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Consumer Track

Property of the Estate and Exemptions

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Consumer: Property of the Estate and Exemptions

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I. WHOSE PROPERTY IS IT ANYWAY: AN OVERVIEW OF COMPETING CLAIMS TO POST PETITION PRE-CONVERSION INCREASES IN ESTATE ASSETS IN CHAPTER 13 TO CHAPTER 7 CONVERSIONS

Nearly two-thirds of all chapter 13 cases fail to result in a discharge for the debtor. Even in generally successful cases in which the chapter 13 debtor confirms a plan and begins repaying creditors, unforeseen circumstances – a loss of a job or an accident resulting in severe injury – can quickly make the chapter 13 case untenable requiring the debtor to convert the case to chapter 7. While in chapter 13, the debtor may have created significant amounts of equity by paying down loans encumbering the debtor's property, or changes in the marketplace may have caused the debtor's property to materially appreciate since the petition date. The chapter 7 trustee will naturally look to liquidate any available equity, but treating any equity created during the chapter 13 as property of the chapter 7 estate risks disincentivizing a debtor from attempting repayment under Chapter 13. *In re Sargente*, 202 B.R. 1023, 1026 (Bankr. S.D. Fla. 1996). So, whose property are post-petition pre-conversion increases in value? As described below, courts are widely split. The following summary seeks to provide an overview of the competing arguments consider by Courts throughout the country.

Of course, the first step in determining whose property it is requires turning to the Bankruptcy Code. In a chapter 13 case, per section 1306, "property of the estate" includes all of the property specified in section 541, *plus* all such property "that the debtor acquires after the commencement of the case but before the case is . . . converted to a case under chapter 7." 11 U.S.C. § 1306(a)(1). In the mid-nineties, Congress added Section 348(f) to the Bankruptcy Code to resolve a split among courts as to whether property acquired after a chapter 13 petition date became property of the subsequent chapter 7 estate following a conversion. Section 348(f)(1)(A) generally provides that the post-conversion estate will consist of the Debtor's property as of the original chapter 13 petition date that is still in the Debtor's possession or control on the conversion date. Unsurprisingly, chapter 7 trustees and debtors read Section 348(f) very differently:

TRUSTEE VIEW: ("SECTION 348(f)(1)(A) MEANS WHAT IT SAYS AND SAYS WHAT IT MEANS.")

The plain language of Section 348(f)(1)(A) provides that in a case converted from chapter 13 to chapter 7, 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 possession of or is under the control of the debtor on the date of conversion." 11 U.S.C. 348(f)(1)(A). Thus, a trustee will argue: if a debtor owns a house as of the petition date and still owns such house as of the date of conversion, then such house satisfies the standard set out in Section 348(f)(1)(A) and is therefore "property of the estate" in the converted case. *In re Goins*, 539 B.R. 510, 515-16 (Bankr. E.D. Va. 2015) (holding that trustee entitled to post-petition pre-conversion appreciate because real estate at issue was always property of the estate).

In adopting this position, the trustee advances the view that the value of the property is an intrinsic characteristic of the property that cannot be separated from property itself. *See Goins*, 539 B.R. at

516; *In re Peter,* 309 B.R. 792, 795 (Bankr. Oregon 2004) (noting that Section 348(f)(1)(A) does not limit the post-conversion chapter 7 property of the estate to "equity in" property of the estate).

Alternatively, some courts instead treat post-petition appreciation as an asset post-petition to be in the nature of "proceeds, product, offspring, rents or profits" of the asset. Those courts then rely on § 541(a)(6) providing that proceeds from property of the estate are also property of the estate. *But see In re Barrera*, 620 B.R. 645, 651 (Bankr. D. Colo. 2020) (noting that treating increases in value as "proceeds" under § 541(a)(6) belies the view that value is an intrinsic part of an asset). Consequently, such courts hold that if the asset itself is property of the estate on the petition date, then any post-petition increase in value of such asset constitutes property of the estate.

Statutory Construction

In construing § 348, courts may invoke traditional cannons of statutory construction. In particular, courts adopting the chapter 7 trustee's position reject debtors appeal to the legislative history and associated policy-oriented arguments (described below) by citing the cannon of statutory construction requiring courts to apply a statute's plain language absent any ambiguity. *See Puerto Rico v. Franklin Cal Tax-Free Tr.* 579 U.S. 115 (2016); *In re Peter,* 309 B.R. 792, 794-795 (Bankr. Oregon 2004) (rejecting appeals to legislative history and associated policy arguments finding instead where "a statute's text is plain, the court is to apply it as written, unless its application would lead to absurd results").

Where Congress wanted to exclude assets from the property of the estate, Congress has done so with specificity. *See*, *e.g.,* 11 U.S.C. § 541(a)(6) (excluding post-petition earnings from services performed from "property of the estate"); *id.* § 541(b) (enumerating specific items that are excluded from "property of the estate").

- In response to the counterargument (discussed below) that in vesting all property of the estate in the chapter 13 debtor as of the confirmation, trustees may invoke the cannon of statutory construction that the specific governs over the more general.

DEBTOR'S VIEW:
("DON'T MAKE ME REGRET TRYING TO REPAY CREDITORS INSTEAD OF JUST LIQUIDATING.")

Rejecting the view that § 348(f)(1)(A) is unambiguous, courts siding with the debtor point to numerous ambiguities. As one such ambiguity, courts have questioned whether in referring to "property of the estate . . . as of the [petition date]," did Congress mean the physical asset or did Congress mean the asset with all of its attributes and value existing on the original petition date. *See In re Barrera*, 620 B.R. 645, 651 (Bankr. D. Colo. 2020).

Upon filing a petition, section 541 provides for the creation of a "bankruptcy estate" consisting of all property and interests of the debtor. 11 U.S.C. § 541. As provided by §1327(b), upon confirmation of a chapter 13 plan (unless the plan expressly states otherwise), property of the estate vests in the debtor, i.e. the property of the estate reverts to its prepetition status. *See In re Harmon*, 2022 Bankr. LEXIS 3739, at *19-*20 (Bankr. E.D. La. June 9, 2022); 11 U.S.C. § 1327(b).

In the event the debtor, acting in good faith, converts his chapter 13 case to one under chapter 7, the debtor must surrender any property still in debtor's possession that constituted property of the estate as of the original chapter 13 petition date. *Id.* at *20; *Rodriguez v. Barrera (In re Barrera)*, 22 F.4th 1217, 1220 (10th Cir. 2022) ("[A]fter conversion, the Chapter 7 estate generally consists of the same interests in property that would have been included in the estate had the debtor originally filed under chapter 7, so long as the debtor has possession or control of those interests at conversion.").

If the debtor instead converts in bad faith, section 348(f)(2) requires the debtor to additionally surrender property acquired post-petition. Thus, in a bad faith conversion case, "property of estate" consists of all property and interest of the debtor as of the date of conversion. *Harmon*, 2022 Bankr. LEXIS 3739 at *20.

The "Snapshot" Rule

Courts siding with the debtor often conclude that treating property of the estate as used in § 348(a)(2)(A) to mean the property *as it existed* on the petition date, including the value of equity as of that date, to be more consistent with the Bankruptcy Code as a whole. *In re Barrera*, 620 B.R. 645, 651 (Bankr. D. Colo. 2020) ("*Barrera I"*); *In re Cofer*, 625 B.R. 194, 200 (following *Barrera I*) For example, Section 522 provides that for purposes of determining the value of a debtor's exemption, "value" means "fair market value" as of the petition date. *In re Barrera*, 620 B.R. 645, 651 (Bankr. D. Colo. 2020) ("*Barrera I"*). 11 U.S.C. § 522(a)(2). Similarly, §§ 502(a)(2) and 506(a)-(b) freezes secured creditors' claims based on the value of the debtor's property as of the petition date. *Id.* If the collateral lacks sufficient value to fully secure a creditor's claim as of the petition date, the amount of the claim exceeding the petition date value is deemed unsecured and interest ceases accruing. *Id.* Likewise, a creditor's security interest is cut off as of the petition date such that the creditor may not assert a lien on property of the estate acquired post-petition. *Id.* at 651-52 (citing § 552(a).)

Legislative History

As further support, courts adopting the debtor's view cite legislative history contending that in adopting § 348 Congress made a policy decision "to encourage debtors to attempt repayment of their creditors through chapter 13 and removes disincentives to making that choice, including . . . the Debtors' forfeiture of any increase in equity due to their post-petition, pre-conversion mortgage payments and/or home appreciation. *Harmon*, 2022 Bankr. LEXIS at *27. More specifically, such legislative history reflects that Congress enacted Section 348(f)(1)(A) to

> ". . . clarify the Code to resolve a split in the case law about what property is in the bankruptcy estate when a debtor converts from chapter 13 to chapter 7. The problem arises because in chapter 13 (and chapter 12), any property acquired after the petition becomes property of the estate, at least until confirmation of a plan. Some courts have held that if the case is converted, all of this after-acquired property becomes part of the estate in the converted chapter 7 case, even though the statutory

> provisions making it property of the estate do not apply to chapter 7. Other courts have held that property of the estate in a converted case is the property the debtor had when the original chapter 13 petition was filed.
>
> These latter courts 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 a 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 **[*27]** 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.
>
> 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 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. 103-394, at 57 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3366.

Finding that allowing the debtor to retain any post-confirmation, pre-conversion property better reflects Congress' intent in adopting § 348, courts adopting the debtor's view hold that property of the estate following conversion from chapter 13 consists of the property still in the debtor's possession or control that would have been property of the estate as of the original petition date conversion from chapter 13 to chapter 7. *In re Cofer*, 625 B.R. 194, 202 (Bankr. Idaho 2021); *see also In re Sargente*, 202 B.R. 1023 (Bankr. S.D. Fla. 1996) (holding in case not controlled by section 348(f) that Congress always intended to encourage repayment plans such that equity created by such payments are not part of chapter 7 estate). In this way, §348(f)(1)(A) "encourage[s] debtors to opt for Chapter 13 bankruptcies by preventing property (including equity) gained during the Chapter 13 period from going into the Chapter 7 estate upon conversion." *In re Nichols*, 319 B.R. 854, 856 (Bankr. S.D. Ohio 2004) *In re Hodges*, 518 B.R. 445, 448 (E.D. Tenn. 2014).

A debtor will contend that Section 348(f)(1)(A) should not be read in isolation but should be construed as a whole giving meaning to each section. Section 348(f)(2) provides that where a debtor converts a chapter 13 case to one under chapter 7, the property of the estate in the converted case shall include all property of the estate as of the date of conversion. Debtors will argue that by construing Section 348(f)(1)(A) to include post-petition, pre-conversion interest in property as property of the estate, courts would render Section 348(f)(2) superfluous.

Debtor View Cases:

In re Cofer, 625 B.R. 194, 195-96 (Bankr. D. Idaho 2021)

Bargeski v. Rose, Nos. 05-962 & 05-1410, 2006 U.S. Dist. LEXIS 29059, *4-5 (D. Md. Mar. 31, 2006).

In re Sparks, 379 B.R. 178, 180-82 (Bankr. M.D. Fla 2006).

In re Harmon, 2022 Bankr. LEXIS 3739, at *19-*20 (Bankr. E.D. La. June 9, 2022)

In re Hodges, 518 B.R. 445, 451 (E.D. Tenn. 2014) (holding that post-petition pre-conversion equity created by the chapter 13 debtor as a result of mortgage payments was not property of the post-conversion chapter 7 case).

In re Sargente, 202 B.R. 1023 (Bankr. S.D. Fla. 1996) (holding that post-petition equity in car resulting from loan payments by chapter 13 debtor belongs to debtor and is not part of post-conversion chapter 7 case).

In re Wegner, 243 B.R. 731 (Bankr. D. Neb. 2000) (excluding the value by which home appreciated during chapter 13 case from the post-conversion chapter 7 estate albeit applying §348(f)(1)(B).

In re Boyum, No. 05-1044-AA, 2005 U.S. Dist. LEXIS 20054, at *2 (D. Or. Sept. 6, 2005) (post-petition equity in car belongs to debtor and is not part of the post-conversion property of the estate.)

See also:

The following cases holding that net proceeds from post-confirmation pre-conversion sale of home resulting from appreciation belong to debtor. Such cases lend support to the view that similar increases in value of debtor's pre-petition assets should inure to the Debtor's benefit post-confirmation even in the absence of a pre-conversion sale.

Rodriguez v. Barrera (In re Barrera), 22 F.4th 1217, 1220-21 (10th Cir. 2022) (holds that net cash proceeds from a pre-conversion, post-petition sale of debtor's home in a chapter 13 case were excluded from the chapter 7 estate post-conversion under Section 348(f)(1)(A) as the debtor no longer owned the home at the time of conversion).

In re Niles, 342 B.R. 72, 75 (Bankr. D. Ariz. 2006) same)

Trustee View Cases:

In re Goins, 539 B.R. 510, 515-16 (Bankr. E.D. Va. 2015) (holding appreciation of real estate during chapter 13 case belongs to

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)

In re Wegner, 243 B.R. 731 (Bankr. D. Neb. 2000)

Potter v. Drewes (In re Potter), 228 B.R. 422, 424 (B.A.P. 8th Cir. 1999).

Castleman v. Burman (In re Castleman), 75 F.4th 1052 (9th Cir. 2023).

II. POST-PETITION APPRECIATION of ASSETS IN CHAPTER 13 BANKRUPTCY – WHO RECEIVES THE BENEFITS?

A. Introduction

This issue arises when a debtor sells a scheduled asset during the bankruptcy process. This presentation addresses whether and to what extent debtors are required to commit the increase in value of these assets to their Chapter 13 plan.

I. Case Study: *In re Elassal*, 654 B.R. 434 (Bankr. E.D. Mich. 2023)

A. Relevant Facts

The debtor filed for Chapter 13 bankruptcy in 2021, declaring a home valued at $250,000 with existing liens of $228,000. Following a divorce, the debtor sold the house two years post-petition for $435,000, netting approximately $177,000.

B. Positions of the Parties

The debtor was able to demonstrate that she failed to qualify for a mortgage loan, and thus needed to use the proceeds to pay for a new residence in full.

The trustee demanded that the debtor first use the proceeds to pay her unsecured creditors in full.

C. The Court's Analysis

1. Reconciling 11 U.S.C. 1306 And 1327

Section 1306 defines property of the estate to include "all property … that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted …"

Section 1327 provides that unless the plan or confirmation order provides otherwise, the confirmation of a plan vests all of the property of the estate in the debtor free and clear of any claim or interest of any creditor provided for by the plan.

To determine whether post-petition appreciation is property of the estate, these two sections must be reconciled. Bankruptcy courts across the country have adopted five distinct theories to reconcile these sections:

- Estate Termination Approach: This theory suggests that the bankruptcy estate ceases to exist once the plan is confirmed. According to this view, all property, regardless of when it was acquired, becomes the property of the debtor. Proponents argue that even if the property vests in the debtor, the estate can still legally exist. Cases supporting this approach include *In re Adams*, 275 B.R. 274 (Bankr. N.D. Ill. 2002).

- Estate Transformation Approach: This approach posits that only property necessary for the plan's execution remains as part of the estate. Originating from § 1322(a)(1), which requires the debtor's plan to provide funds to the trustee as necessary for plan execution, this approach grants courts flexibility in interpreting what constitutes "necessary." Courts favoring this approach may allow trustees to capture post-petition appreciation, despite potential contradictions with bankruptcy code policies. *In re Ziegler*, 136 B.R. 497, 501–502 (Bankr. N.D. Ill. 1992).

- Conditional Vesting Approach: Under this approach, the debtor gains the right to use the property upon confirmation, but this right is not final until discharge. Assets acquired after confirmation are considered property of the estate and may be administered accordingly. This approach challenges debtors wishing to retain appreciation in value and is generally less favored.

- Estate Preservation Approach: This theory holds that property remains part of the estate despite vesting in the debtor at confirmation. It adopts the language of § 1306(a) and requires disregarding § 1327. Proponents justify this approach by suggesting that "vest" in § 1327 implies a transfer of possessory interest, not title. Cases supporting this approach include *In re Grissom*, 137 B.R. 689 (Bankr. W.D. Tenn. 1992); *In re Antal*, 459 B.R. 248 (E.D. Mich. 2011); *In re Camacho*, 311 B.R. 186 (Bankr. E.D. Mich. 2004); *In re Elrod*, 523 B.R. 790 (Bankr. W.D. Tenn. 2015); *United States v. Harchar*, 371 B.R. 254 (N.D. Ohio 2007).

- Estate Replenishment Approach: This approach asserts that all property becomes the debtors upon confirmation, but newly acquired property "replenishes" the estate. Courts adopting this view see it as the best way to reconcile conflicting sections §1306 and § 1327.

The *Elassal* court endorsed the Estate Preservation approach, determining it as the most suitable method to give effect to both §1306 and 1327.

2. Appreciation Cannot Be Separated From The Underlying Asset.

Adoption of the Estate Preservation approach does not fully answer the question of whether appreciation can be treated separately from the underlying asset. *Elassal* clarified that in Chapter

13, the appreciation of prepetition property is not a newly acquired asset for the debtor and cannot be "untethered" from the asset itself.

The *Elassal* court dismissed the trustee's assertion that post-petition appreciation is disposable income to the debtor that must be committed to the plan. The court reasoned that appreciation lacks the essential characteristics of income, particularly the absence of providing a continuous stream of payments to the debt.

B. Case Study: *In re Pugh*, No. 23-49193 (Bankr. E.D. Mich. Mar. 18, 2024)

Pugh arose partly from a footnote found in *Elassal.* Specifically, the *Elassal* court noted that the debtor and the trustee could have included a provision in the chapter 13 plan providing that appreciation would be committed to the plan. In *Pugh*, the trustee sought to force this provision on the debtor.

A. Relevant Facts

The debtor scheduled his residence at a value of $106,000 with $98,210 in liens and exempted $7,790 in equity. His plan initially proposed surrendering the property to the lenders. During debtor's post-petition divorce proceedings, the property was appraised at $66,000. Debtor was awarded the property in the divorce, and, at his confirmation hearing, the debtor expressed a preference to remain in the property and pursue a loan modification.

B. The Parties' Positions

The trustee objected to confirmation unless the plan's vesting provision was amended to provide that the property would remain property of the estate until discharge.

The debtor argued that the trustee could not unilaterally force a change to the vesting provision proposed by the plan, and even if he did, doing so is contrary to the bankruptcy code's policy to provide a debtor with a "fresh start."

C. The Court's Analysis

1. A Court Must Be Given A Good Reason To Delay Vesting Under §1322.

The model plan adopted by the Eastern District of Michigan contains a provision that requires vesting of estate property in the debtor at confirmation. The *Pugh* court acknowledged that while the court has discretion to delay vesting under §1322, it must be given a good reason to do so. There was no good cause to do so here.

2. The Trustee Lacks Authority To Unilaterally Alter The Vesting Provision

The trustee lacks the authority to unilaterally alter the vesting provision. 11 U.S.C. § 1321, vests the debtor with responsibility to file the plan. § 1323(a) allows the debtor, and the debtor alone to

propose the plan. As a result, the trustee is prohibited from initiating plan filings or modifications. The trustee has a right to raise objections to valuation, but such objections must be grounded in specific sections of the Bankruptcy Code.

III. DETERMINING WHETHER MASS TORT AND OTHER PERSONAL INJURY CLAIMS ARE PROPERTY OF THE ESTATE

Late night TV and social media outlets are loaded with advertisements seeking potential plaintiffs for mass tort and product liability claims. Many of these claims arise out of prior exposure to everything from mesh implants, knee and hip replacements, weight loss drugs and other pharmaceuticals, to the use of defective earplugs, baby powder, exposure to round-up weed killer and other household chemicals, and exposure to contaminated water at U.S. Marine Base Camp Lejeune, N.C., dating as far back as 1953.

Many of these so-called "mass tort claims" involve significant time gaps between the time of exposure to the alleged defective product, and discovery or manifestation of the injury to the claimants. When there is an intervening bankruptcy filing, determining whether these types of claims are property of the bankruptcy estate (the "Estate") present unique and sometimes difficult issues for individual debtors, bankruptcy trustees and the Bankruptcy Courts.

To determine these issues, Courts generally apply two factors to determine whether personal injury claims, and the proceeds therefrom, are property of the Estate. The first factor analyzed by the courts is the timing of discovery of the injury, while the second factor considers whether the injury and resulting proceeds are sufficiently rooted in the debtor's pre-petition past.

TIMING OF DISCOVERY OF INJURY

Bankruptcy courts have held that whether a personal injury claim is property of the Estate is dependent upon the timing of when the injury occurred, which is governed by state law. *In re Ross*, 548 B.R. 632, 634 (Bankr. E.D.N.Y. 2016). In *Ross*, the debtor had a pelvic mesh implanted and later removed, both occurring pre-petition, for reasons not specified in the record. In 2004 the debtor filed a Chapter 7 petition and did not disclose the existence of any claim related to the mesh. Years later, the debtor learned by way of a television advertisement that there were class action proceedings regarding defective pelvic mesh. debtor retained counsel and accepted a settlement from the manufacturers. The trustee moved to reopen the case due to the timing of the injuries and contended the settlement proceeds were property of the Estate. The bankruptcy court ruled in favor of the debtor holding that: (1) if no cause of action had matured pre-petition, it was irrelevant whether the debtor ultimately developed an injury; and (2) as of the date the petition was filed, debtor had no expectation that her implantation would create a right to receive the settlement proceeds several years later, and therefore the settlement was not sufficiently rooted in debtor's pre-petition past to warrant inclusion of the proceeds in the Estate.

Similarly, in the case of *In re Wagner*, 530 B.R. 695, 697 (Bankr. E.D. Wis. 2015), the debtor had hip replacement surgery pre-petition, post-petition learned of potential claims against the

manufacturer of her implant, and subsequently filed suit related to the implant. The only act that occurred pre-petition was the implant of her device, debtor had no symptoms and stated she was unaware of any issues with the implant. The trustee filed a motion to reopen the case and moved for summary judgment to administer the settlement proceeds. The bankruptcy court denied the trustee's motion for summary judgment, holding that determining the timing of when a debtor knew of her injury was a question for the trier of fact.

In *Sikirica v. Harber (In re Harber)*, 553 B.R. 522, 525 (Bankr. W.D. Pa. 2016) the bankruptcy court held that post-petition settlement proceeds received by the debtor were not property of the Estate. In *Harber*, the debtor had a hip implant pre-petition and was later informed that certain devices were defective and retained class action counsel. Subsequently, debtor filed a chapter 7 petition and listed the claim in the schedules with the note "hip replacement is currently operating satisfactorily, no damages as yet." The Debtor later received a post-petition settlement from the manufacturer and the trustee moved to compel turnover of the settlement proceeds. The bankruptcy court held that the claim was not property of the Estate because: "(1) although debtor was aware of the potential for a problem with her device pre-petition, she did not manifest an injury until after the bankruptcy case was closed; (2) the claim was not sufficiently rooted in the pre-bankruptcy past because there was no injury or symptoms pre-petition; and (3) Debtors were not judicially estopped from arguing that the claim was excluded from the Estate where they listed it as an asset on the schedules and failed to object when the trustee excepted it from abandonment because they disclosed the existence of a potential claim, but noted that the hip was "operating satisfactorily" with "no damages as of yet.""

Similarly, in *Hanawalt v. Hardesty (In re Hanawalt*), Nos. 07-59138, 16-2029, 2017 Bankr. LEXIS 3437, at *1 (Bankr. S.D. Ohio Sep. 22, 2017), the bankruptcy court held that settlement proceeds were not property of the Estate because no injury was discovered until several years after debtor filed bankruptcy. The debtor in this case received settlement proceeds from defective pelvic mesh. Although the debtor received a pelvic mesh implantation pre-petition, the mesh was not discovered to be defective until surgery conducted several years post-petition. Because the injury was not discovered pre-petition, and was not sufficiently rooted in pre-petition conduct, the claim was not property of the Estate. *See also In re Segura*, No. 07-31907, 2016 Bankr. LEXIS 638, at *9 (Bankr. N.D. Ohio Mar. 2, 2016). In finding that the claim was not property of the Estate, the court held that "in order to have an interest in a product liability cause of action, "injury" requires more than simply being exposed to a defective product or, as in this case, having a defective product implanted in the body."

RECENT DECISIONS

Camp Lejeune Claim

In re Hancock, 2023 WL 1849310 (Bankr. E.D. Virginia, February 7, 2023). In *Hancock*, the debtor and his spouse (the "Debtors") filed a voluntary petition under Chapter 7 on July 19, 2022. The Trustee filed a Report of No Distribution. The Debtors received their discharge, and the case was closed on October 24, 2022. On August 10, 2022, while the Debtors' case was pending, Congress enacted into law the *Camp Lejune Justice Act of 2022*. *See* Pub. L. No. 117-168, § 804, 136 Stat. 1759, 1802-03 (2022) (the "Act"). The Act allows individuals who resided, worked or

were exposed to water at Camp Lejeune, North Carolina between August 1, 1953 and December 31, 1987, to bring an action in the U.S. District Court for the Eastern District of North Carolina to obtain relief for harm caused by the water at Camp Lejeune.

After the Petition Date, the debtor alleged he had a claim under the Act but did not amend his schedules to include this claim. The Debtors subsequently filed a motion to reopen the case to allow them to amend their schedules to disclose the claim. The Court denied the motion on the basis that Debtors had no right to payment of the claim as of the Petition Date. The Debtor's right to payment did not accrue until the Act was signed into law on August 10, 2022, which occurred after the Petition Date. *Id.* at *3. The Court held that the date on which the Debtor suffered the alleged injury was not relevant to the inquiry as the right to payment of the claim arose post-petition and was therefore not property of the Estate. *Id.*

Roundup Claim

In re Tarrant, 2023 WL 2616969 (Bankr. C.D. Ill., March 23, 2023). In *Tarrant*, the debtor filed a voluntary petition under Chapter 7 on October 15, 2015. The Trustee filed a Report of No Distribution. The debtor received their discharge, and the case was closed on February 12, 2016. The debtor was diagnosed with cancer on December 17, 2017, and later connected his cancer to exposure to Roundup. More than six years later on November 14, 2022, the United States Trustee filed a motion to reopen the case. The debtor opposed the reopening of his bankruptcy case and argued his case should not be reopened because he had no enforceable cause of action when his bankruptcy case was filed two years earlier.

The Bankruptcy Court granted the motion to reopen to allow a case trustee to investigate whether the debtor's Roundup claim was property of the Estate. The court held that to establish that the Roundup claim was property of the estate, the trustee must establish that the Debtor had an enforceable claim against Roundup when he filed his Chapter 7 case in 2015. *Id.* at *7. To make that determination, the court held that the trustee must not only show that the debtor was exposed to Roundup but must also prove that the debtor had developed cancer prior to filing his Chapter 7 bankruptcy petition and knew or should have known about both the injury and its wrongful cause when he commenced his bankruptcy case. *Id.* The court imposed the cost of such investigation on the U.S. Trustee and case trustee.

DISCOVERY RULE - APPLYING ILLINOIS LAW

Under Illinois law "when a party knows or reasonably should know that an injury has occurred and that it was wrongfully caused the statute begins to run… and the party is under an obligation to inquire further to determine whether an actionable wrong was committed." *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 171 (1981). Normally under Illinois law personal injury claims are subject to a two-year statute of limitations. *See* 735 ILCS 5/13-202. However, this two-year period can be enlarged for injuries that are not readily discoverable. Courts have held that the limitations period begins to run when a victim: (1) discovers the injury occurred and knows it was wrongfully caused; or (2) has "sufficient information concerning the injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct occurred." *Daubach v. Honda Motor Co*., 303 Ill. App. 3d 309, 314 (5th Dist. 1999).

The timing of when an injury occurs is a question of fact. *Aspegren v. Howmedica, Inc., Div. of Pfizer, Inc.*, 129 Ill. App. 3d 402 (1st Dist. 1984). In *Aspegren,* the court addressed when the statute of limitations began to run on the claim. Plaintiff had a hip implant and brought suit against the manufacturer for alleged defects of the implant. Plaintiff learned that there were problems with the implant when she had an x-ray of her hip, and it showed the implant was fractured. The manufacturer argued that plaintiff discovered the injury when the x-ray occurred. The plaintiff argued, however, that the limitations period did not begin until she was able to investigate whether the implant was defective after its removal. The court held that a factfinder could have found that it was not possible for her to discover at the time of her x-ray whether the injury had been wrongfully caused and the question of the timeliness of the complaint was one for the court. Although the plaintiff first learned of her injury when her doctor showed her x-rays of the fractured hip implant and informed her that it had to be replaced, this was not sufficient to determine that plaintiff was aware that the implant was defective, thus a cause of action had not accrued until after the removal.

Applying Illinois law, the Seventh Circuit Court of Appeals also examined the timing of injuries in *Aebischer v. Stryker Corp*., 535 F.3d 732, 733 (7th Cir. 2008). In *Aebischer*, the plaintiff received a hip implant and was later informed of loosening of the implant and learned that particles of the implant were deteriorating. The district court held that that plaintiff was on "inquiry notice" when her doctor explained these complications and was thus time-barred from filing suit. The Seventh Circuit disagreed and held that typically the date on which a plaintiff receives inquiry notice is a question of fact. Applying Illinois law, the court restated the two factors as set forth above—that when an injury is not readily discoverable the statute begins to run when plaintiff either: (1) actually discovers the wrongful injury; or (2) has "sufficient information concerning [the] injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved." *Id.* at 735; *see also Daubach*, 303 Ill. App. 3d at 314.

Whether Injury is Sufficiently Rooted in Debtor's Pre-petition Past

The case of *Segal v. Rochelle*, 382 U.S. 375 (1966) has been widely cited as the controlling authority on whether a cause of action is property of the Estate. *Segal* involved the issue of whether a tax refund arising by virtue of the application of a net operating loss carryback to pre-petition periods was property of the Estate. Because the taxes refunds at issue arose from taxes that had been paid pre-petition and the loss that generated the refund also occurred pre-petition, the court held that the refund was "sufficiently rooted" in the debtor's pre-petition past as to constitute property of the Estate. *Id.* at 380.

A decision out of the Vermont Bankruptcy Court, analyzed the timing and discovery of an injury based upon Vermont state law, as well as whether the settlement proceeds were "sufficiently rooted in the debtor's past" to merit inclusion in the estate. *See*, *In re Vasquez*, No. 10-10806, 2018 Bankr. LEXIS 498, at *1 (Bankr. D. Vt. Feb. 23, 2018). The debtor received a pelvic mesh implant in 2005 and sought treatment for symptoms in 2009 but was not informed these symptoms were related to a defective implant. The debtor filed Chapter 7 in 2010. Later that year, the debtor was again seen by a doctor for various symptoms seemingly related to the implant. In 2013, three years

post-petition, debtor had the implant removed, retained counsel, and in 2015 reached a settlement with manufacturers. Applying Vermont law, the court first determined that the discovery of the defective implant and related injury occurred post-petition, thus the settlement proceeds were not property of the Estate. The court also analyzed whether the injury and resulting settlement proceeds were sufficiently rooted in the debtor's pre-petition past. In order to make this determination, the court examined three factors: "(1) whether and when the device caused injury to the debtor; (2) when the debtor and medical community became aware of a potential defect in the device; and (3) the motivation behind, and timing of, surgical removal of the device." Applying these factors to the debtor's case, the court held that the settlement proceeds were not sufficiently rooted in the debtor's pre-petition past and were not property of the Estate.

Other courts have been critical of the sufficiently rooted in the past approach. In *In re Wagner* discussed above, the court criticized the approach stating that a "bankruptcy debtor cannot be expected to predict and disclose possible future injury by each and every product he or she has previously used. To be rooted in the debtor's pre-bankruptcy past, there is no way of knowing how far back the root would go." *In re Wagner* 530 B.R. at 705. Thus, the court applied state law regarding the timing of the discovery of injuries. *See also Holstein v. Knofler (In re Holstein)*, 321 B.R. 229, 238 (Bankr. N.D. Ill. 2005) (in finding that legal malpractice claim was not property of Estate the court held that *Segal* should not be read so broadly as to bring property into the Estate simply because some portion of the conduct involved in establishing the cause of action occurred pre-petition). Relying on the express language of section 541, the *Holstein* court held that a cause of action must have accrued pre-petition in order to be property of the Estate. *Id.*, *see also* 11 U.S.C. §541.

APPLICATION OF JUDICIAL ESTOPPEL TO UNDISCLOSED CLAIMS

Case Summaries

***Herrera-Nevarez v. Ethicon, Inc.*, No. 17 C 3930, 2017 U.S. Dist. LEXIS 92416, at *2 (N.D. Ill. June 15, 2017)**

In 2005 the debtor was surgically implanted with a medical device to control urinary incontinence. In 2008, the FDA issued a health warning that products such as the one implanted in the debtor were associated with serious complications. Between 2009 and 2011 the debtor visited her doctor for treatment of gynecological and urinary symptoms but was never advised by her doctor that they may be the result of the medical device. The debtor filed a Chapter 7 petition in March 2011, but did not disclose any potential personal injury or products liability claim. After receiving her Chapter 7 discharge, the debtor saw a television advertisement regarding potential problems with the medical device and contacted counsel. In March 2012, the debtor filed suit against several manufacturers alleging that she was injured from a defective medical device. The manufacturers later moved for summary judgment on the ground that the claim was barred by the doctrine of judicial estoppel based on the Debtor's failure to disclose the claim in the bankruptcy case. The manufacturers also asserted the debtor should be barred from receiving any surplus from the estate. The debtor thereafter notified the U.S. Trustee of the claim, who moved to reopen the case and reappointed the Chapter 7 trustee. The trustee retained the debtor's personal injury counsel who then moved to substitute the Chapter 7 trustee as the real party in interest, which the court granted.

In denying the motion for summary judgment, the District Court held that judicial estoppel does not apply to claims brought by the trustee for the benefit of the estate and it was best left to the bankruptcy court to determine whether debtor was entitled to any surplus funds. *See Metrou* and *Biesek,* discussed below.

***Metrou v. M.A. Mortenson Co.*, 781 F.3d 357 (7th Cir. 2015)**

After receiving discharge in a Chapter 7 case, debtor filed a tort suit arising out of an undisclosed pre-petition claim. Tort defendants sought summary judgment on judicial estoppel grounds, arguing that the debtor had not listed the claim on his bankruptcy schedules. After the bankruptcy trustee reopened debtor's bankruptcy case to substitute as plaintiff, the district court allowed the suit to proceed but ruled that the trustee's recovery could not exceed the value of the debtor's unpaid debts. The Seventh Circuit rejected the district court's approach that served to throw out *all* claims omitted from a debtor's bankruptcy schedules, whether or not the omission was culpable. According to the Seventh Circuit, such a rule would serve to injure innocent creditors too, by reducing the stakes to the point where the suit, net of legal expenses, would be abandoned as having a negative value. Rather, an innocent trustee is entitled to pursue the suit as an asset of the estate, regardless of whether the debtor should have disclosed the claim, and without any cap on recoverable damages. The Seventh Circuit remarked that the bankruptcy court is best equipped to address whether the debtor's omission was culpable and what disposition to make of surplus proceeds, if any, even suggesting that the bankruptcy court could give creditors a bonus or return the excess to the defendants.

***Biesek v. Soo Line R. Co.*, 440 F.3d 410 (7th Cir. 2006)**

The district court granted summary judgment on judicial estoppel grounds in favor of a debtor's employer after finding that the debtor purposefully omitted the claim against the employer from his bankruptcy schedules. While recognizing that plenty of authority supported the district judge's conclusion, the Seventh Circuit rejected application of judicial estoppel to cases where it would have the adverse effect of harming innocent creditors. The Seventh Circuit suggested that bankruptcy fraud should be discouraged instead by revoking the debtors' discharges and referring them for potential criminal prosecution. Rather, judicial estoppel should be considered if and when the trustee abandons the undisclosed claim after determining it to be worthless or low in value. As the trustee had not abandoned the claim in this case, the Seventh Circuit noted that it was not the debtor's to pursue in litigation.

***Slater v. United States Steel Corp.*, 871 F.3d 1174, 1176 (11th Cir. 2017)**

Debtor failed to disclose an employment discrimination claim on her schedules or any time prior to receiving her discharge. Debtor's former employer moved for summary judgment on the claims and the court granted the motion based upon judicial estoppel. In deciding whether to apply judicial estoppel, the court considered: (1) whether the party took an inconsistent position under oath in a prior proceeding; and (2) whether the inconsistent position was calculated to make a mockery of the judicial system. To determine if the debtor intended to make a mockery of the judicial system, the district court analyzed: (1) whether the debtor had knowledge of the undisclosed claim; and (2) whether the debtor had a motive for concealment. The Eleventh Circuit, *en banc*, reversed and

remanded. The court held that whether the debtor acted with the requisite intent should be examined in light of the totality of the facts and circumstances of the omission. To evaluate the debtor's intent, courts should look a number of factors such as: (1) the debtor's level of sophistication; (2) whether and under what circumstances the debtor corrected the disclosures; (3) whether the debtor told his bankruptcy attorney about the civil claims before filing the disclosures; (4) whether the trustee or creditors were aware of the civil claims before the debtor amended the disclosures; (5) whether the debtor identified other lawsuits to which he was a party; (6) any findings or actions by the bankruptcy court after the omission was discovered. The Eleventh Circuit rejected the prior notion that the failure to disclose a civil claim, by itself, was sufficient to permit the inference that the debtor intended to make a mockery of the judicial system. *Id*. at 1185. Some courts in the Northern District of Illinois have applied the prior two-part test for determining the requisite intent, however the Seventh Circuit has not addressed this issue since the ruling in *Slater.*

***Seymour v. Collins*, 2015 IL 118432 (September 24, 2015)**

The Illinois Appellate Court affirmed a trial court's judgment that plaintiffs were judicially estopped from proceeding on their claims because they had failed to disclose their personal injury claims in their Chapter 13 petition. Following a lengthy discussion of the applicable standard for review of dismissal on grounds of judicial estoppel, the Illinois Supreme Court reversed the judgments of the appellate and trial courts, holding that although the debtors had a legal obligation to disclose the litigation in their bankruptcy case there was no evidence that they intended to deceive or mislead the bankruptcy court – "a critical factor in the application of judicial estoppel." The Illinois Supreme Court was unwilling to presume that the debtor's failure to disclose was deliberate manipulation and found that such an inference or presumption is not controlling in Illinois. Such reasoning would "[diminish] the application of judicial estoppel to a rigid formula and fails to consider the specific circumstances of each case."

***In re Enyedi*, 371 B.R. 327 (Bankr. N.D. Ill. 2007)**

Approximately one year after bankruptcy trustee filed a no asset report and debtor obtained a discharge in a Chapter 7 case, debtor's counsel sought to reopen debtor's bankruptcy case to include a workers compensation action and a personal injury action that had been filed in state court prior to the petition date but were omitted from the debtor's bankruptcy schedules. The defendants in the personal injury suit were not served with the motion to reopen the case, the trustee's motion for reappointment, or the trustee's motion to appoint special counsel. While the bankruptcy case was being revived, the state court defendants successfully sought dismissal of the lawsuit on judicial estoppel grounds due to the debtor's failure to schedule the lawsuit in the bankruptcy case. Neither the bankruptcy trustee nor the Estate was served with notice of the defendants' motion to dismiss. The bankruptcy trustee moved in the bankruptcy court to void the order of dismissal as *ab initio* because it was entered in violation of the automatic stay, and the bankruptcy court agreed. The bankruptcy court stated the general principal that once a Chapter 7 bankruptcy petition has been filed, the trustee holds the exclusive right to pursue the debtor's pre-petition causes of action, and that, absent abandonment, a debtor cannot pursue a cause of action for his or her own benefit. Because the causes of action were never scheduled and administered by the trustee, they were never abandoned and remained property of the bankruptcy estate subject

to the automatic stay. The bankruptcy court went on to find that the order dismissing the pre-petition lawsuit with prejudice, entered without prior notice to the bankruptcy trustee, was in violation of the automatic stay under Section 362(a) of the Bankruptcy Code and therefore void *ab initio*.

***In re Muhlig*, 494 B.R. 755 (Bankr. S.D. Fla. 2013)**

After defendants in a Florida state court lawsuit, which had not been scheduled by the debtor, obtained summary judgment dismissal on the basis of debtor's lack of standing to pursue an asset of the Estate, the bankruptcy trustee sought to void the dismissal as in violation of the automatic stay. The bankruptcy court agreed with the trustee, finding that the defendants' attempt to enforce the entry of summary judgment against an innocent trustee, who had not been served with the defendants' motion despite their awareness of the bankruptcy case, was in violation of the automatic stay. The bankruptcy court distinguished the defendants' actions from other "defensive" actions in non-bankruptcy litigation that would not be in violation of the automatic stay: (1) defendants may seek dismissal or summary judgment on claims brought by a party with standing under the Bankruptcy Code to assert claims of the Estate; or (2) seek dismissal or summary judgment on a claim brought by a debtor who lacks standing provided that the motion is served on bankruptcy trustee and defendants are seeking dismissal of the party lacking standing without prejudice to the bankruptcy trustee substituting in as the proper party in interest. Agreeing with the decision in *In re Enyedi*, 371 B.R. 327 (Bankr. N.D. Ill. 2007), the court held that a defendant's efforts in seeking dismissal of Estate actions brought by debtors who lacked standing violated the automatic stay when done without notice to the bankruptcy trustee.

IV. WHEN DOES THE APPLICABLE COMMITMENT PERIOD BEGIN?

In the 2005 Bankruptcy Code amendment commonly known as BAPCPA[1] , Congress added the term "applicable commitment period", an undefined term in section 101 of the Code. It appears in only two places—sections 1325 and 1329. Pre-BAPCPA, the Code did not set down an absolute minimum duration for chapter 13 plans. The debtor was permitted to propose a plan that might last, for example, only for two years or one year or one month that could be confirmed if no one objected and if all applicable conditions of confirmation were satisfied. *See In re Torres,* 193 B.R. 319, 321 (Bankr. N.D. Cal. 1996). Unless a plan proposed payment of all allowed claims, three years was the effective minimum.

Under BAPCPA, the applicable commitment period is 3 years for a below-median debtor and 5 years for an above-median debtor. Those periods may be shortened only to the extent that the unsecured claims may be paid in full more quickly. In effect, the "three-year period" was replaced by the "applicable commitment period". *See In re Martin,* 464 B.R. 798, 802 (Bankr. C.D. Ill. 2012). In spite of the lack of clarity in the Code as to when the applicable commitment period begins, most courts rule that the commitment period starts when the first payment is due. A minority view holds that it begins on the plan confirmation date. In general, the Sixth and Seventh

[1] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)

Circuits follow the majority view, although Judge G. Michael Halfenger of the Eastern District of Wisconsin recently held that it begins at confirmation.

Section 1325(b) states that "the applicable commitment period beginning on the date that *the first payment* is due under the plan." Section 1325(b) makes no mention of a "confirmed plan" but consistently refers to the first payment date. Based upon this reading some courts hold that the commitment period begins 30 days after the petition is filed. *In re Humes*, 579 B.R. 557, 560 (Bankr. D. Colo. 2018). In contrast, other courts read section 1325(b) to start the commitment period as soon as the plan is confirmed and rely upon section 1329(c), which states that "[a] plan modified under this section may not provide for payments over a period that expires after the applicable commitment period under section 1325(b)(1)(B) after the time that the first payment under the original *confirmed* plan was due." *West v. Costen*, 826 F.2d 1376, 1378 (4th Cir. 1987). Understandably, this imprecision within the Code's language leads to confusion.

JURISDICTION SPLITS

A majority of courts support the "first payment" view. *See In re Humes*, 579 B.R. at 560; *In re Schuster*, No. 10-01175, 2015 WL 9282447, at *4 (Bankr. D.D.C. Dec. 18, 2015) ("when measuring the five-year maximum duration of a modified plan, the measurement runs from the date on which the first payment was due under 11 U.S.C. § 1326(a)"); *In re Ramsey*, 507 B.R. 736, 739 (Bankr. D. Kan. 2014) ("the first payment was due on January 23, 2009. . . the applicable commitment period was due January 23, 2014"); *Profit v. Savage (In re Profit)*, 283 B.R. 567, 575 (B.A.P. 9th Cir. 2002) ("We have held that the 60-month period . . . commences on the date the first plan payment was due pursuant to § 1326(a)(1)"); *Baxter v. Evans (In re Evans)*, 183 B.R. 331 (Bankr. S.D. Ga. 1995) ("the most logical point from which to begin counting the repayment period is at the time the debtor is first required to make payments under § 1326(a)(1)").

A minority of courts support the "confirmation date" view. *West*, 826 F.2d at 1378.

Sixth and Seventh Circuits Views

A. The Sixth Circuit supports the "first payment" view.

Although the Bankruptcy Court for the Western District of Michigan previously adopted the "confirmation date" view, *In re Cook*, 148 B.R. 273, 281 (Bankr. W.D. Mich. 1992) (citing *West*, 826 F.2d at 1378), the trend in this circuit may have shifted. Recently, the Bankruptcy Court for the Eastern District of Michigan ruled that the commitment period begins when the first plan payment is due. *In re Kinne*, No. 19-49692, 2020 Bankr. LEXIS 2401, at *8 (Bankr. E.D. Mich. Sep. 11, 2020). If the model plan, however, states that the applicable commitment period begins on the confirmation date, this provision remains valid unless modified before confirmation. *In re Nicholson*, No. 17-47542, 2023 Bankr. LEXIS 1495, at *1-2 (Bankr. E.D. Mich. June 7, 2023).

The Bankruptcy Court for the Northern District of Ohio also supports the "first payment" view. *In re Lundy*, No. 15-32271, 2016 Bankr. LEXIS 3771, at *33 (Bankr. N.D. Ohio Oct. 19, 2016).[2]

[2] We were unable to find any cases from either the Kentucky or Tennessee bankruptcy courts.

B. Seventh Circuit

1. Wisconsin supports the "confirmation date" view.

Emphasizing the phrase "under the plan" in § 1325(b), the Bankruptcy Court for the Eastern District of Wisconsin ruled that the applicable commitment period starts from the plan's confirmation date. *In re Goldapske*, 657 B.R. 855, 858 (Bankr. E.D. Wis. 2024).

2. Indiana supports the "first payment" view.

Indiana bankruptcy courts consistently rule that the commitment period starts on the date of the first payment. *See In re Magallanes*, No. 09-23286, 2010 Bankr. LEXIS 1387, at *13 (Bankr. N.D. Ind. May 13, 2010); *In re Musselman*, 341 B.R. 652, 657 (Bankr. N.D. Ind. 2005).

3. Illinois seems to support the "first payment" view.

Although the Bankruptcy Court for the Northern District of Illinois have not explicitly addressed when the commitment period starts, it seems that as "§ 1322(d) limits Chapter 13 plans to a maximum of five years," this may mean that the five years begins on the date of the first payment, due 30 days after the petition date. *In re Grant*, 428 B.R. 504, 508 (Bankr. N.D. Ill. 2010).

CONCLUSION

If the applicable commitment period begins on the 30th day after the petition is filed, the chapter 13 debtor may pay less than a chapter 13 debtor who makes her payment beginning on the 30th day after the petition date but whose applicable commitment period does not start until plan confirmation. Many plans are not confirmed for three or four months after the petition date creating a greater number of overall payments. This seems curious. Is this what Congress meant?

Faculty

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Hon. Deborah L. Thorne is a U.S. Bankruptcy Judge for the Northern District of Illinois in Chicago, appointed on Oct. 22, 2015. Prior to joining the bench, she was a partner in the Chicago office of Barnes & Thornburg LLP, where she was a member of its Financial Insolvency and Restructuring Department. Her practice included the representation of creditors and other parties in insolvency

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