [1I]

If it were assumed, for the purposes of decision, that there was sufficient evidence for a bankruptcy judge's ruling that an individual debtor had acted in bad faith, then the individual, who had filed a voluntary petition under Chapter 7 of the Bankruptcy Code (11 U.S.C.S. §§ 701 et seq.), had forfeited his right under § 706(a) of the Code (11 U.S.C.S. § 706(a)) to proceed under Chapter 13 of the Code (11 U.S.C.S. §§ 1301 et seq.)--even though § 706(a) generally provided that a debtor could convert a case under Chapter 7 to some other chapters including Chapter 13 "at any time" (if the case had not been converted under one of three specific provisions), and even though § 706(a) further provided

that any waiver of this right to convert a case was "unenforceable"--as:

• The text of § 706(d) of the Code (11 U.S.C.S. § 706(d))--which expressly conditioned the individual's right to convert on his ability to qualify as a "debtor" under Chapter 13--provided adequate authority for the denial of the individual's request for conversion, where in practical effect, a court's ruling, under § 1307(c) of the Code (11 U.S.C.S. § 1307(c)), that a person's Chapter 13 case was to be dismissed or converted to Chapter 7 "for cause" because of prepetition bad-faith conduct, including fraudulent acts committed in an earlier Chapter 7 proceeding, was tantamount to a ruling that the person did not qualify as a debtor under Chapter 13.

• Nothing in the text of either § 706 or § 1307(c) (or the legislative history of either provision) limited the authority of a court to take appropriate action in response to fraudulent conduct by the atypical litigant who had demonstrated that the litigant was not entitled to the relief available to the typical debtor.

• The broad authority granted, in § 105(a) of the Code (11 U.S.C.S. § 105(a)), to bankruptcy judges to take any action that was necessary or appropriate "to prevent an abuse of process" was adequate to authorize an immediate denial of a § 706(a) motion to convert.

(Stevens, J., joined by Kennedy, Souter, Ginsburg, and Breyer, JJ.)

BANKRUPTCY §3 > BANKRUPTCY -- PURPOSE OF CODE > Headnote:
LEdHN[2A] [2A] LEdHN[2B] [2B]

The principal purpose of the Bankruptcy Code (11 U.S.C.S. §§ 101 et seq.) is to grant a fresh start to the honest but unfortunate debtor. (Stevens, J., joined by Kennedy, Souter, Ginsburg, and Breyer, JJ.)

[*959]**

APPEAL §1299 > BANKRUPTCY -- BAD FAITH -- SUFFICIENCY OF EVIDENCE -- ASSUMPTION > Headnote:
LEdHN[3A] [3A] LEdHN[3B] [3B] LEdHN[3C] [3C] LEdHN[3D] [3D]

On certiorari to review a Federal Court of Appeals' judgment against an individual debtor in a bankruptcy case, the United States Supreme Court--in considering whether the individual, who had been found to have acted in bad faith, had forfeited the right to convert his case from Chapter 7 of the Bankruptcy Code (11 U.S.C.S. §§ 701 et seq.) to Chapter 13 (11 U.S.C.S. §§ 1301 et seq.)--assumed that the individual had had more income available when he had sought to convert to Chapter 13 than when he had commenced his Chapter 7 case, since the sufficiency of the evidence of bad faith was not at issue. Moreover, in such circumstances, the Supreme Court had no occasion to articulate with precision what conduct qualified as "bad faith" sufficient to permit a bankruptcy judge to dismiss a Chapter 13 case or to deny conversion from Chapter 7. (Stevens, J., joined by Kennedy, Souter, Ginsburg, and Breyer, JJ.)

STATUTES §147.7 > COMMITTEE REPORTS -- BANKRUPTCY > Headnote:
LEdHN[4] [4]

For purposes of determining the extent of an individual's right, under § 706(a) of the Bankruptcy Code (11 U.S.C.S. § 706(a)), to convert a case under Chapter 7 (11 U.S.C.S. §§ 701 et seq.) to Chapter 13 (11 U.S.C.S. §§ 1301 et seq.), the broad description, in some congressional committee reports, of this § 706(a) right as "absolute" failed to give full effect to an express limitation in § 706(d) of the Code (11 U.S.C.S. § 706(d)), which conditioned the individual's right to convert on his ability to qualify as a "debtor" under Chapter 13. (Stevens, J., joined by Kennedy, Souter, Ginsburg, and Breyer, JJ.)

APPEAL §1339.5 > CERTIORARI -- ISSUE NOT CONSIDERED > Headnote:
LEdHN[5A] [5A] LEdHN[5B] [5B]

On certiorari to review a Federal Court of Appeals' judgment against an individual debtor in a bankruptcy case, the United States Supreme Court did not consider whether the individual had failed to meet a debt limit in § 109(e) of the Bankruptcy Code (11 U.S.C.S. § 109(e)), as (1) the bankruptcy judge below had made no such determination on the record before the Supreme Court; and (2) it was not necessary to the Supreme Court's

decision that such a determination be made. (Stevens, J., joined by Kennedy, Souter, Ginsburg, and Breyer, JJ.)

BANKRUPTCY §420.1 > BANKRUPTCY -- CONVERSION TO CHAPTER 13 > Headnote:
LEdHN[6A] [6A] LEdHN[6B] [6B]

For purposes of determining the extent of a debtor's right, under § 706(a) of the Bankruptcy Code (11 U.S.C.S. § 706(a)), to convert a case under Chapter 7 (11 U.S.C.S. §§ 701 et seq.) to some other chapters including Chapter 13 (11 U.S.C.S. §§ 1301 et seq.), the reference in § 706(a) to the unenforceability of a waiver of the right to convert functioned as a consumer-protection provision against adhesion contracts, whereby creditors might be precluded from attempting to prescribe a waiver of the right to convert as a non-negotiable condition of contractual agreements. However, this § 706(a) reference, in protecting a borrower from waiver, was not a shield against forfeiture. (Stevens, J., joined by Kennedy, Souter, Ginsburg, and Breyer, JJ.)

[*960]**

BANKRUPTCY §420.1 > BANKRUPTCY -- CHAPTER 13 PROCEEDINGS > Headnote:
LEdHN[7A] [7A] LEdHN[7B] [7B]

For purposes of determining what conduct qualifies as "bad faith" sufficient to permit a bankruptcy judge to dismiss a case under Chapter 13 of the Bankruptcy Code (11 U.S.C.S. §§ 1301 et seq.) or to deny conversion from Chapter 7 of the Code (11 U.S.C.S. §§ 701 et seq.) to Chapter 13, a debtor's conduct must be atypical. Limiting dismissal or denial of conversion to extraordinary cases is particularly appropriate in light of the fact that lack of good faith in proposing a Chapter 13 plan is an express statutory ground (under § 1325(a)(3) of the Code (11 U.S.C.S. § 1325(a)(3))) for denying plan confirmation. (Stevens, J., joined by Kennedy, Souter, Ginsburg, and Breyer, JJ.)

Syllabus

In filing his petition under Chapter 7 of the Bankruptcy Code, petitioner Marrama misrepresented the value of his Maine property and that he had not transferred it during the preceding year. Respondent DeGiacomo, the trustee of Marrama's estate, stated his intention to recover the Maine property as an estate asset. Thereafter, Marrama sought to convert the proceeding to Chapter 13, but the trustee and respondent bank, Marrama's principal creditor, objected, contending that the request to convert was made in bad faith and would constitute an abuse of the bankruptcy process. The Bankruptcy Judge denied Marrama's request, finding bad faith. **[****2]** Affirming, the First Circuit's Bankruptcy Appellate Panel rejected **[***961]** Marrama's argument that he had an absolute right to convert under § 706(a) of the Bankruptcy Code, which provides that a Chapter 7 debtor "may convert a case" so long as it has not been converted previously, and that a waiver of the right to convert is unenforceable. The First Circuit also rejected that argument, emphasizing, *inter alia,* that a bankruptcy court has the authority to dismiss a Chapter 13 petition based on a debtor's bad faith, and that a first-time motion to convert a Chapter 7 case to Chapter 13 should not be treated differently from the filing of a Chapter 13 petition in the first instance.

Held:

Marrama forfeited his right to proceed under Chapter 13. The broad description of the right to convert as "absolute" in Senate and House Committee Reports fails to give full effect to the express limitation of § 706(d), which provides that "a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter." That text expressly conditioned Marrama's right to convert on his ability to qualify as a Chapter 13 "debtor." Marrama does not **[****3]** qualify as such a debtor under § 1307(c), which provides that a Chapter 13 proceeding may be either dismissed or converted to a Chapter 7 proceeding "for cause." Bankruptcy courts routinely treat dismissal for prepetition bad-faith conduct as implicitly authorized by the words "for cause," and a ruling that an individual's Chapter 13 case should be dismissed or converted to Chapter 7 because of bad faith is tantamount to a ruling that the individual does not qualify as a Chapter 13 debtor. Congress gave "'honest but unfortunate debtor[s],'" Grogan v. Garner, 498 U.S. 279, 287, 111 S. Ct. 654, 112 L. Ed. 2d 755, the chance to repay their debts should they acquire the means to do so, and § 706(a) protects a debtor from being forced to waive that right. However, a provision protecting a borrower from waiver is not a shield against

forfeiture. Neither § 706 nor § 1307(c) limits a court's authority to take appropriate action in response to fraudulent conduct by the atypical litigant who has demonstrated that he is not entitled to the relief available to the typical debtor. On the contrary, bankruptcy judges' broad authority to take necessary or appropriate action "to prevent an abuse of process" described **[****4]** in Code § 105(a) is adequate to authorize an immediate denial of a § 706 motion to convert in lieu of a conversion order that merely postpones the allowance of equivalent relief and may give a debtor an opportunity to take action prejudicial to creditors.

430 F.3d 474, affirmed.

Counsel: David G. Baker argued the cause for petitioner.

G. Eric Brunstad, Jr. argued the cause for respondents.

Lisa S. Blatt argued the cause for the United States, as amicus curiae, by special leave of court.

Judges: Stevens, J., delivered the opinion of the Court, in which Kennedy, Souter, Ginsburg, and Breyer, JJ., joined. Alito, J., filed a dissenting opinion, in which Roberts, C. J., and Scalia and Thomas, JJ., joined, post, p.376.

Opinion by: STEVENS

Opinion

[*367] [1107]** Justice **Stevens** delivered the opinion of the Court.

LEdHN[1A][↑] [1A]LEdHN[2A][↑] [2A] The principal purpose of the Bankruptcy Code is to grant a "'fresh start'" to the "'honest but unfortunate debtor.'" Grogan v. Garner, 498 U.S. 279, 286, 287, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991). Both Chapter 7 and Chapter 13 of the Code permit an insolvent individual to discharge certain **[***962]** unpaid debts toward that end. Chapter 7 authorizes a discharge of prepetition debts following the liquidation of the debtor's assets by a bankruptcy trustee, who then distributes the proceeds to creditors. Chapter 13 authorizes an individual with regular income to obtain a discharge after the successful completion of a payment **[****5]** plan approved by the bankruptcy court. Under Chapter 7 the debtor's nonexempt assets are controlled by the bankruptcy trustee; under Chapter 13 the debtor retains possession of his property. A proceeding that is commenced under Chapter 7 may be converted to a Chapter 13 proceeding and vice versa. 11 U.S.C. §§ 706(a), 1307(a) and (c).

LEdHN[1B][↑] [1B] An issue that has arisen with disturbing frequency is whether a debtor who acts in bad faith prior to, or in the course of, filing a Chapter 13 petition by, for example, fraudulently concealing significant assets, thereby forfeits his right to obtain Chapter 13 relief. The issue may arise at the outset of a Chapter 13 case in response to a motion by creditors or by the United States trustee either to dismiss the case or to convert it to Chapter 7, see § 1307(c). It also may arise in a Chapter 7 case when a debtor files a motion under § 706(a) to convert to Chapter 13. In the former context, despite the absence of any statutory provision specifically addressing the issue, the federal courts are virtually unanimous that prepetition bad-faith conduct may cause a forfeiture of any right to proceed with a Chapter 13 case.[1] In the **[****6] [**1108] [*368]** latter context, however, some courts have suggested that even a bad-faith debtor has an absolute right to convert at least one Chapter 7 proceeding into a Chapter 13 case even though the case will thereafter be dismissed or immediately returned to Chapter 7.[2] We granted certiorari to decide whether the Code mandates that procedural anomaly. *547 U.S. 1191, 126 S. Ct. 2859, 165 L. Ed. 2d 894 (2006)*.

[**7]** I

On March 11, 2003, petitioner, Robert Marrama, filed a voluntary petition under Chapter 7, thereby creating an estate consisting of all his property "wherever located and by whomever held." 11 U.S.C. § 541(a). Respondent Mark DeGiacomo is the trustee of that

---

[1] See, *e.g.*, In re Alt, 305 F.3d 413, 418-419 (CA6 2002); In re Leavitt, 171 F.3d 1219, 1224 (CA9 1999); In re Kestell, 99 F.3d 146, 148 (CA4 1996); In re Molitor, 76 F.3d 218, 220 (CA8 1996); In re Gier, 986 F.2d 1326, 1329-1330 (CA10 1993); In re Love, 957 F.2d 1350, 1354 (CA7 1992); In re Sullivan, 326 B. R. 204, 211 (Bkrtcy. App. Panel CA1 2005)(per curiam).

[2] See, *e.g.*, In re Martin, 880 F.2d 857, 859 (CA5 1989); In re Croston, 313 B. R. 447 (Bkrtcy. App. Panel CA9 2004); In re Miller, 303 B. R. 471 (Bkrtcy. App. Panel CA10 2003).

estate. Respondent Citizens Bank of Massachusetts (hereinafter Bank) is the principal creditor.

In verified schedules attached to his petition, Marrama made a number of statements about his principal asset, a house in Maine, that were misleading or inaccurate. For instance, while he disclosed that he was the sole beneficiary of the trust that owned the property, he listed its value as zero. He also denied that he had transferred any property other than in the ordinary course of business during the year preceding the filing of his petition. Neither statement was true. In fact, the Maine property had substantial value, and Marrama had transferred it into the newly created trust for no consideration seven months prior to filing his Chapter 7 **[***963]** petition. Marrama later admitted that the purpose of the transfer was to protect the property from his creditors.

After Marrama's examination at the meeting of creditors, **[****8]** see *11 U.S.C. § 341*, the trustee advised Marrama's counsel that he intended to recover the Maine property as an asset of the estate. Thereafter, Marrama filed a "Verified Notice **[*369]** of Conversion to Chapter 13." Pursuant to *Federal Rule of Bankruptcy Procedure 1017(f)(2)*, the notice of conversion was treated as a motion to convert, to which both the trustee and the Bank filed objections. Relying primarily on Marrama's attempt to conceal the Maine property from his creditors,[3] the trustee contended that the request to convert was made in bad faith and would constitute an abuse of the bankruptcy process. The Bank opposed the conversion on similar grounds.

LEdHN[1C][1C] *LEdHN[3A]*[3A] **[****9]** At the hearing on the conversion issue, Marrama explained through counsel that his misstatements about the Maine property were attributable to "scrivener's error," that he had originally filed under Chapter 7 rather than Chapter 13 because he was then unemployed, and that he had recently become employed and was therefore eligible **[**1109]** to proceed under Chapter 13.[4] The Bankruptcy Judge rejected these **[*370]** arguments, ruling that there is no "Oops" defense to the concealment of assets and that the facts established a "bad faith" case. App. 34a-35a. The judge denied the request for conversion.

[**10]** Marrama's principal argument on appeal to the Bankruptcy Appellate Panel for the First Circuit[5] was that he had an absolute right to convert his case from Chapter 7 to Chapter 13 under the plain language of *§ 706(a)* of the Code. The panel affirmed the decision of the Bankruptcy Court. It construed *§ 706(a)*, when read in connection with other provisions of the Code and the Bankruptcy Rules, as creating a right to convert a case from Chapter 7 to Chapter 13 that "is absolute only in the absence of extreme **[***964]** circumstances." *In re Marrama, 313 B. R. 525, 531 (2004)*. In concluding that the record disclosed such circumstances, the panel relied on Marrama's failure to describe the transfer of the Maine residence into the revocable trust, his attempt to obtain a homestead exemption on rental property in Massachusetts, and his nondisclosure of an anticipated tax refund.

[**11]** On appeal from the panel, the Court of Appeals for the First Circuit also rejected the argument that *§ 706(a)* gives a Chapter 7 debtor an absolute right to

[3] The trustee also noted that in his original verified schedules Marrama had claimed a property in Gloucester, Mass., as a homestead exemption, see *11 U.S.C. § 522(b)(2)*; *Mass. Gen. Laws, ch. 188, § 1* (West 2005), but testified at the meeting of creditors that he did not reside at the property and was receiving rental income from it, App. 71a-72a. Moreover, when asked at the meeting whether anyone owed him any money, Marrama responded "No," *id.,* at 50a, and in response to a similar question on Schedule B to his petition, which specifically requested a description of any "tax refunds," Marrama indicated that he had "none," Supp. App. 6. In fact, Marrama had filed an amended tax return in July 2002 in which he claimed the right to a refund, and shortly before the hearing on the motion to convert, the Internal Revenue Service informed the trustee that Marrama was entitled to a refund of $8,745.86, App. 30a-31a.

[4] The parties dispute the accuracy of this representation. The trustee's brief notes that Schedule I to Marrama's original petition indicates that he had been employed by a flooring company at the time the case was filed. See Brief for Respondent Mark G. DeGiacomo 10, n 7 (citing Supp. App. 18, 30). Marrama's counsel stated during oral argument, however, that the income listed in Schedule I represented an estimate based on employment that had not yet begun. Tr. of Oral Arg. 24. Since the sufficiency of the evidence of bad faith is not at issue, we may assume that Marrama did have more income available when he sought to convert than when he commenced the Chapter 7 case.

[5] The judicial council of any circuit is authorized by statute to establish a bankruptcy appellate panel service, comprising bankruptcy judges, to hear appeals from the bankruptcy courts with the consent of the parties. See *28 U.S.C. § 158(b)*; *Connecticut Nat. Bank v. Germain, 503 U.S. 249, 252, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992)*. The First Circuit has established this service.

convert to Chapter 13. In addition to emphasizing that the statute uses the word "may" rather than "shall," the court added:

> "In construing subsection 706(a), it is important to bear in mind that the bankruptcy court has unquestioned authority to dismiss a chapter 13 petition--as distinguished from converting the case to chapter 13--based upon a showing of 'bad faith' on the part of the debtor. We can discern neither a theoretical nor a practical reason that Congress would have chosen to treat a first-time **[*371]** motion to convert a chapter 7 case to chapter 13 under subsection 706(a) differently from the filing of a chapter 13 petition in the first instance." In re Marrama, 430 F.3d 474, 479 (2005) (citations omitted).

LEdHN[1D][] [1D] While other Courts of Appeals and Bankruptcy Appellate Panels have refused to recognize any "bad faith" exception to the conversion right created by § 706(a), see n 2, *supra*, we conclude that the courts in this case correctly held that Marrama forfeited his right to proceed under **[****12]** Chapter 13.

II

LEdHN[1E][] [1E]LEdHN[4][] [4] The two provisions of the Bankruptcy Code most relevant to our resolution of the issue are subsections (a) and (d) of 11 U.S.C. § 706, which provide:

> HN1[] "(a) The debtor may convert a case under this chapter to a case under chapter **[**1110]** 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.
>
> HN2[] "(d) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter."

Petitioner contends that subsection (a) creates an unqualified right of conversion. He seeks support from language in both the House and Senate Committee Reports on the provision. The Senate Report stated:

> "Subsection (a) of this section gives the debtor the one-time absolute right of conversion of a liquidation case to a reorganization or individual repayment plan case. If the case has already once been converted from chapter 11 or 13 to chapter 7, then the debtor does not have that right. The policy of the **[****13]** provision is that the debtor **[*372]** should always be given the opportunity to repay his debts, and a waiver of the right to convert a case is unenforceable." S. Rep. No. 95-989, p 94 (1978); see also H. R. Rep. No. 95-595, p 380 (1977) (using nearly identical language).

The Committee Reports' reference to an "absolute right" of conversion is more equivocal than petitioner suggests. **[***965]** Assuming that the described debtor's "opportunity to repay his debts" is a shorthand reference to a right to proceed under Chapter 13, the statement that he should "always" have that right is inconsistent with the earlier recognition that it is only a one-time right that does not survive a previous conversion to, or filing under, Chapter 13. More importantly, the broad description of the right as "absolute" fails to give full effect to the express limitation in subsection (d). The words "unless the debtor may be a debtor under such chapter" expressly conditioned Marrama's right to convert on his ability to qualify as a "debtor" under Chapter 13.

LEdHN[1F][] [1F]LEdHN[2B][] [2B]LEdHN[5A][] [5A] There are at least two possible reasons why Marrama may not qualify as such a debtor, one arising under § 109(e) of the Code, and the other turning on the construction **[****14]** of the word "cause" in § 1307(c). The former provision imposes a limit on the amount of indebtedness that an individual may have in order to qualify for Chapter 13 relief.[6] More pertinently,[7] **[****16]** **[*373]** the latter provision, HN3[

---

[6] Subsection (e) of 11 U.S.C. § 109 provides: "Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $250,000 and noncontingent, liquidated, secured debts of less than $750,000, or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $250,000 and noncontingent, liquidated, secured debts of less than $750,000 may be a debtor under chapter 13 of this title." These dollar limits are subject to adjustment for inflation every three years. See § 104(b).

[7] Marrama initiated a new Chapter 13 case the day after we granted certiorari in the present case. The new case was dismissed on the grounds that, under § 109(e), he was ineligible to be a Chapter 13 debtor. See In re Marrama, 345 B. R. 458, 463-464, and n 10 (Bkrtcy. Ct. Mass. 2006). As the

] § 1307(c), provides that a Chapter 13 proceeding may be either dismissed or converted to a Chapter 7 proceeding "for cause" and includes a nonexclusive list of 10 causes justifying that **[**1111]** relief.[8] None of the specified causes mentions prepetition bad-faith conduct (although paragraph (10) does identify one form of Chapter 7 error--which is necessarily prepetition **[***966]** conduct--that would justify dismissal of a Chapter 13 case).[9] Bankruptcy courts nevertheless routinely treat dismissal for prepetition bad-faith conduct as implicitly authorized by the words "for cause." See n 1, *supra.* In practical effect, a ruling that an individual's **[*374]** Chapter 13 case should be dismissed or converted to Chapter 7 because of prepetition bad-faith conduct, including fraudulent acts committed in an earlier Chapter 7 proceeding, is tantamount to a ruling that the individual does not qualify as a debtor under Chapter 13. That individual, in other words, is not a member of the class **[****15]** of "'honest but unfortunate debtor[s]'" that the bankruptcy laws were enacted to protect. See Grogan v. Garner, 498 U.S., at 287, 111 S. Ct. 654, 112 L. Ed. 2d 755. The text of § 706(d) therefore provides adequate authority for the denial of his motion to convert.

LEdHN[1G][ ] [1G]LEdHN[6A][ ] [6A] **[****17]** HN5[ ] The class of honest but unfortunate debtors who do possess an absolute right to convert their cases from Chapter 7 to Chapter 13 includes the vast majority of the hundreds of thousands of individuals who file Chapter 7 petitions each year.[10] Congress sought to give these individuals the chance to repay their debts should they acquire the means to do so. Moreover, as the Court of Appeals observed, the reference in § 706(a) to the unenforceability of a waiver of the right to convert functions "as a consumer protection provision against adhesion contracts, whereby a debtor's creditors might be precluded from attempting to prescribe a waiver of the debtor's right to convert to chapter 13 as a non-negotiable condition of its contractual agreements." 430 F.3d, at 479.

LEdHN[1H][ ] [1H]LEdHN[3B][ ] [3B]LEdHN[6B][ ] [6B]LEdHN[7A][ ] [7A] **[****18]** A statutory provision protecting a borrower from waiver is not a shield against forfeiture. HN6[ ] Nothing in the text of either § 706 or § 1307(c) (or the legislative history of either provision) limits the authority of the court to take appropriate action in response to fraudulent conduct by the atypical litigant who has demonstrated that he is not entitled to **[*375]** the relief available to the typical debtor.[11] **[****19]** On the contrary, **[**1112]** the broad authority granted to bankruptcy judges to take any action that is necessary or appropriate "to prevent an abuse of process"

Bankruptcy Judge made no such determination on the record before us in this case, and as it is not necessary to our decision that such a determination be made, we do not consider whether Marrama fails to meet the § 109(e) debt limit.

[8] Title 11 U.S.C. § 1307(c) provides, in relevant part: HN4[ ] "Except as provided in subsection (e) of this section, on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including-- "(1) unreasonable delay by the debtor that is prejudicial to creditors; "(2) nonpayment of any fees and charges required under chapter 123 of title 28; "(3) failure to file a plan timely under section 1321 of this title; "(10) only on request of the United States trustee, failure to timely file the information required by paragraph (2) of section 521." Section 521(2), which has since been amended and redesignated as § 521(a)(2), see 119 Stat. 38, imposes a duty on a debtor in a Chapter 7 proceeding to file within a certain time period a statement of intent with respect to the retention or surrender of property being used to secure debts. See 11 U.S.C. § 521(a)(2) (2000 ed. and Supp. V).

[9] Indeed, because § 521(2) by its terms applies only to Chapter 7 debtors, at least one prominent treatise has assumed that this subsection could only apply to a debtor who has converted a case from Chapter 7 to Chapter 13. See 8 Collier on Bankruptcy P1307.04[9] (rev. 15th ed. 2006).

[10] We are advised by the Administrative Office of the United States Courts that 833,148 Chapter 7 cases were filed in fiscal year 2006. Memorandum from Steven R. Schlesinger, Administrative Office of the United States Courts, to Supreme Court Library (Dec. 13, 2006) (available in Clerk of Court's case file).

[11] We have no occasion here to articulate with precision what conduct qualifies as "bad faith" sufficient to permit a bankruptcy judge to dismiss a Chapter 13 case or to deny conversion from Chapter 7. It suffices to emphasize that the debtor's conduct must, in fact, be atypical. Limiting dismissal or denial of conversion to extraordinary cases is particularly appropriate in light of the fact that lack of good faith in proposing a Chapter 13 plan is an express statutory ground for denying plan confirmation. 11 U.S.C. § 1325(a)(3); see In re Love, 957 F.2d, at 1356 ("Because dismissal is harsh . . . the bankruptcy court should be more reluctant to dismiss a petition . . . for lack of good faith than to reject a plan for lack of good faith under Section 1325(a)").

described in § 105(a) of the Code,[12] is surely adequate to authorize an immediate denial of a motion **[***967]** to convert filed under § 706 in lieu of a conversion order that merely postpones the allowance of equivalent relief and may provide a debtor with an opportunity to take action prejudicial to creditors.[13]

[**20]** Indeed, as the Solicitor General has argued in his brief *amicus curiae,* even if § 105(a) had not been enacted, the **[*376]** inherent power of every federal court to sanction "abusive litigation practices," see *Roadway Express, Inc. v. Piper, 447 U.S. 752, 765, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980)*, might well provide an adequate justification for a prompt, rather than a delayed, ruling on an unmeritorious attempt to qualify as a debtor under Chapter 13.

Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

Dissent by: ALITO

Dissent

Justice **Alito**, with whom The **Chief Justice,** Justice **Scalia,** and Justice **Thomas** join, dissenting.

Under the clear terms of the Bankruptcy Code, a debtor who initially files a petition under Chapter 7 has the right to convert the case to another chapter under which the case is eligible to proceed. The Court, however, holds that a debtor's conversion right is conditioned upon a bankruptcy judge's finding of "good faith." Because the imposition of this condition is inconsistent with the Bankruptcy Code, I respectfully dissent.

I

The Bankruptcy Code unambiguously provides that a debtor who has filed a bankruptcy petition under Chapter 7 has a broad right **[****21]** to convert the case to another chapter. Title *11 U.S.C. § 706(a)* states:

> "[A] debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title."

[1113]** The Code restricts a Chapter 7 debtor's conversion right in two--and only two--ways. First, § 706(a) makes clear that the right to convert is available only once: A debtor may convert so long as "the case has not been converted [to Chapter 7] under *section 1112*, *1208*, or *1307* of this title." Second, § 706(d) provides that a debtor wishing to convert to another chapter must meet the conditions that are needed in **[*377]** order to "be a debtor under such chapter." Nothing in § 706(a) or any other provision of the Code suggests that a bankruptcy judge has the discretion to override a debtor's exercise of the § 706(a) conversion right on a ground not set out **[***968]** in the Code. Thus, a straightforward reading of the Code suggests that a Chapter 7 debtor has the right to convert the debtor's case to Chapter 13 (or another chapter) provided that the two express statutory conditions contained in § 706 are satisfied.

[**22]** This reading of the Code is buttressed by the contrast between the terms of § 706 and the language employed in other Code provisions that give bankruptcy judges the discretion to deny conversion requests. As noted, § 706(a) says that a Chapter 7 debtor "may convert" the debtor's case to another chapter. Chapters 11, 12, and 13 contain similar provisions stating that debtors under those chapters "may convert" their cases to other chapters. See §§ 1112(a), *1208(a)*, and *1307(a)* (2000 ed. and Supp. IV). Chapters 11, 12, and 13 also contain separate provisions governing conversion requests by other parties in interest. For example, the applicable provision in Chapter 11 provides:

> "On request of a party in interest and after notice

---

[12] Title *11 U.S.C. § 105(a)* provides: ***HN7***[↑] "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."

[13] Both the Chapter 7 trustee and the United States as *amicus curiae* argue in their briefs that in the interval between the allowance of a motion to convert under § 706(a) and the subsequent granting of a motion to dismiss under § 1307(c), the fact that the debtor would have possession of the property formerly under the control of the trustee would create an opportunity for the debtor to take actions that would impair the rights of creditors. Whether or not that risk is significant, under our understanding of the Code, the debtor's prior misconduct may provide a sufficient justification for a denial of his motion to convert.

and a hearing, *the court may convert* a case under this chapter to a case under chapter 11 of this title at any time." § 706(b) (emphasis added).

See also §§ 1112(b), 1208(b), (d), and 1307(c).

In these sections, parties in interest are not given a right to convert. Rather, parties in interest are authorized to request conversion. And the authority to convert, after notice and a hearing, is expressly left to the discretion of the bankruptcy **[****23]** court, which "may convert" the case if the general standard of "cause" is found to have been met. If the Code had been meant to give a bankruptcy court similar authority when a Chapter 7 debtor wishes to convert, the Code would have used language similar to that in §§ 1112(b), 1208(b), (d), **[*378]** and 1307(c). Congress knew how to limit conversion authority in this way, and it did not do so in § 706(a).

In Chapter 7, Congress did directly address the consequences of the sort of conduct complained of in this case. In § 727(a)(3), Congress specified that a debtor may be denied a discharge of debts if "the debtor has concealed . . . records, and papers, from which the debtor's financial condition or business transactions might be ascertained." The Code further provides that discharge may be denied if the debtor has "made a false oath or account" or "presented or used a false claim." § 727(a)(4). In addition to blocking discharge, Congress could easily have deemed such conduct sufficient to bar conversion to another chapter, but Congress did not do so.

Instead of taking that approach, Congress included in the statutory scheme several express means to redress a debtor's bad faith. First, **[****24]** if a bankruptcy court finds that there is "cause," the court may convert or reconvert a Chapter 11 or Chapter 13 restructuring to a Chapter 7 liquidation. §§ 1112(b), 1307(c). Second, a Chapter 13 debtor must propose a repayment plan to satisfy the debtor's creditors--a plan that is subject to court approval **[**1114]** and must be proposed in good faith. §§ 1325(a)(3), (4); accord, § 1328(b)(2). Third, a debtor's asset schedules are filed under penalty of perjury. 28 U.S.C. § 1746; Fed. Rule Bkrtcy. Proc. 1008. Fourth, a Chapter 13 case is overseen by a trustee who is empowered to investigate the debtor's financial affairs, to furnish information regarding the bankruptcy estate to parties in interest, and to oppose discharge if necessary. 11 U.S.C. §§ 704(4), (6), and (9). **[***969]** See also § 1302(b) (defining the powers of a Chapter 13 trustee in part by reference to the powers of a Chapter 7 trustee). These measures, as opposed to the "good faith" requirement crafted by the Court, represent the Code's strategy for dealing with debtors who engage in the type of abusive tactics that the Court's opinion targets.[1]

[**25]** **[*379]** In sum, the Code expressly gives a debtor who initially files under Chapter 7 the right to convert the case to another chapter so long as the debtor satisfies the requirements of the destination chapter. By contrast, the Code pointedly does not give the bankruptcy courts the authority to deny conversion based on a finding of "bad faith." There is no justification for disregarding the Code's scheme.

II

In reaching the conclusion that a bankruptcy judge may override a Chapter 7 debtor's conversion right based on a finding of "bad faith," the Court reasons as follows. Under § 706(d), a Chapter 7 debtor may not convert to another chapter "unless the debtor may be a debtor under such chapter." Under § 1307(c), a Chapter 13 proceeding may be dismissed or converted to Chapter 7 "for cause." One such "cause" recognized by bankruptcy courts is "bad faith." Therefore, a Chapter 7 debtor who has proceeded in "bad faith" and wishes to convert his or her case to Chapter 13 is not eligible to "be a debtor" under Chapter 13 because the debtor's case would be subject to dismissal or reconversion to Chapter 7 pursuant to § 1307(c). I cannot agree with this strained reading of the Code.

The requirements **[****26]** that must be met in order to "be a debtor" under Chapter 13 are set forth in 11 U.S.C. § 109 (2000 ed. and Supp. V), which is appropriately titled "Who may be a debtor." The two requirements that are specific to Chapter 13 appear in subsection (e). First, Chapter 13 is restricted to individuals, with or without their spouses, with regular income. Second, a debtor may not proceed under Chapter 13 if specified debt limits are exceeded.[2]

---

[1] And as noted above, 11 U.S.C. § 727(a)(4) also addresses such conduct, making it a bar to discharge, but not to conversion.

[2] "Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $307,675 and noncontingent, liquidated, secured debts of less than $922,975, or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the

[**27]** **[*380]** As the Court of Appeals below correctly understood, § 706(d)'s requirement that a debtor may convert only if "the debtor may be a debtor under such chapter" obviously refers to the chapter-specific requirements of § 109. *In re Marrama, 430 F.3d 474, 479, n. 3 (CA1 2005)*.

Rather than reading §§ 109(e) and 706(d) together, the Court puts § 109(e) aside and treats § 706(d) as a separate **[**1115]** repository of additional requirements (namely, the absence of the grounds for dismissal or reconversion under § 1307(c)) that a Chapter 7 debtor must satisfy *before* conversion to Chapter 13. But § 1307(c) plainly does not set out requirements that an individual must meet in order to "be a debtor" under Chapter 13. Instead, **[***970]** § 1307(c) sets out the standard ("cause") that a bankruptcy court must apply in deciding whether, in its discretion, an already filed Chapter 13 case should be dismissed or converted to Chapter 7. Thus, the Court's holding in this case finds no support in the terms of the Bankruptcy Code.

In holding that a bankruptcy judge may deny conversion based on "bad faith," the Court of Appeals appears to have been influenced by the belief that following the literal **[****28]** terms of the Code would be pointless. *Id., at 479-481*. Specifically, the Court of Appeals observed that if a debtor who wishes to convert from Chapter 7 to Chapter 13 has exhibited such "bad faith" that the bankruptcy court would immediately convert the case back to Chapter 7 under § 1307(c), then no purpose would be served by requiring the parties and the court to go through the process of conversion and prompt reconversion. *Id., at 481*.

It is by no means clear, however, that conversion under § 706(a) followed by a reconversion proceeding under § 1307(c) would be an empty exercise. The immediate practical **[*381]** effect of following the statutory scheme is compliance with *Bankruptcy Rule 1017(f)*, which applies *Bankruptcy Rule 9014* to the reconversion. *Fed. Rule Bkrtcy. Proc. 1017(f)(1)*. *Rule 9014(a)*, in turn, requires that the request be made by motion and that "reasonable notice and opportunity for hearing . . . be afforded the party against whom relief is sought." The Court's decision circumvents this process and forecloses the right that a Chapter 13 debtor would otherwise possess to file a Chapter 13 repayment and reorganization plan, *11 U.S.C. § 1321*, **[****29]** which must be filed in good faith and which must demonstrate that creditors will receive no less than they would under an immediate Chapter 7 liquidation, §§ 1325(a)(3) and (4); accord, § 1328(b)(2). While the plan must be filed no later than 15 days after filing the petition or conversion, the debtor may file the plan at the time of conversion, *i.e.,* before the reconversion hearing. *Fed. Rule Bkrtcy. Proc. 3015(b)*.

Moreover, it is not clear whether, in converting a case "for cause" under § 1307(c), a bankruptcy court must consider the debtor's plan (if already filed) and, if the plan must be considered, whether the court must take into account whether the plan was filed in good faith, whether it honestly discloses the debtor's assets, whether it demonstrates that creditors would in fact fare better under the plan than under a liquidation, and whether the plan in some sense "cures" prior bad faith. Today's opinion renders these questions academic, and little is left to guide what a bankruptcy court must consider, or may disregard, in blocking a § 706(a) conversion.[3]

[**30]** The Court notes that the Bankruptcy Code is intended to give a ""fresh start"" to the ""honest but unfortunate debtor." " *Ante, at 367, 374, 166 L. Ed. 2d, at 961, 966* (quoting *Grogan v. Garner, 498 U.S. 279, 286, 287, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991)*). But compliance with the statutory scheme--conversion to Chapter 13 followed by notice **[*382]** and a hearing on the question of reconversion-- **[**1116]** would at least provide some structure to the process of identifying those debtors **[***971]** whose "'bad faith'" meets the Court's standard for consignment to liquidation, *i.e.,* "'bad faith'" conduct that is "atypical" and "extraordinary." *Ante, at 375, n 11, 166 L. Ed. 2d, at 966*.

III

Finally, the Court notes two alternative bases for its holding. First, the Court points to *11 U.S.C. § 105(a)*, which governs a bankruptcy court's general powers.[4]

---

date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $307,675 and noncontingent, liquidated, secured debts of less than $922,975 may be a debtor under chapter 13 of this title." § 109(e) (footnote omitted).

[3] Indeed, the only procedural guidance for such a situation is *Federal Rule of Bankruptcy Procedure 1017(f)(2)*, which requires the filing of a motion to convert by the debtor and service thereof.

[4] "The court may issue any order, process, or judgment that is

Second, the Court suggests that even without a textual basis, a bankruptcy court's inherent power may empower it to deny a § 706(a) conversion request for bad faith. Obviously, however, neither of these sources of authority authorizes a bankruptcy court to contravene the Code. On the contrary, a bankruptcy court's general and equitable powers "must and can only be exercised within **[****31]** the confines of the Bankruptcy Code." Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206, 108 S. Ct. 963, 99 L. Ed. 2d 169 (1988); accord, SEC v. United States Realty & Improvement Co., 310 U.S. 434, 455, 60 S. Ct. 1044, 84 L. Ed. 1293 (1940) ("A bankruptcy court . . . is guided by equitable doctrines and principles except in so far as they are inconsistent with the Act").

Ultimately, § 105(a) and a bankruptcy court's inherent powers may have a role to play in a case such as this. The problem the Court identifies is a real one. A debtor who is convinced that he or she can successfully conceal assets **[****32]** has a significant incentive to pursue Chapter 7 liquidation in lieu of a Chapter 13 restructuring. If successful, the debtor preserves wealth; if unsuccessful, the debtor can convert to Chapter 13 and land largely where the debtor would have **[*383]** been if he or she had fully disclosed all assets and proceeded in Chapter 13 in the first instance.

Bankruptcy courts have used their statutory and equitable authority to craft various remedies for a range of bad faith conduct: requiring accountings or reporting of assets;[5] **[****33]** enjoining debtors from alienating estate property;[6] penalizing counsel;[7] assessing costs and fees;[8] or holding the debtor **[***972]** in contempt.[9] But **[**1117]** whatever steps a bankruptcy court may take pursuant to § 105(a) or its general equitable powers, a bankruptcy court cannot contravene the provisions of the Code.

[**34]** Because the provisions of the Code rule out the procedure that was followed in this case by the Bankruptcy Court, I would reverse the judgment of the Court of Appeals.

References

11 U.S.C.S. §§ 105(a), 706, 1307(c)

2 Collier on Bankruptcy, 15th Edition Revised PP 105.01, 105.04 (Matthew Bender)

6 Collier on Bankruptcy, 15th Edition Revised PP 706.01, 706.02, 706.05 (Matthew Bender)

8 Collier on Bankruptcy, 15th Edition Revised PP 1307.01, 1307.04 (Matthew Bender)

1 Collier Bankruptcy Manual, 3d Edition Revised PP 105.01, 105.04 (Matthew Bender)

2 Collier Bankruptcy Manual, 3d Edition Revised PP 706.01, 706.02, 706.05 Matthew Bender)

3 Collier Bankruptcy Manual, 3d Edition Revised PP

---

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." § 105(a).

[5] See, *e.g.*, In re All Denominational New Church, 268 B. R. 536 (Bkrtcy. App. Panel CA8 2001) (affirming dismissal for failure to comply with required monthly reporting); In re Martin's Aquarium, Inc., 225 B. R. 868, 880 (Bkrtcy. Ct. E D Pa. 1998) ("[A] debtor may, in an appropriate case, be required to produce an accounting, and . . . a bankruptcy court does indeed have the power to so order [this equitable remedy]").

[6] See, *e.g.*, In re Bartmann, 320 B. R. 725, 732-733 (Bkrtcy. Ct. N D Okla. 2004); In re Newport Creamery, Inc., 293 B. R. 293 (Bkrtcy. Ct. R I 2003); In re Peklo, 201 B. R. 331 (Bkrtcy Ct. Conn. 1996).

[7] See, *e.g.*, In re Everly, 346 B. R. 791, 797 (Bkrtcy. App. Panel CA8 2006) (bankruptcy court's § 105 powers include authority to sanction counsel); In re Brooks-Hamilton, 329 B. R. 270 (Bkrtcy. App. Panel CA9 2005) (upholding sanction and suspension of debtor's counsel); In re Washington, 297 B. R. 662 (Bkrtcy. Ct. S D Fla. 2003).

[8] See, *e.g.*, In re Deville, 280 B. R. 483 (Bkrtcy. App. Panel CA9 2002); In re Johnson, 336 B. R. 568, 573 (Bkrtcy. Ct. S D Fla. 2006); In re Couch-Russell, No. 00-02226, 2003 Bankr. LEXIS 2260, 2003 WL 25273863 (Bkrtcy. Ct. Idaho Apr. 2, 2003); In re Gorshtein, 285 B. R. 118 (Bkrtcy. Ct. S D N Y 2002).

[9] See, *e.g.*, In re Sekendur, 334 B. R. 609 (Bkrtcy. Ct. N D Ill. 2005) (imposing contempt sanction for serial and vexatious bankruptcy filing); In re Tolbert, 258 B. R. 387 (Bkrtcy. Ct. W D Mo. 2001) (same); In re Swanson, 207 B. R. 76 (Bkrtcy. Ct. N J 1997) (imposing civil contempt under § 105 for failure to vacate property).

1307.01, 1307.04 (Matthew Bender)

2 *Collier Bankruptcy Practice Guide PP 37.04*, *37.06*, *37.09*, *37.32* (Matthew Bender)

L Ed Digest, Bankruptcy § 420.1

L Ed Index, Bankruptcy

End of Document

Faculty

Jenny L. Doling is the founding member of J. Doling Law, PC in Palm Desert, Calif., which serves Reno, Nev., Las Vegas and Southern California. She represents creditors, trustees, and consumer and business debtors and family farmers in chapter 7, 11, 12 and 13 bankruptcy and insolvency matters, and bankruptcy-related appeals. She is a California State Bar Certified Bankruptcy Specialist. Ms. Doling is an active member of the bankruptcy bar. She is the secretary and a member of the board of directors of the National Association of Consumer Bankruptcy Attorneys (NACBA), and she is the current vice president and a member of the board of directors of the San Diego Bankruptcy Forum, as well as a past president of the Inland Empire Bankruptcy Forum. Ms. Doling is a frequent speaker on bankruptcy and law practice management topics for NACBA, the National Conference of Bankruptcy Judges (NCBJ), the National Association of Chapter Thirteen Trustees (NACTT), ABI and the California Bankruptcy Forum (CBF). In addition, she has been the professor of bankruptcy law at the California Desert Trial Academy (CDTA) since 2015, and she serves on the Central District of California Bar Advisory Committee, meeting quarterly with the Central District of California bankruptcy judges. In 2023, Chief Justice John G. Roberts of the U.S. Supreme Court appointed Ms. Doling to serve a three-year term on the Judicial Conference Bankruptcy Rules Committee. She is admitted to practice in all state and federal courts in California and Nevada, and before the U.S. Ninth and Tenth Circuit Courts of Appeals. Ms. Doling was a member of the Desert Defenders Conflict Panel for Riverside County, representing indigent clients in misdemeanor cases under the Conflict Panel for nearly 10 years. She received her B.A. in criminal justice and her J.D. from California Western School of Law in San Diego in 1999, where she received an Academic Achievement Award in Bankruptcy and was also honored with an Award for Excellence from the *American Bankruptcy Law Journal*.

Dianne C. Kerns is the standing Chapter 13 Trustee for Southern Arizona in Tucson, appointed in 1996. She is a member of the Trustee Education Network Board and the Arizona Local Rules Advisory Committee. Ms. Kerns has served on the National Association of Chapter 13 Trustees Board of Directors and the Arizona Trial Court Appointments Commission, and she chaired the Arizona Taskforce for the Mortgage Modification Mediation Program implemented in 2017. She is an alumnus of the Arizona Bankruptcy American Inn of Court and is a frequent writer and speaker on consumer bankruptcy issues. Ms. Kerns received her Bachelor's degree in accounting *summa cum laude* in 1984 from Arizona State University, and her J.D. *magna cum laude* in 1987 from Arizona State University College of Law.

Jen Lee is chief disruptor and founder of Lawyer Success Network in San Francisco, as well as founder of Jen Lee Law, Inc. Formerly a bankruptcy attorney, she helps lawyers and professional service providers break free from traditional business models through the development of innovative products, services and strategies. Ms. Lee consults with bankruptcy attorneys on legal and business strategies, including speaking on substantive bankruptcy topics for bar associations, private firms and trade organizations. She also often speaks on business-management topics, such as charging for consultations, law firm design, networking skills and reaching more clients through service design. Ms. Lee received her B.S. in business management from Empire State College, her M.B.A. in global management from the University of Phoenix, and her J.D. from the University of Richmond School of Law.