



AMERICAN
BANKRUPTCY
INSTITUTE

Southeast Bankruptcy Workshop

Consumer Session

Conversions in Chapters 13 and 7

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CONVERSIONS IN CHAPTER 7 & 13



Panelists:

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Moderator: Nancy J. Whaley Standing Chapter 12 and 13 Trustee (Northern District of Georgia)

AGENDA

Conversions from 7 to 13

Conversions from 13 to 7

Creditor Actions

Debtor Actions

Post-Petition Appreciation



2023 SOUTHEAST BANKRUPTCY WORKSHOP

CONVERSION FROM 7 TO 13

DEBTOR FILES FOR CHAPTER 7. DEBTOR IS MARRIED BUT HER HUSBAND DID NOT FILE. HER SCHEDULES REFLECT THE FOLLOWING:

SCHEDULE A/B – HOME WITH VALUE OF \$800,000. ANSWER TO ITEM 28 – NO TAX REFUNDS OWED TO HER ARE LISTED.

SCHEDULE D – MORTGAGE ON PROPERTY OF \$450,000

SCHEDULE C – EXEMPTION OF \$67,000 ON HOME

SCHEDULE E – IRS DEBT OF \$150,000

SCHEDULE F – \$50,000 (CREDIT CARD AND JUDGMENT ON A LAWSUIT)

SCHEDULE I – SPOUSE IS ACCOUNTANT WITH INCOME OF \$8,000 PER MONTH. DEBTOR IS AN ENTREPRENEUR WHO EMBROIDERS T-SHIRTS AND MAKES AN AVERAGE OF \$800 A MONTH.

AT THE § 341 MEETING, WHEN QUESTIONED ABOUT THE IRS DEBT, DEBTOR TESTIFIED SHE HAD RECENTLY FOUND OUT ABOUT A YEAR PRIOR TO THE FILING THAT HER HUSBAND HAD NOT BEEN FILING THEIR JOINT TAX RETURNS, SO SHE ENDED UP FILING HER OWN TAX RETURNS FOR THE PAST TWO YEARS, CLAIMING HER CHILDREN AS DEPENDENTS. SHE VOLUNTARILY, AND WITHOUT ANY PROMPTING FROM THE TRUSTEE, DISCLOSED THAT SHE HAD RECEIVED ABOUT \$30,000 IN TAX REFUNDS – MOST OF IT WAS RECEIVED POST-PETITION, BUT SOME OF IT COULD HAVE BEEN PREPETITION. SHE FURTHER EXPLAINED THE \$150,000 IN TAX DEBT IS REALLY THE NON-FILING SPOUSE'S DEBT AND THAT THE \$30,000 IN TAX REFUNDS WOULD GO TO PAY THE DEBT. SHE ALSO TESTIFIED THAT SHE HAD INTENDED TO FILE CHAPTER 13, BUT HER ATTORNEY COUNSELED HER TO FILE A CHAPTER 7 AND THAT SHE LISTED THE \$150,000 IN IRS DEBT ON COUNSEL'S ADVICE, DESPITE BEING HER HUSBAND'S DEBT.

DEBTOR FILED MOTION TO CONVERT HER CASE FROM CHAPTER 7 TO CHAPTER 13, AND THE CHAPTER 7 TRUSTEE OBJECTED, ARGUING THAT DEBTOR FILED THE MOTION IN BAD FAITH IN THAT SHE HAD FILED UNTRUTHFUL SCHEDULES, AND THAT THE CASE WOULD BE SUBJECT TO IMMEDIATE CONVERSION BACK TO CHAPTER 7 FOR BAD FAITH BUT ALSO BECAUSE SHE DID NOT HAVE SUFFICIENT INCOME TO FUND THE PLAN.

AT TRIAL, DEBTOR APPEARED FLUSTERED AND EMOTIONAL, AND THE TESTIMONY WAS, AT TIMES, EQUIVOCAL AS SHE APPEARED FINANCIALLY NAÏVE AND CONFUSED REGARDING HER BANKRUPTCY SCHEDULES AND HER PERSONAL FINANCES. BASED ON HER TESTIMONY, IT APPEARED SHE WAS NOT PROPERLY COUNSELED BUT ADMITTED TO REVIEWING AND SIGNING THE SCHEDULES.

WHO CARRIES THE BURDEN OF PROOF?

WHAT DO YOU DO AS CREDITOR'S COUNSEL FOR MAIN CREDITOR? IF THE CASE IS CONVERTED, WHAT STEPS CAN YOU TAKE?

WHAT DO YOU DO AS DEBTOR'S COUNSEL?

WHAT DO YOU DO AS CHAPTER 7 TRUSTEE?

IF CONVERSION IS ALLOWED, WHAT STEPS CAN BE TAKEN TO ENSURE THAT THE DEBTOR DOES NOT DISSIPATE ASSETS BEFORE POSSIBLE RECONVERSION TO CHAPTER 7

SEE IN RE BRADLEY, 649 B.R. 693 (BANKR. D.S.C. 2023).

DEBTOR'S DISMISSAL OF CHAPTER 13

ON THREE SEPARATE OCCASIONS, MR. JONES SOUGHT CHAPTER 13 RELIEF SHORTLY BEFORE A SCHEDULED FORECLOSE SALE OF HIS HOME—THUS PREVENTING THE SALE—AND THEN MOVED FOR DISMISSAL OF THE CASES SHORTLY AFTERWARD. GETTING TIRED OF MR. JONES' TACTICS TO STALL THE FORECLOSURE PROCEEDINGS, SWIFT BANK FINALLY DECIDES TO DO SOMETHING. IN THE THIRD CASE, SWIFT BANK BRINGS A MOTION TO VACATE THE BANKRUPTCY COURT'S ORDER DISMISSING MR. JONES' RECENT BANKRUPTCY CASE, AND THE BANKRUPTCY COURT GRANTED THE MOTION, REINSTATED THE CHAPTER 13 CASE AND PROSPECTIVELY LIFTED THE AUTOMATIC STAY FOR A PERIOD OF TWO YEARS.

WHAT SHOULD DEBTOR'S COUNSEL DO?

WHAT SHOULD SWIFT BANK HAVE DONE TO PREVENT GETTING TO THIS POINT?

HOW WOULD THE OUTCOME HAVE BEEN DIFFERENT IF SWIFT BANK HAD BROUGHT A MOTION TO CONVERT PRIOR TO DEBTOR'S THIRD MOTION TO DISMISS?

SEE SMITH V. U.S. BANK NAT'L ASS'N (IN RE SMITH), 999 F.3D 452 (6TH CIR. 2021); IN RE NICHOLS, 10 F.4TH 956 (9TH CIR. 2021).

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DEBTOR'S DISMISSAL OF CHAPTER 13

ACE CONSTRUCTION, INC. ("ACE") PREVIOUSLY EMPLOYED MR. SMITH. A COUPLE OF YEARS AGO, ACE SUED MR. SMITH FOR BREACH OF NON-COMPETE AND NON-DISCLOSURE COVENANTS IN HIS EMPLOYMENT CONTRACT AND MISAPPROPRIATION OF TRADE SECRETS. FOLLOWING ARBITRATION, THE STATE COURT ENTERED JUDGMENT AGAINST MR. SMITH IN THE AMOUNT OF \$800,000.00.

MR. SMITH FILED A CHAPTER 13 PETITION. HIS SCHEDULES REFLECT:

SCHEDULE D: SECURED DEBT OF \$2,200,000.00 (INCLUDING THE \$800,000.00 JUDGMENT OWED TO ACE)

SCHEDULE E: \$300,000.00 OWED TO IRS

SCHEDULE F: \$200,000.00.

- + ACE COMMENCED AN ADVERSARY COMPLAINT SEEKING TO HAVE ITS DEBT DECLARED NON-DISCHARGEABLE UNDER § 523(A)(4) AND (6). IT BECAME CLEAR THAT THE AMOUNT OF DEBT ON SCHEDULE F WAS INACCURATE AND UNDERSTATED AND THAT WHEN ADDING ALL THE UNSECURED DEBT, IT TOTALED \$265,000.00 – BRINGING THE TOTAL AMOUNT OF THE DEBT ABOVE THE LIMIT FOR CHAPTER 13S.
-

MR. SMITH HAD ENOUGH WITH THE BANKRUPTCY LITIGATION AND FILED A MOTION TO DISMISS CHAPTER 13.

WHAT SHOULD ACE DO?

DOES INELIGIBILITY TO BE A CHAPTER 13 DEBTOR UNDER § 109(E) DEPRIVE DEBTOR OF HIS RIGHT TO DISMISS THE BANKRUPTCY CASE UNDER § 1307(B)?

SEE IN RE POWELL, 644 B.R. 181 (B.A.P. 9TH CIR. 2022). BUT SEE IN RE LETTERESE, 397 B.R. 507 (BANKR. S.D. FLA. 2008).

CONVERSION OF CHAPTER 13 TO 7

MR. JONES AND SWIFT CORP. HAD ENGAGED IN A BUSINESS DEAL THAT RESULTED IN A LAWSUIT IN STATE COURT. THE TRIAL COURT SIDED WITH SWIFT CORP. AND DIRECTED MR. JONES TO PAY SWIFT CORP. \$10 MILLION AND ORDERED MR. SMITH TO DEPOSIT THE FUNDS IN THE COURT REGISTRY WITHIN 5 DAYS. THE FUNDS WERE NOT DEPOSITED; ACCORDINGLY, THE STATE COURT SET A CONTEMPT HEARING FOR JULY 1ST TO DETERMINE SANCTIONS TO BE IMPOSED ON MR. SMITH. ON JUNE 30TH AT 11:50 P.M., MR. SMITH FILES A PETITION FOR CHAPTER 13 BANKRUPTCY. THE FOLLOWING DAY, SWIFT CORP. FILES AN EMERGENCY MOTION TO CONVERT THE CASE TO CHAPTER 7 ON THE GROUNDS THAT MR. SMITH FILED THE PETITION IN BAD FAITH. THE DEBTOR FILED AN OBJECTION BASICALLY ARGUING THAT IF THE CASE CANNOT CONTINUE IN CHAPTER 13, THEN THE CASE SHOULD BE DISMISSED. AT THE HEARING, DEBTOR'S COUNSEL AGAIN STATES THAT "IF THE CASE CANNOT PROCEED IN CHAPTER 13, THEN IT NEEDS TO BE DISMISSED – NOT CONVERTED". NO REFERENCE TO § 1307(B) WAS MADE.

CAN THE CASE BE DISMISSED GIVEN THE FACT THAT THE REQUEST FOR DISMISSAL WAS MADE AFTER A MOTION TO CONVERT WAS FILED AND § 1307(B) WAS NOT CITED IN THE RESPONSE OR REFERENCED AT THE HEARING?

SEE COLBURN V. REAVES, NO. CV-21-01630, 2022 WL 3754721 (D. ARIZ. AUG. 30, 2022).

2023 SOUTHEAST BANKRUPTCY WORKSHOP

CONVERSION OF CHAPTER 13 TO 7 POST PETITION APPRECIATION OF ASSET

DR. FERGUSON IS AN UNMARRIED PLASTIC SURGEON AND IS KNOWN TO MANY AS THE "ROCKIN' DOC" FOR HIS PARTYING REPUTATION. HE HAS INCURRED MASSIVE UNSECURED DEBT OBLIGATIONS WOODING POTENTIAL SUITORS, LAVISHING THEM WITH LUXURY GIFTS AND EXTRAORDINARY VACATIONS. DR. FERGUSON HAS ALSO INCURRED UNSECURED PRIORITY DEBT FOR UNPAID TAXES, AS HE WOULD MUCH RATHER SPEND HIS MONEY PARTYING THAN PAYING THE IRS.

DUE TO HIS INCOME AND TO DEAL WITH HIS TAX DEBT, DR. FERGUSON FILES A CHAPTER 13. HIS SCHEDULES REFLECT THE FOLLOWING:

SCHEDULE A/B – RESIDENCE WITH A VALUE OF \$750,000.00. (THE SCHEDULE NOTES THAT THE HOME HAS A LEAKY ROOF DUE TO STORM DAMAGE AND IS IN NEED OF A NEW HVAC SYSTEM, AS THE CURRENT SYSTEM NO LONGER WORKS.); LEASED VEHICLE; 401K WITH A VALUE OF \$125,000.00; AND HOUSEHOLD GOODS WITH A VALUE OF \$5,000.00.
SCHEDULE D – MORTGAGE ON THE PROPERTY OF \$700,000.00.
SCHEDULE C – EXEMPTION OF \$35,000.00 ON THE RESIDENCE.
SCHEDULE E – IRS DEBT OF \$50,000.00
SCHEDULE F – UNSECURED DEBT OBLIGATIONS OF \$250,000.00

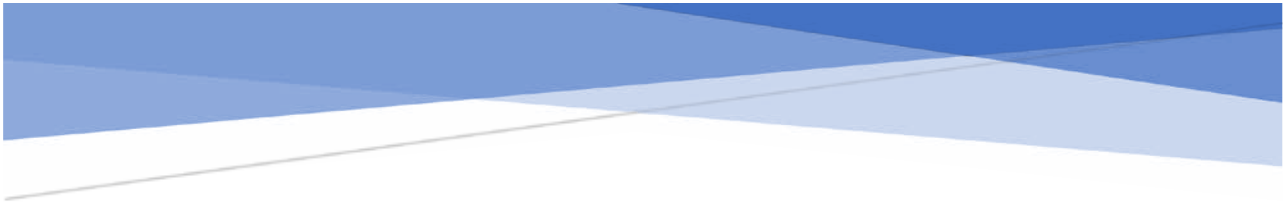
UNFORTUNATELY, THE ROCKIN' DOC'S PARTYING WAYS HAVE CAUGHT UP WITH HIM AND DR. FERGUSON'S MEDICAL LICENSE HAS BEEN SUSPENDED. AND WHILE DR. FERGUSON IS STILL EMPLOYED HIS WAGES HAVE DECREASED SUBSTANTIALLY SUCH THAT HE CAN NO LONGER AFFORD HIS CHAPTER 13 PLAN PAYMENT, WHICH IS A 100% PAY PLAN.

DR. FERGUSON IS IN HIS THIRD YEAR OF A FIVE YEAR PLAN. HIS MORTGAGE BALANCE HAS DECREASED, POST-PETITION, THROUGH PAYMENTS BY DR. FERGUSON. THE CURRENT BALANCE IS \$650,000.00. DR. FERGUSON, POST-PETITION, REPLACED THE ROOF ON THE HOME, INSTALLED TWO NEW HVAC SYSTEMS, AND REPLACED ALL WINDOWS IN THE HOME. IT IS ESTIMATED THAT THESE REPAIRS/IMPROVEMENTS INCREASED THE VALUE OF THE HOME BY \$50,000.00. ADDITIONALLY REAL ESTATE VALUES IN DR. FERGUSON'S NEIGHBORHOOD ARE AT AN ALL-TIME HIGH. INVENTORY IS LOW, PRICES ARE HIGH, AND MOST HOMES FOR SALE ARE UNDER CONTRACT WITHIN 24 HOURS OF LISTING. IN ADDITION, OF THE LAST 5 HOMES THAT HAVE SOLD IN THE LAST 2 YEARS, HAVE SOLD ABOVE ASKING PRICE. IT IS ESTIMATED THAT THE CURRENT VALUE OF DR. FERGUSON'S HOME IS \$900,000.00.

**IF DR. FERGUSON CONVERTS HIS CHAPTER 13 TO A CHAPTER 7, WHO GETS THE APPRECIATION IN VALUE OF THE HOUSE?
WHAT DO YOU DO AS A CHAPTER 7 TRUSTEE?
WHAT DO YOU DO AS DEBTOR'S COUNSEL?**

IN RE GOINS, 539 B.R. 510 (BANKR. E.D. VA. 2015)
IN RE CASTLEMAN, 2022 WL 2392058 (W.D. WA. JULY 1, 2022) (ON APPEAL TO 9TH CIRCUIT)
COSLOW V. REISZ, 811 F. APP'X 980 (6TH CIR. 2020)
POTTER V. DREWES (IN RE POTTER), 228 B.R. 422 (B.A.P. 8TH CIR. 1999)
IN RE BARRERA, 22 F.4TH 1217 (10TH CIR. 2022) – FULL CASE NAME
IN RE COFER, 625 B.R. 194 (BANKR. D. IDAHO 2021)
IN RE PEREZ, 345 B.R. 137 (D. DEL. 2006)

THANK YOU



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Conversions in Chapters 13 and 7

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S.C.) | Charleston

Moderator: **Nancy J. Whaley** Standing Chapter 12 and
13 Trustee (Northern District of Georgia)

Materials By:

Hon. Elisabetta G. M. Gasparini
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and

Brian R. Anderson Fox Rothschild LLP | Greensboro, NC

Samantha K. Brumbaugh Ivey, McClellan, Siegmund, Brumbaugh & McDonough,
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CONVERSION FROM CHAPTER 7 TO CHAPTER 13

11 U.S.C. § 706

- Debtor requesting conversion to chapter 11, 12, or 13 (§ 706(a))
 - Permissible – no absolute right – *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007); “if the case has not been converted under section 1112, 1208, or 1307.”
 - Any waiver of the right to convert a case under § 706(a) is unenforceable.
- Party in interest requesting conversion to chapter 11 (§ 706(b))
 - Permissible – no absolute right.
 - Permissible even if a case has previously been converted to Chapter 7.
- Party in interest requesting conversion to chapter 12 or 13 (§ 706(c))
 - Not permissible “unless the debtor requests or consents to such conversion”
- Note: Conversion to another chapter is not allowed unless the debtor may be a debtor under such chapter (§ 706(d)). *See In re Nikoloutsos*, 199 F.3d 233 (5th Cir. 2000) (holding that conversion to Chapter 13, under which debtor was ineligible, and subsequent confirmation of plan were fraudulently obtained and subject to revocation).

BASES TO OBJECT TO CONVERSION FROM CHAPTER 7 TO 13

1. Case previously converted.
2. Lack of good faith.
3. Ineligibility – 11 U.S.C. § 706(d).

CONVERSION FROM CHAPTER 7 TO CHAPTER 13
CASE PREVIOUSLY CONVERTED

What does it mean that the debtor may convert the case “if the case has not been converted under section 1112, 1209 or 1307”?

- Some courts treat that as an absolute bar and hold that it cannot be reconverted if it was the subject of a prior conversion. *See In re Andrews*, 613 B.R. 896 (Bankr. E.D. Mich. 2020); *In re Muth*, 378 B.R. 302 (Bankr. D. Col. 2007); *In re Hardin*, 301 B.R. 298 (Bankr. C.D. Ill. 2003); *In re Baker*, 389 B.R. 764 (Bankr. M.D. Ala. 2003).
- Other courts have held that conversion from a prior chapter does not bar reconversion. *See In re Sherman*, 600 B.R. 453, 456 (Bankr. D.N.M. 2019); *Povah v. Hansbury and Finn, Inc. (In re Povah)*, 455 B.R. 328 (Bankr. D. Mass. 2011); *In re Anderson*, 354 B.R. 766 (Bankr. D.S.C. 2006); *In re Manouchehri*, 320 B.R. 880 (Bankr. N.D. Ohio 2004); *In re Frazier*, No. 17-01324, 2019 WL 4732377 (Bankr. N.D. Iowa Sept. 26, 2019).

CONVERSION FROM CHAPTER 7 TO CHAPTER 13
LACK OF GOOD FAITH AND INELIGIBILITY

***MARRAMA v. CITIZENS BANK OF MASS.*, 549 U.S. 365 (2007)**

Facts

- Chapter 7 debtor made two significant false statements in his schedules and statements:
 - a. Statement in the SOFA that he had not made any transfers of property during the year prior to the petition date. In reality, he had transferred a home to a trust he created right before the bankruptcy in which he was the sole beneficiary.
 - b. He disclosed his interest in the trust but listed its value in the schedules at \$0.
- Trustee intended to revoke the trust and recover the home as estate property.
- Debtor filed notice of conversion to Chapter 13 pursuant to § 706(a). Trustee and creditor objected. The lower courts denied conversion.

Issue

Whether a Chapter 7 debtor has an absolute right to convert their case to Chapter 13 when the case would be subject to dismissal or reconversion on bad faith grounds. Said differently, must a bankruptcy court go through the drill of converting a Chapter 7 case to Chapter 13 when reconversion appears to be inevitable?

Holding

The Supreme Court, in a 5-4 opinion, affirmed lower courts and concluded that the drill was unnecessary, and denial of conversion was warranted:

- Debtor’s right to convert is limited by § 706(d) – “[n]otwithstanding any other provision of this section, a case may not be converted to a case under another chapter . . . unless the debtor may be a debtor under such chapter.”
Section 706(d) limits conversion if:
 - Debtor is not eligible for Chapter 13 under the limits of § 109(e)
 - Debtor could be subject, once in Chapter 13, to reconversion or dismissal pursuant to § 1307(c) for “cause” – including bad faith.
- Section 105(a) – prevents abuse of process; prevents possibility that a debtor could gain control of assets upon conversion to Chapter 13 and dissipate them before the case could be reconverted to Chapter 7. *But see Law v. Siegel*, 134 S. Ct. 1188 (2014).

**CONVERSION FROM CHAPTER 7 TO CHAPTER 13
UNRESOLVED ISSUES IN *MARRAMA***

- What constitutes “lack of good faith”? *See Marrama*, 549 U.S. 365, 374 n.1 (2007) “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.”
- Must a bankruptcy court consider the debtor’s plan (if one is on file) or debtor’s ability to confirm a plan? *See* Justice Alito’s dissent in *Marrama*.
 - *See In re Bradley*, 649 B.R. 693 (Bankr. D.S.C. 2023); *In re Kuhn*, 322 B.R. 377 (Bankr. N.D. Ind. 2005); *In re Dugger*, No. 6:16-bk-04010-CCJ, 2017 WL 11569067 (Bankr. M.D. Fla. Mar. 13, 2017).

CONVERSION FROM CHAPTER 7 TO CHAPTER 13
BURDEN OF PROOF

- **Debtor** bears the initial burden of making a prima facie case for conversion by demonstrating:
 - No prior conversion
 - Eligibility under § 109
 - Conversion is to achieve a purpose permitted under the proposed chapter.
- Burden then shifts to **objecting party** to demonstrate Debtor is not eligible under *Marrama*.
- Burden may shift back to **Debtor** to demonstrate that conversion is warranted, in good faith, and in the best interest of creditors.

See In re Broad Creek Edgewater, LP, 371 B.R. 752 (Bankr. D.S.C. 2007); *In re George Love Farming, LC*, 366 B.R. 170, 179 (Bankr. D. Utah 2007).

DISMISSAL OF CHAPTER 7 CASES
11 U.S.C. § 707

- Debtor or party in interest requesting dismissal.
 - Permissible – no absolute right. Most cases require “cause” for dismissal even if sought by a debtor. *See In re Fleurantin*, 420 Fed. Appx. 194 (3rd Cir. 2011); *Smith v. Geltzer (In re Smith)*, 507 F.3d 64 (2d Cir. 2007); *Dionne v. Simmons (In re Simmons)*, 200 F.3d 738 (11th Cir. 2000); *Sicherman v. Cohara (In re Cohara)*, 324 B.R. 24, 27 (B.A.P. 6th Cir. 2005); *Bartee v. Ainsworth (In re Bartee)*, 317 B.R. 362, 366 (B.A.P. 9th Cir. 2004); *Turpen v. Eide (In re Turpen)*, 244 B.R. 431, 434 (B.A.P. 8th Cir. 2000); *In re Leonard*, No. 21-01299-HB, 2021 WL 3919818, at *3 (Bankr. D.S.C. Sept. 1, 2021).
 - (a) The court **may** dismiss a case under this chapter for “cause”, including (but not limited to):
 - (1) Unreasonable delay by the debtor that is prejudicial to creditors;
 - (2) Nonpayment of fees or charges required under chapter 123 of title 28;
and
 - (3) Failure to timely file information required by § 521(a)- only if UST requests.

- (b) The court **may** dismiss (or convert if the debtor consents) a case filed by a debtor whose debts are primarily consumer debts if the presumption of abuse arises (§ 707(b)(1)).
- (c) If the presumption of abuse does not arise or is rebutted, the court should consider if debtor filed in bad faith or the “totality of circumstances” (§ 707(b)(3)).

DEBTOR’S CONSIDERATIONS WITH DISMISSAL

- Section 109(g)
 - No individual or family farmer may be a debtor who has been a debtor in a case pending at any time within the prior 180 days if:
 - The case was dismissed for (a) willful failure of the debtor to abide by orders of the court or (b) to appear before the court in proper prosecution of the case; or
 - The debtor requested and obtained the voluntary dismissal of the case following the filing of a motion for relief from stay.
- Section 362(c)(3) and (4) – may cause the stay to expire after 30 days from filing or not go into effect at time of filing.

CONVERSION OF CHAPTER 13 TO OTHER CHAPTERS

- Debtor requesting conversion to chapter 7 (§ 1307(a))
 - Permissible – no absolute right.
 - Any waiver of the right to convert a case under § 1307(a) is unenforceable.
 - Debtor must be eligible to be a debtor under the new chapter.
- Debtor requesting conversion to chapter 11 or 12 (§ 1307(d))
 - Must be ordered prior to confirmation of a Chapter 13 plan.
 - Not permissible for chapter 13 commenced by a farmer unless the debtor requests such conversion (§ 1307(f)).
 - Debtor must be eligible to be a debtor under the new chapter.
- Party in interest or UST requesting conversion to chapter 7 (§§ 1307(c) and (e))
 - Permissible – no absolute right.
 - For “cause” – 11 enumerated reasons listed in § 1307(c) or for failure to file tax returns as required by Section 1308 (§ 1307(e))
 - Not permissible for chapter 13 commenced by a farmer unless the debtor requests such conversion (§ 1307(f)).

- Debtor must be eligible to be a debtor under the new chapter.
- Party in interest or UST requesting conversion to chapter 11 or 12 (§ 1307(d))
 - Permissible – no absolute right.
 - Conversion must be ordered before confirmation of a plan has occurred.
 - Not permissible for chapter 13 commenced by a farmer unless the debtor requests such conversion (§ 1307(f)).
 - Debtor must be eligible to be a debtor under the new chapter.

DISMISSAL OF CHAPTER 13

- Party in interest or UST requesting dismissal – 11 U.S.C. § 1307(c) and (d) apply – same standards as conversion but the Court must decide “whichever is in the best interest of creditors and the estate.”
- Debtor requesting dismissal (§ 1307(b))
 - Absolute right if case has not been previously converted.
 - *See In re Skandis*, 648 B.R. 918 (B.A.P. 6th Cir. 2023) – holding that debtor did not have absolute right to dismiss Chapter 7 case after bankruptcy case had been converted from one under Chapter 13.
 - Rule 1017(f)(2) – “conversion or dismissal under . . . § 1307(b) shall be on motion filed and served as required by Rule 9013.” *See Colburn v. Reaves*, No. CV-21-01630, 2022 WL 3754721 (D. Ariz. Aug. 30, 2022).

DISMISSAL OF CHAPTER 13 DEBTOR'S ABSOLUTE RIGHT TO DISMISS CHAPTER 13

- Do Chapter 13 Debtors have an absolute right to dismiss their case even when otherwise acting in bad faith?
 - *Law v. Siegel*, 134 S. Ct. 1188 (2014) – Supreme Court retreated somewhat from *Marrama's* reliance on section 105 and held that section cannot be used to override the express language of the Bankruptcy Code. Section 1307(b) expressly says “shall”.
 - *See Smith v. U.S. Bank Nat'l Ass'n (In re Smith)*, 999 F.3d 452 (6th Cir. 2021); *In re Nichols*, 10 F.4th 956 (9th Cir. 2021) – holding that the right of a Chapter 13 debtor to dismiss their case is absolute even if bad faith.
 - *But see Jacobsen v. Moser (In re Jacobsen)*, 609 F.3d 647 (5th Cir. 2010); *Molitor v. Edison (In re Molitor)*, 76 F.3d 218 (8th Cir. 1996) – remain undisturbed.

- Not all courts have arrived at the same conclusion as the Sixth and Ninth Circuits post-*Siegel*. See *In re Grigsby*, No. 19-10027, 2019 WL 1220930 (Bankr. W.D. La. Mar. 13, 2019); *In re Pustejovsky*, 577 B.R. 671 (Bankr. W.D. Tex. 2017); *In re Criscuolo*, No. 09-014063, 2014 WL 1910078 (Bankr. E.D. Va. May 13, 2014).

CONVERSION FROM 7 TO 13

Debtor files for Chapter 7. Debtor is married but her husband did not file. Her Schedules reflect the following:

- Schedule A/B – home with value of \$800,000. Answer to Item 28 – no tax refunds owed to her are listed.
- Schedule D – mortgage on property of \$450,000
- Schedule C – exemption of \$67,000 on home
- Schedule E – IRS debt of \$150,000
- Schedule F – \$50,000 (credit card and judgment on a lawsuit)
- Schedule I – Spouse is accountant with income of \$8,000 per month. Debtor is an entrepreneur who embroiders t-shirts and makes an average of \$800 a month.

At the § 341 meeting, when questioned about the IRS debt, Debtor testified she had recently found out about a year prior to the filing that her husband had not been filing their joint tax returns, so she ended up filing her own tax returns for the past two years, claiming her children as dependents. She voluntarily, and without any prompting from the Trustee, disclosed that she had received about \$30,000 in tax refunds – most of it was received post-petition, but some of it could have been prepetition. She further explained the \$150,000 in tax debt is really the non-filing spouse's debt and that the \$30,000 in tax refunds would go to pay the debt. She also testified that she had intended to file Chapter 13, but her attorney counseled her to file a chapter 7 and that she listed the \$150,000 in IRS debt on counsel's advice, despite being her husband's debt.

Debtor filed motion to convert her case from Chapter 7 to Chapter 13, and the Chapter 7 Trustee objected, arguing that debtor filed the motion in bad faith in that she had filed untruthful schedules, and that the case would be subject to immediate conversion back to Chapter 7 for bad faith but also because she did not have sufficient income to fund the plan.

At trial, Debtor appeared flustered and emotional, and the testimony was, at times, equivocal as she appeared financially naïve and confused regarding her bankruptcy schedules and her personal finances. Based on her testimony, it appeared she was not properly counseled but admitted to reviewing and signing the schedules.

- *What do you do as plaintiff's counsel in the lawsuit (Schedule F)? If the case is converted, what steps can you take?*
- *What do you do as Debtor's counsel?*
- *What do you do as Trustee's counsel?*
- *Who carries the burden of proof?*
- *If conversion is allowed, what steps can be taken to ensure that the Debtor does not dissipate assets before possible reconversion to Chapter 7?*

See In re Bradley, 649 B.R. 693 (Bankr. D.S.C. 2023).

DEBTOR'S DISMISSAL OF CHAPTER 13

On three separate occasions, Mr. Jones sought Chapter 13 relief shortly before a scheduled foreclosure sale of his home—thus preventing the sale—and then moved for dismissal of the cases shortly afterward. Getting tired of Mr. Jones' tactics to stall the foreclosure proceedings, Swift Bank finally decides to do something. In the third case, Swift Bank brings a motion to vacate the Bankruptcy Court's order dismissing Mr. Jones' recent bankruptcy case, and the Bankruptcy Court granted the motion, reinstated the chapter 13 case and prospectively lifted the automatic stay for a period of two years.

- *What should Debtor's counsel do?*
- *What should Swift Bank have done to prevent getting to this point?*
- *How would the outcome have been different if Swift Bank had brought a motion to convert prior to Debtor's third motion to dismiss?*

See Smith v. U.S. Bank Nat'l Ass'n (In re Smith), 999 F.3d 452 (6th Cir. 2021); *In re Nichols*, 10 F.4th 956 (9th Cir. 2021).

DEBTOR'S DISMISSAL OF CHAPTER 13

ACE Construction, Inc. ("ACE") previously employed Mr. Smith. A couple of years ago, ACE sued Mr. Smith for breach of non-compete and non-disclosure covenants in his

employment contract and misappropriation of trade secrets. Following arbitration, the state court entered judgment against Mr. Smith in the amount of \$800,000.00.

Mr. Smith filed a chapter 13 petition. His schedules reflect:

- Schedule D: Secured debt of \$2,200,000.00 (including the \$800,000.00 judgment owed to ACE)
- Schedule E: \$300,000.00 owed to IRS
- Schedule F: \$200,000.00.

ACE commenced an adversary complaint seeking to have its debt declared non-dischargeable under § 523(a)(4) and (6). It became clear that the amount of debt on Schedule F was inaccurate and understated and that when adding all the unsecured debt, it totaled \$265,000.00 – bringing the total amount of the debt above the limit for chapter 13s.

Mr. Smith had enough with the bankruptcy litigation and filed a motion to dismiss Chapter 13.

- *What should ACE do?*
- *Does ineligibility to be a Chapter 13 debtor under § 109(e) deprive debtor of his right to dismiss the bankruptcy case under § 1307(b)?*

See In re Powell, 644 B.R. 181 (B.A.P. 9th Cir. 2022). *But see In re Letterese*, 397 B.R. 507 (Bankr. S.D. Fla. 2008).

CONVERSION OF CHAPTER 13 TO 7

Mr. Jones and Swift Corp. had engaged in a business deal that resulted in a lawsuit in state court. The trial court sided with Swift Corp. and directed Mr. Jones to pay Swift Corp. \$10 million and ordered Mr. Smith to deposit the funds in the court registry within 5 days. The funds were not deposited; accordingly, the state court set a contempt hearing for July 1st to determine sanctions to be imposed on Mr. Smith. On June 30th at 11:50 p.m., Mr. Smith files a petition for Chapter 13 bankruptcy. The following day, Swift Corp. files an emergency motion to convert the case to Chapter 7 on the grounds that Mr. Smith filed the petition in bad faith. The Debtor filed an objection basically arguing that if the case cannot continue in Chapter 13, then the case should be dismissed. At the hearing, Debtor's counsel again states that "if the case cannot proceed in Chapter 13, then it needs to be dismissed – not converted". No reference to § 1307(b) was made.

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- *Can the case be dismissed given the fact that the request for dismissal was made after a motion to convert was filed and § 1307(b) was not cited in the response or referenced at the hearing?*

See Colburn v. Reaves, No. CV-21-01630, 2022 WL 3754721 (D. Ariz. Aug. 30, 2022).

CONVERSION OF CHAPTER 13 TO 7 POST PETITION APPRECIATION OF ASSET

Dr. Ferguson is an unmarried plastic surgeon and is known to many as the “Rockin’ Doc” for his partying reputation. He has incurred massive unsecured debt obligations wooing potential suitors, lavishing them with luxury gifts and extraordinary vacations. Dr. Ferguson has also incurred unsecured priority debt for unpaid taxes, as he would much rather spend his money partying than paying the IRS.

Due to his income and to deal with his tax debt, Dr. Ferguson files a Chapter 13. His Schedules reflect the following:

- Schedule A/B – residence with a value of \$750,000.00. (The Schedule notes that the home has a leaky roof due to storm damage and is in need of a new HVAC system, as the current system no longer works.); leased vehicle; 401k with a value of \$125,000.00; and household goods with a value of \$5,000.00.
- Schedule D – mortgage on the property of \$700,000.00.
- Schedule C – exemption of \$35,000.00 on the residence.
- Schedule E – IRS debt of \$50,000.00
- Schedule F – unsecured debt obligations of \$250,000.00

Unfortunately, the Rockin’ Doc’s partying ways have caught up with him and Dr. Ferguson’s medical license has been suspended. And while Dr. Ferguson is still employed his wages have decreased substantially such that he can no longer afford his Chapter 13 plan payment, which is a 100% pay plan.

Dr. Ferguson is in his third year of a five year plan. His mortgage balance has decreased, post-petition, through payments by Dr. Ferguson. The current balance is \$650,000.00. Dr. Ferguson, post-petition, replaced the roof on the home, installed two new HVAC systems, and replaced all windows in the home. It is estimated that these repairs/improvements increased the value of the home by \$50,000.00. Additionally, real estate values in Dr. Ferguson’s neighborhood are at an all-time high. Inventory is low, prices are high, and most homes for sale are under contract within 24 hours of listing.

In addition, of the last 5 homes that have sold in the last 2 years, have sold above asking price. It is estimated that the current value of Dr. Ferguson's home is \$900,000.00.

- *If Dr. Ferguson converts his Chapter 13 to a Chapter 7, who gets the appreciation in value of the house?*
- *What do you do as a Chapter 7 Trustee?*
- *What do you do as Debtor's counsel?*

In re Goins, 539 B.R. 510 (Bankr. E.D. Va. 2015)

In re Castleman, 2022 WL 2392058 (W.D. Wa. July 1, 2022) (on appeal to 9th Circuit)

Coslow v. Reisz, 811 F. App'x 980 (6th Cir. 2020)

Potter v. Drewes (In re Potter), 228 B.R. 422 (B.A.P. 8th Cir. 1999)

In re Barrera, 22 F.4th 1217 (10th Cir. 2022) – full case name

In re Cofer, 625 B.R. 194 (Bankr. D. Idaho 2021)

In re Perez, 345 B.R. 137 (D. Del. 2006)

Faculty

Brian R. Anderson is a partner in the Financial Restructuring and Bankruptcy department at Fox Rothschild, LLP in Greensboro, N.C., where he concentrates his practice on bankruptcy, creditors' rights and commercial litigation. He regularly represents banking and financial institutions, credit unions, businesses, contractors, secured and unsecured creditors, trustees, executors and guarantors before state and federal courts. He also provides strategic counsel on a wide range of bankruptcy issues, including complex chapter 11 cases, avoidance actions, adversary proceedings and out-of-court workouts. Mr. Anderson is Board Certified in Business Bankruptcy Law by the American Board of Certification and the North Carolina State Bar Board of Legal Specialization. He also serves as a U.S. Bankruptcy Trustee and subchapter V trustee for the U.S. Bankruptcy Court for the Middle District of North Carolina, and as a court-appointed receiver in the North Carolina court system. After graduating from law school, he clerked for Hon. Thomas W. Waldrep, Jr. in the U.S. Bankruptcy Court for the Middle District of North Carolina. Mr. Anderson received his B.S.B.A. from the University of North Carolina at Chapel Hill and his J.D. *cum laude* from American University Washington College of Law.

Elizabeth A. Childers is a bankruptcy attorney at Rountree Leitman Klein & Geer, LLC in Atlanta and she represents debtors and creditors in all chapters of bankruptcy. She also handles state court matters such as real estate disputes, evictions and commercial litigation. Ms. Childers has experience dealing with complex issues in bankruptcy matters and other litigation matters. She is admitted to practice before the U.S. District Courts for the Northern, Middle and Southern Districts of Georgia. Ms. Childers received her B.A. and B.S.M., both *cum laude*, in 2003 from Tulane University and her J.D. *cum laude* in 2007 from the University of Georgia School of Law.

Hon. Elisabetta G. M. Gasparini is a U.S. Bankruptcy Judge for the District of South Carolina in Charleston, appointed on June 27, 2022, after an extensive career as a trial attorney with the Office of the U.S. Trustee in both Region 4 (2012-22) and Region 2 (2009-12). During her tenure with Region 4 in Columbia, S.C., she served as chapter 11 regional coordinator in complex chapter 11 cases. In 2019, Ms. Gasparini received the Director's Award for Excellence in Chapter 11 Complex Issues. While serving as a trial attorney for Region 2 in New York, she worked on numerous high-profile cases, including American Airlines, Blockbuster and Lehman Brothers. Prior to her service with the UST, Judge Gasparini was a member of the corporate restructuring groups for several firms in New York from 2001-09, where she worked on complex chapter 11 cases and mass-tort bankruptcies, and represented various defendants to preference actions. She previously clerked for her predecessor, Hon. John E. Waites, from 1999-2001. Judge Gasparini was born in Milan, Italy, and immigrated to the U.S. with her family in 1987. She received her B.A. in 1996 from Wake Forest University and her J.D. in 1999 from the University of South Carolina School of Law.

Diana Santos Johnson is an associate with Waldrep Wall Babcock & Bailey PLLC in Winston-Salem, N.C. She joined the firm in 2021 and is part of its bankruptcy team. Prior to joining WWBB, Ms. Johnson was a staff attorney at Legal Aid of North Carolina, Inc. She also served as an associate at Bolton Law Group, P.A., where she represented individual and small business debtors in bankruptcy

proceedings in the Middle District of North Carolina. Ms. Johnson received her B.A. in Spanish from Wake Forest University, where she was a Volunteer Service Corps Member and received a Certificate in Spanish Interpreting, and her J.D. from North Carolina Central University School of Law, where she was a staff member of the *North Carolina Central Law Review*.

Nancy J. Whaley is an attorney serving as a chapter 12 and 13 trustee for the Northern District of Georgia in Atlanta. She is a Fellow of the American College of Bankruptcy and serves on ABI's Board of Directors. She also is a past chair of ABI's Southeast Bankruptcy Workshop. Ms. Whaley is a member of the Northern District of Georgia Bankruptcy Court's Bench and Bar Committee and served on the Executive Committee and co-chaired the Community Service Committee for the W. Homer Drake, Jr. Georgia Bankruptcy American Inn of Court. She is a past chair of the Atlanta Bar Association's Bankruptcy Section and the Bankruptcy Section of the State Bar of Georgia. Ms. Whaley served as president of the Georgia Association for Women Lawyers and of the GAWL Foundation. She has served on the State Bar of Georgia's Executive Committee, is a member of its board of governors and currently chairs its Investment Committee. Ms. Whaley is on the board of directors for the Association of Chapter 12 Trustees, and she is a member of the National Association of Chapter 13 Trustees and is their representative to the Advisory Committee on Bankruptcy Rules. She also serves as Treasurer for NACTT Foundation. Ms. Whaley retired from the Air Force Reserve as a Lieutenant Colonel. She received her B.A. *cum laude* from Eureka College, where she was a Ronald Reagan Scholar, and her J.D. from Emory Law School.