AMERICAN BANKRUPTCY INSTITUTE

2021 Rocky Mountain Bankruptcy Virtual Conference

You Want Me to Do What? The Dilemma of Trying to Interpret and Follow Appellate Precedent

Presented by IWIRC

Hon. Terrence L. Michael
U.S. Bankruptcy Court (N.D. Okla.) | Tulsa

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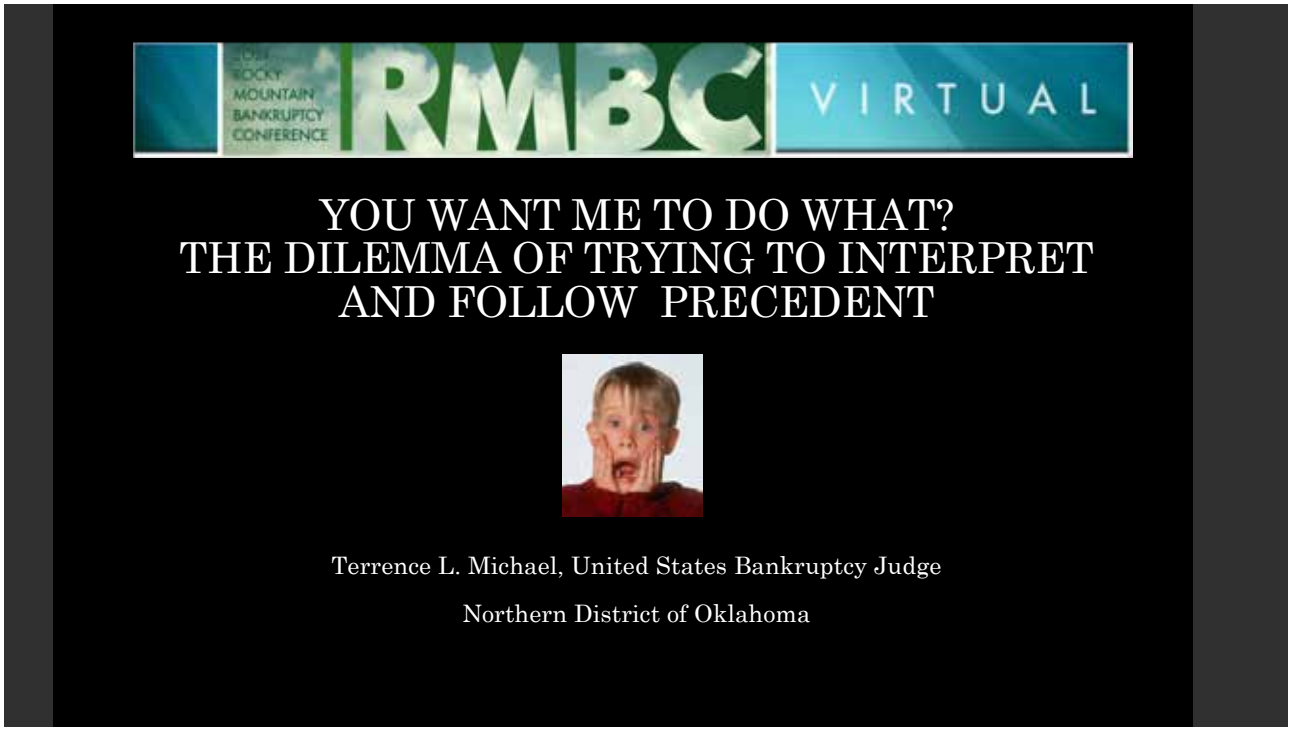
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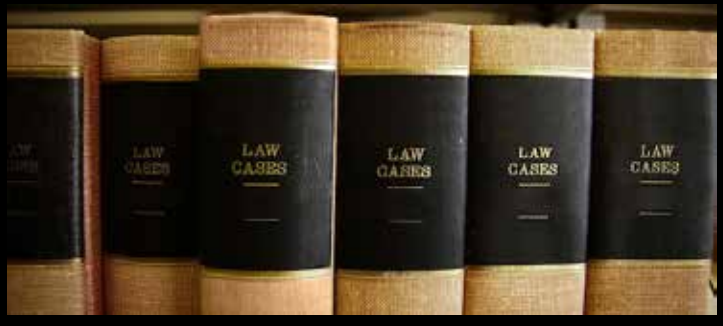
YOU WANT ME TO DO WHAT?
THE DILEMMA OF TRYING TO INTERPRET
AND FOLLOW PRECEDENT
Terrence L. Michael, United States Bankruptcy Judge
Northern District of Oklahoma

Remember playing "telephone" as a kid?

(Choose your picture based on your own demographic.)

What's Out There, Anyway?

- Bankruptcy Court Opinions (published and unpublished)
- District Court Opinions (published and unpublished)
- BAP Opinions (published and unpublished)
- Circuit Opinions (published and unpublished)
- SCOTUS Opinions



When is authority not authority?

Local Rule 36-3 of the United States Court of Appeals for the Ninth Circuit (prior to January 1, 2007):

- (a) Unpublished dispositions and orders of this Court are not binding precedent, except when relevant under the doctrine of law of the case, res judicata, and collateral estoppel.
- (b) Citation: Unpublished dispositions and orders of this Court **may not be cited to or by the courts of this circuit**, except in the following circumstances.
- (i) They may be cited to this Court or to or by any other court in this circuit when relevant under the doctrine of law of the case, res judicata, or collateral estoppel.
- (ii) They may be cited to this Court or by any other courts in this circuit for factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys' fees, or the existence of a related case.
- (iii) They may be cited to this Court in a request to publish a disposition or order made pursuant to Circuit Rule 36-4, or in a petition for panel rehearing or rehearing en banc, in order to demonstrate the existence of a conflict among opinions, dispositions, or orders.
- (c) Attach Copy: A copy of any cited unpublished disposition or order must be attached to the document in which it is cited, as an appendix.

Now we have FRAP 32.1

- **Rule 32.1 Citing Judicial Dispositions**
- (a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:
- (a)(i) designated as "unpublished," "not for publication," "nonprecedential,-" "not precedent," or the like; and
- (ii) issued on or after January 1, 2007.
- (b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

OK, so we have lower courts covered. But what about these folks:

(Sorry, I couldn't find a picture with the newest Justice.)

Harris v. Viegelahn

- Filed as a Chapter 13 Case
- Plan Confirmed
- Case Converted to Chapter 7
- Assignment of $1,200 in possession of the Chapter 13 Trustee to counsel for payment of Attorney's Fees in the Chapter 7 Case
- $4,313.22 in remaining funds held by the Chapter 13 Trustee
- This is money that would have gone to the first mortgage holder on the house (Chase), but for the fact that Chase previously obtained relief from the automatic stay.
- Debtor moves to get the money back.
- Trustee has already paid the funds to general unsecured creditors under the terms of the confirmed plan and asks the Court to bless this action.

So What Happens?

- **Bankruptcy Court**:
  - Takes no evidence and issues a bench ruling.
  - Applying Section 348, finds that the money belongs to the Debtor, and orders the Trustee to pay $4,319.22 to the Debtor.
- **District Court**:
  - Affirms the decision.
  - Applies Section 348(f)(1)(A), holding that creditors have no vested right in funds under a confirmed Chapter 13 Plan after conversion.
  - Relies on a Third Circuit Decision, *In re Michael*.
    - (Is that a great name for a case or what?)

Harris takes the Fifth (Circuit) (or is it the other way around?)

- Fifth Circuit reverses.
- Rules that while creditors have no vested right to funds under a Chapter 13 plan prior to confirmation, the same does not hold true after plan confirmation.
- Rules that the Trustee was correct to distribute the funds to creditors under the terms of the Chapter 13 Plan.
- Acknowledges, but remains silent as to, the $1,200 paid out of those funds to counsel for the Debtor.
- Case gets appealed to the U.S. Supreme Court.

The Third Circuit View: *Michael*

- Similar Facts:
  - Trustee held $9,100 in payments that would have gone to the first mortgage holder had that creditor not obtained relief from the automatic stay and foreclosed.
  - Trustee kept the money in case Debtor and Creditor made a deal and Debtor needed to pay the arrearage.
  - Upon conversion to Chapter 7, Trustee stated an intent to pay the $9,100 to unsecured creditors under the terms of the plan.
- Bankruptcy Court ruled in favor of the Debtor and ordered the $9,100 paid to the Debtor.
- District Court affirmed.
- Third Circuit affirmed (2-1).

Harris hits the big time (a/k/a the Supreme Court)

- 9-0 decision with some great sound bites:
- "Section 348(f), all agree, makes one thing clear: A debtor's postpetition wages, including undisbursed funds in the hands of a trustee, ordinarily do not become part of the Chapter 7 estate created by conversion. Absent a bad-faith conversion, § 348(f) limits a converted Chapter 7 estate to property belonging to the debtor "as of the date" the original Chapter 13 petition was filed. Postpetition wages, by definition, do not fit that bill."
- **"When a debtor exercises his statutory right to convert, the case is placed under Chapter 7's governance, and no Chapter 13 provision holds sway."**

So what happens next?

Now it gets personal:

- If the case is dismissed, under §1326(a)(2), the Debtor gets the money after payment of administrative claims.
- If the case is converted, under *Harris*, §1326(a)(2) doesn't apply. The Debtor gets the money, and counsel (at least arguably) has no right to have their fees paid first.
- This issue was never in play in *Harris*.

Adequate Protection Payments:

§ 1326(a)(1)(C)

- Who gets the money if a Chapter 13 case is dismissed while the Trustee is holding money earmarked for adequate protection payments?
- Does something like this sound familiar?
  - The trustee shall hold all plan payments received (including the portion of the plan payments upon which a lien has been provided for under the plan) until confirmation of a plan, dismissal or conversion of the case. If a plan is confirmed, the trustee shall disburse all payments held as provided in the confirmed plan. If the case is dismissed or is converted to another chapter prior to confirmation of a plan, the adequate protection lien provided for in the plan shall attach to plan payments received by the trustee on or before the date of conversion or dismissal and the Chapter 13 trustee is authorized to disburse the funds to which the adequate protection lien has attached to the creditor entitled thereto[.]

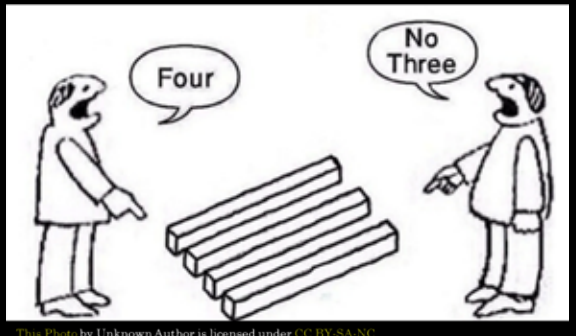
So what is a Bankruptcy Judge to do with *Harris*?

Option One:
Limit *Harris* to its facts.

Option 2:
Ask Congress to amend the Bankruptcy Code.

The Third Option: Apply *Harris* across the board.

How about another example? *Taggart v. Lorenzen*



How Bankruptcy Judges Feel About Discharge Orders

Let's Talk About *Taggart* on the way to the Supreme Court:

- The facts are a study in shenanigans.
- Bankruptcy Court – Found a Violation of the Discharge Order
- BAP – Not so Fast
- 9th Circuit – Way to Go, BAP! (Almost always a good answer).
- The Supremes gave us this nugget:
- "We conclude that neither a standard akin to strict liability nor a purely subjective standard is appropriate. Rather, in our view, a court may hold a creditor in civil contempt for violating a discharge order if there is *no fair ground of doubt* as to whether the order barred the creditor's conduct. In other words, civil contempt may be appropriate if there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful."

Taggart after SCOTUS

The Wide Wide World of *Taggart* in the Eyes of Other Courts

In re Freeman, 608 B.R. 228 (BAP 9th Cir. 2019)

- The standard under *Taggart* is "generally" objective.
- "That said, subjective intent is not always irrelevant: 'Our cases suggest, for example, that civil contempt sanctions may be warranted when a party acts in bad faith.'"
- "On the other hand, a party's good faith, even if it does not prevent a finding of civil contempt, might help determine the appropriate sanction."
- Apparently, subjective intent is back in play in the 9th Circuit.
- Case was remanded back to the Bankruptcy Court, which found no basis for contempt.

The game of telephone continues:

- *In re DiBattista*, 615 B.R. 31, 39 (S.D.N.Y. 2020):
- "The fair ground of doubt standard is generally an objective one, but a party's subjective intent is relevant. For example, 'civil contempt sanctions may be warranted when a party acts in bad faith,' and '[o]n the flip side of the coin, a party's good faith, even where it does not bar civil contempt, may help to determine an appropriate sanction.'" (citations omitted)
- Sound familiar?

In re Cowan, 2020 WL 7330049, Case No. 18-54666-JWC (Bankr. N.D. Ga. Dec. 11, 2020).
(A study in great judging and not-so-great lawyering.)

The Legend of *Taggart* Grows

- Automatic Stay Violations – *In re Moo Jeong*, 2020 WL 1277575 (9th Cir. BAP March 16, 2020).
- Rule 3002.1 Violations – *In re Gravel*, 601 B.R. 873 (Bankr. D. Vt. 2019).
- Debtor's Failure to Comply With an Order after Conversion of Case – *In re Skandis*, 621 B.R. 218 (Bankr. W.D. Mich. 2020).
- Violation of an Order Confirming a Chapter 11 Plan – *In re Kimball Hill, Inc.*, 620 B.R. 894 (Bankr. N.D. Ill. 2020).

The best advice I can give you is:

- Know Your Judge
- Know The Facts of Your Case
- Know The Facts of the Cases You Cite
- Know Your Circuit
- Beware of Sound Bites
- And Good Luck with the SCOTUS Cases

YOU WANT ME TO DO WHAT? THE DILEMMA OF TRYING TO INTERPRET AND FOLLOW APPELLATE PRECEDENT

Terrence L. Michael†

I. INTRODUCTION

Almost 20 years ago, as a relatively new bankruptcy judge, I posted a series of brief writing tips to the Court's web site. When it came to case citation, this is what I wrote:

> Know the facts of the cases you cite. At the writing of this little ditty, there are almost 300 volumes of West's Bankruptcy Reporter. Suffice it to say that some judge, somewhere, sometime has written and published an opinion which contains the magic words which support your position. It is extremely tempting to insert that quotation (I call them "sound bites") into your brief and say, "see, judge, other courts agree with me so I must be right." This is a dangerous practice. Courts decide real disputes. Real disputes are fact driven. For me, the facts of a case are at least as important as the legal analysis. Be wary of the case which is factually dissimilar to yours, but has a great sound bite. Be sure (either in your brief or at oral argument) to explain why the factually dissimilar case is applicable to your situation. Also, be cognizant of the difference between the holding of a case and the dicta contained therein. Most judges (this one included) find little value in dicta unless we already agree with it.[1]

This principle works well in the world of brief writing. After all, a brief is written to a very limited audience (a judge and her clerk) for a very specific purpose (to persuade the judge on one set of facts in one particular case). Judicial decisions are a different animal. Judicial decisions, especially published judicial decisions, are written for a larger audience and a slightly different purpose. While the published

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1. Terrence Michael, *Ten Tips for Effective Brief Writing (at least with respect to briefs submitted to Judge Michael)*, http://www.oknb.uscourts.gov/sites/default/files/JMFiles/briefwritingtips.pdf. These tips have been the subject of other articles as well, so they cannot be all bad. *See, e.g.*, Douglas Abrams, *10 Tips for Effective Brief Writing*, Wis. Law., Feb. 2015, at 14.

trial court decision is written to resolve the dispute between the parties presently before the court, it is also written to shape the behavior of those who might come before the court in the future and to limit future litigation.[2]

Published decisions of appellate courts, however, serve a broader function. In the case of decisions of the United States Supreme Court, they are binding upon every court in the land. In a similar fashion, published decisions of the Courts of Appeals for the various circuits bind the lower federal courts. Moreover, appellate court decisions are at least one step removed from the front lines of fact finding. When it comes to bankruptcy cases, an appellate court faces a unique hurdle. Many bankruptcy cases involve an ongoing business or a debtor trying to reorganize her personal affairs. The dispute before the bankruptcy court in an adversary proceeding or contested matter is part of an ongoing process, rather than a single confined dispute. While the bankruptcy court is fully aware of this fact, and cognizant that the issue decided today may affect the decisions made by debtors and creditors tomorrow, that nuance is often lost on the appellate courts.

While there can be no doubt under our current system of jurisprudence lower courts are bound by published decisions of appellate courts, the question remains as to what a trial court is to do with broad pronouncements found in an appellate decision based upon limited or dissimilar facts. The theses advanced here are that lower courts should be permitted to look beyond the broad pronouncements of an appellate court and consider the factual nature of the dispute giving rise to the appellate decision. Also, appellate courts should focus their rulings on the dispute before them rather than make broad statements of law that may be unclear, lead to unintended results in future cases, and, in some cases, be uninterpretable. To demonstrate the issue and the problem, it is necessary to examine the various means by which circuit courts of appeals limit the precedential value of opinions, and one Supreme Court case that has cut a wide precedential swath.

II. THE ABILITY OF THE FEDERAL COURTS OF APPEAL TO LIMIT THE EFFECT OF THEIR DECISIONS

The United States Circuit Courts of Appeals ("CCAs") act as the intermediate level of review between district court decisions and the

2. The concept is simple. If lawyers and litigants know what a particular judge is likely to do in a given situation, they will shape their behavior accordingly. And, if a similar dispute arises in the future, the decision may help them arrive at a settlement rather than litigate the issue yet again, to the delight of all involved (especially the judge, who will be thrilled at the thought that someone actually read her decision. Trust me on this one).

United States Supreme Court. Unlike Supreme Court review, which is discretionary, the CCAs must hear and consider all appeals submitted to them.[3] In most circumstances, CCAs sit in three judge panels. This is done as a matter of necessity; the CCAs do not have the ability to hear each and every decision *en banc*.[4] Since not every circuit court judge weighs in on every decision, and not every circuit judge sees things in the same light, the circuit courts had to come up with a means to allow three judge panels to issue decisions that did not necessarily bind the entire court in all future cases.

The solution was to create two separate types of decisions: published (in the West Reporter system) and unpublished. Published opinions bind all future three judge panels on an issue until the issue is determined by the court *en banc*, or until the Supreme Court hears and resolves the identical issue.[5] Unpublished opinions do not have the same effect.

Prior to 2006 (more or less), many circuits had a rule severely limiting the citation of unpublished opinions. For example, prior to January 1, 2007, Local Rule 36-3 of the United States Court of Appeals for the Ninth Circuit provided that:

> (a) Unpublished dispositions and orders of this Court are not binding precedent, except when relevant under the doctrine of law of the case, res judicata, and collateral estoppel. (b) Citation: Unpublished dispositions and orders of this Court *may not be cited to or by the courts of this circuit*, except in the following circumstances. (i) They may be cited to this Court or to or by any other court in this circuit when relevant under the doctrine of law of the case, res judicata, or collateral estoppel. (ii) They may be cited to this Court or by any other

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3. 28 U.S.C. § 1291 (2012).

4. For example, the United States Court of Appeals for the Tenth Circuit, which has a total of nineteen active and senior judges, 2,296 cases were terminated on the merits in the year ending March 31, 2017. *See Table B-5—U.S. Courts of Appeals Federal Judicial Caseload Statistics* (March 31, 2017), UNITED STATES COURTS, http://www.uscourts.gov/statistics/table/b-5/federal-judicial-caseload-statistics/2017/03/31 (last visited Apr. 2, 2018). It would be impossible for all nineteen judges to consider and timely rule on this many appeals in a calendar year.

5. *See, e.g.*, *In re* Smith, 10 F.3d 723, 724 (10th Cir. 1993) ("We cannot overrule the judgment of another panel of this court. We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court."); Hart v. Massanari, 266 F.3d 1155, 1171 (9th Cir. 2001).

> Circuit law, a concept wholly unknown at the time of the Framing, binds all courts within a particular circuit, including the court of appeals itself. Thus, the first panel to consider an issue sets the law not only for all the inferior courts in the circuit, but also future panels of the court of appeals . . . . Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court.

Id. (citations omitted).

> courts in this circuit for factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys' fees, or the existence of a related case. (iii) They may be cited to this Court in a request to publish a disposition or order made pursuant to Circuit Rule 36-4, or in a petition for panel rehearing or rehearing en banc, in order to demonstrate the existence of a conflict among opinions, dispositions, or orders. (c) Attach Copy: A copy of any cited unpublished disposition or order must be attached to the document in which it is cited, as an appendix.[6]

Under this rule, unpublished decisions had no precedential existence. Other circuits had similar rules.[7]

Around the turn of the 20th century, courts began to look at these rules with circumspection. One of the most interesting decisions was *Anastasoff v. United States*[8] from the United States Court of Appeals for the Eighth Circuit.[9] In that case, Ms. Anastasoff sought a refund of a tax overpayment. The parties did not dispute that an overpayment of taxes had taken place; however, the applicable statute required the claim for refund to be made within three years of the date of the overpayment. She mailed the claim for refund within the three-year period, but the claim was received by the IRS three years and one day after the overpayment was made. The question before the court was whether the "Mailbox Rule" codified in 26 U.S.C. § 7502 applied to the case, making the applicable time period run from the date of mailing rather than the date of receipt.[10] In a prior unpublished decision, *Christie v. United States*,[11] the United States Court of Appeals for the Eighth Circuit held that the "Mailbox Rule" did not apply in such situations. Ms. Anastasoff recognized *Christie*, but argued that

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6. 9TH CIR. R. 36-3 (adopted effective July 1, 2000) (amended effective January 1, 2007) (emphasis added).

7. *See, e.g.*, D.C. CIR. R. 28(c) (abrogated December 1, 2008); 8TH CIR. R. 28A(i) (abrogated January 8, 2007).

8. 223 F.3d 898 (8th Cir. 2000).

9. Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000) [hereinafter *Anastasoff I*], *vacated on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000).

10. *See* 26 U.S.C. § 7502(a)(1) (2012). This section, Date of delivery, provides:

> If any return, claim, statement, or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of the internal revenue laws is, after such period or such date, delivered by United States mail to the agency, officer, or office with which such return, claim, statement, or other document is required to be filed, or to which such payment is required to be made, the date of the United States postmark stamped on the cover in which such return, claim, statement, or other document, or payment, is mailed shall be deemed to be the date of delivery or the date of payment, as the case may be.

Id.

11. No. 91-2375MN, 1992 U.S. App. LEXIS 38446 (8th Cir. Mar. 20, 1992) (per curiam).

it was not binding upon the panel under Eighth Circuit Rule 28(A)(i), and that, in any event, it was wrongly decided.

After a thorough and deliberate analysis, a three judge panel of the Eighth Circuit ruled that unpublished decisions constitute binding precedent, and, to the extent the Eighth Circuit local rule sought to limit the precedential effect of unpublished decisions, it was "unconstitutional under Article III, because it purports to confer on the federal courts power that goes beyond the 'judicial.'"[12] The effect of this decision was to remove the distinction between published and unpublished opinions, and make *every* decision of a three judge panel binding throughout the circuit. As for the merits of the case, the panel ruled that, based upon the prior decision, the "Mailbox Rule" provided no safe harbor for Ms. Anastasoff, and affirmed the judgment of the district court denying her refund claim.

At this point the case becomes interesting. While *Anastasoff I* was pending, the United States Court of Appeals for the Second Circuit, in a *published* decision, *Weisbart v. United States*,[13] decided that the "Mailbox Rule" would apply in such situations, and would render the claim for refund timely. Ms. Anastasoff, armed with *Weisbart*, requested reconsideration of her case *en banc*. In response to this request, the IRS filed a pleading stating that it "intended to pay the taxpayer's claim in full, with interest at the statutory rate."[14] In addition, the IRS advised the Eighth Circuit that it had entered an internal directive modifying its practices and policies, and would follow *Weisbart* in all future claims for overpayments of federal taxes.[15] On that basis, over the protests of Ms. Anastasoff that "[t]he issue of the status of unpublished decisions is of great importance to the bar and bench[,]" the Eighth Circuit found that the payment of Ms. Anastasoff's claim with interest rendered the entire appeal moot, dismissed the appeal, and vacated *Anastasoff I* in its entirety.[16] The issue of whether unpublished decisions held precedential value lived to fight another day. In addition, the principle announced in *Anastasoff I* was rejected by many courts, which held that courts may, as a matter of

12. *Anastasoff I*, 223 F.3d at 900.

13. 222 F.3d 93 (2d Cir. 2000), *abrogated by* United States v. Mead Corp., 533 U.S. 218 (2001).

14. Anastasoff v. United States, 235 F.3d 1054 (8th Cir. 2000) [hereinafter *Anastasoff II*] (en banc), *vacating* 223 F.3d 898 (8th Cir. 2000).

15. *Anastasoff II*, 235 F.3d at 1055-56. Think about that one for a moment. The IRS, having won the day on the merits of its claim, decided to moot the litigation by paying the claim in full, effectively vacating the decision on the precedential effect of unpublished opinions. Did it do so because the IRS felt *Anastasoff I* was wrongly decided, or because there were other unpublished decisions of circuit courts that were detrimental to the IRS better left in the category of unbinding precedent?

16. *Id*. at 1056.

policy, determine that unpublished decisions have no precedential value.[17]

The issue of prohibiting citation to unpublished decisions eventually came to the attention of the Committee on Rules of Practice and Procedure and the Advisory Committee on the Federal Rules of Appellate Procedure. In 2006, new Federal Rule of Appellate Procedure 32.1 was drafted as follows:

> Rule 32.1 Citing Judicial Dispositions (a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (a)(i) designated as "unpublished," "not for publication," "nonprecedential," "not precedent," or the like; and (ii) issued on or after January 1, 2007. (b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.[18]

Under this rule, circuit courts can no longer impose a blanket prohibition on citations of unpublished opinions. In response, many circuit courts have issued rules providing that unpublished decisions within the circuit have limited persuasive effect, and are eligible for citation.[19]

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17. *See, e.g.,* Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001); Symbol Techs., Inc. v. Lemelson Med., 277 F.3d 1361 (Fed. Cir. 2002) (adopting rationale of *Hart v. Massanari*); Hogan v. Carter, 85 F.3d 1113 (4th Cir. 1996); Stephens v. City of Topeka, Kan., 33 F. Supp. 2d 947, 955 (D. Kan. 1999) ("Unpublished opinions of the Tenth Circuit are not binding upon this court."), *aff'd on other grounds*, 189 F.3d 478 (10th Cir. 1999); Belfance v. Black River Petroleum, Inc. *(In re Hess)*, 209 B.R. 79, 82 n.3 (B.A.P. 6th Cir. 1997) ("unpublished decisions are not binding precedent in the same sense as published decisions").

18. FED. R. APP. P. 32.1 (effective December 1, 2006).

19. *See, e.g.,* 1ST CIR. R. 32.1.0(a) ("An unpublished judicial opinion, order, judgment or other written disposition of this court may be cited regardless of the date of issuance. The court will consider such dispositions for their persuasive value but not as binding precedent."); 2ND CIR. R. 32.1.1 (unpublished decisions issued after December 1, 2007, may be cited as persuasive authority); 4TH CIR. R. 32.1 ("Citation of this Court's unpublished dispositions issued prior to January 1, 2007, . . . [are] disfavored . . . . If a party believes, nevertheless, that an unpublished disposition . . . has precedential value . . . and that there is no published opinion that would serve as well, such disposition may be cited . . . ."); 7TH CIR. R. 32.1 (b) ("Opinions, which may be signed or per curiam, are released in printed form, are published in the Federal Reporter, and constitute the law of the circuit. Orders, which are unsigned, are released in photocopied form, are not published in the Federal Reporter, and are not treated as precedents."); 8TH CIR. R. 32.1A ("Unpublished opinions are decisions a court designates for unpublished status. They are not precedent. Unpublished opinions issued on or after January 1, 2007, may be cited in accordance with FRAP 32.1. Unpublished opinions issued before January 1, 2007, generally should not be cited."); 9TH CIR. R. 36-3(a) ("Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion").

There are no such rules, however, when it comes to decisions of the United States Supreme Court. Unlike the circuit courts, the Supreme Court has absolute discretion in hearing appeals. As a matter of practice, the Supreme Court hears a very small percentage of the cases it is asked to review.[20] When the Supreme Court decides a case, it issues a published opinion dispositive of the issue before it. A majority decision of the Supreme Court is binding upon every court in the land.[21] While this maxim is simple in theory, it can become complex in application.

III. THE STORY OF *HARRIS V. VIEGELAHN*

On February 10, 2010, Charles Harris ("Mr. Harris") filed a Chapter 13 petition in the United States Bankruptcy Court for the Western District of Texas. Although Mr. Harris was able to confirm a Chapter 13 Plan, he, like many other Chapter 13 debtors, was ultimately unable to perform under its terms. Mr. Harris, with the advice of counsel, made the decision to convert his case to a case under Chapter 7.[22] Mr. Harris, through counsel, filed the appropriate notice of conversion on November 21, 2011.[23] Attached to the notice of conversion was an assignment by Mr. Harris to his counsel of $1,200 of the funds held by Mary Viegelahn ("Ms. Viegelahn"), the Chapter 13 trustee for Mr. Harris's case. These funds were to be paid as attorneys' fees for services rendered in furtherance of the conversion of the case.[24] In accordance with the assignment, on November 22, 2011, Ms. Viegelahn paid Mr. Harris's counsel the $1,200, which left $4,319.22 in Ms. Viegelahn's hands. This money represented payments that were to be made under the plan to Chase, the holder of a first mortgage on Mr. Harris's residence. Prior to conversion, Chase obtained relief from the automatic stay to allow it to foreclose on the residence. After relief

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20. *Frequently Asked Questions*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/faq_general.aspx (last visited Apr. 3, 2018). According to the Supreme Court website, "The Court receives approximately 7,000-8,000 petitions for a writ of certiorari each Term. The Court grants and hears oral argument in about 80 cases." *Id*.

21. An obvious statement, to be sure. But, just in case, *see, e.g.,* United States v. Katzin, 769 F.3d 163, 173 (3d Cir. 2014).

22. Pursuant to § 1307(a) of the United States Bankruptcy Code, "[t]he debtor may convert a case under this chapter to a case under chapter 7 of this title at any time. Any waiver of the right to convert under this subsection is unenforceable." 11 U.S.C. § 1307(a).

23. Notice to Convert Case to Chapter 7 Case, *In re Harris*, No. 10-50655-C (Bankr. W.D. Tex. Nov. 21, 2011) ECF No. 30.

24. The bankruptcy court in question had previously ruled that such assignments, if made in writing with clear disclosure of the amount of funds being assigned, were valid and enforceable. *In re Zamora*, 274 B.R. 268 (Bankr.W.D. Tex. 2002). Such was the case here.

was granted, Ms. Viegelahn stopped making payments to Chase, and held the amounts that would have otherwise been paid to Chase in her account.

Shortly after conversion, Mr. Harris requested that Ms. Viegelahn refund him the remaining $4,319.22. Instead, Ms. Viegelahn disbursed those remaining funds to unsecured creditors in accordance with the terms of the confirmed Chapter 13 plan. Less than amused, Mr. Harris filed a motion with the bankruptcy court seeking return of those funds.[25] Ms. Viegelahn resisted, arguing that she was bound by the terms of the confirmed plan to distribute all monies in her possession (after payment of the $1,200, apparently), to unsecured creditors in accordance with the terms of the confirmed plan.

The bankruptcy court held a hearing on the motion to compel the return of funds. The only evidence admitted was the court docket sheet and a timeline showing the payment timing and history with respect to the $4,319.22. Ms. Viegelahn argued that, under the confirmed plan and § 1327 of the Bankruptcy Code, she was not only authorized, but bound to pay the monies in her possession at the time of conversion to creditors as provided for under the plan.[26] Mr. Harris, relying on 11 U.S.C §§ 348(e)[27] and 1326(a)(2),[28] argued that conversion terminated the ability of a Chapter 13 trustee to make any distributions to creditors, and mandated return of funds in the trustee's possession to the debtor. After hearing argument from the parties, the bankruptcy court ruled from the bench, finding that, under 11

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25. Motion to Compel Return of Funds, *In re* Harris, No. 10-50655-C (Bankr. W.D. Tex. Nov. 21, 2011), ECF No. 38.

26. 11 U.S.C. 1327 (2012). This section, effect of confirmation, states:

> (a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan. (b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor. (c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

Id.

27. 11 U.S.C. § 348(e) (2012) ("Conversion of a case under section 706, 1112, 1208, or 1307 of this title terminates the service of any trustee or examiner that is serving in the case before such conversion.").

28. 11 U.S.C. § 1326 (2012). Subsection (a)(2) provides:

> A payment made under paragraph (1)(A) shall be retained by the trustee until confirmation or denial of confirmation. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan as soon as is practicable. If a plan is not confirmed, the trustee shall return any such payments not previously paid and not yet due and owing to creditors pursuant to paragraph (3) to the debtor, after deducting any unpaid claim allowed under section 503(b).

Id.

U.S.C. § 348, the monies at issue belonged to Mr. Harris, and that Ms. Viegelahn erred when she disbursed funds to creditors under the plan. The bankruptcy court ordered Ms. Viegelahn to pay $4,319.22 to Mr. Harris in a summary order.[29]

A. On to the District Court

Ms. Viegelahn appealed to the district court, which, in a detailed and thoughtful opinion, affirmed the bankruptcy court's decision.[30] The district court found, under § 348(f)(1)(A) of the Bankruptcy Code, property of the bankruptcy estate in a converted case does not include the post-petition earnings of the debtor, unless, under § 348(f)(2), it is determined that the conversion of the case was in bad faith. The district court further found, relying in part upon a decision entered by the United States Court of Appeals for the Third Circuit,[31] funds received by a Chapter 13 trustee after a plan has been confirmed but before a case is converted belong to the debtor, based "on the Congressional policy of encouraging debtors to attempt a Chapter 13 bankruptcy—through which a debtor will pay his creditors at least as much and likely more than he would have under Chapter 7—without penalty if that attempt fails."[32] The district court also ruled creditors have no vested right in the funds held by a Chapter 13 trustee after the case is converted to Chapter 7. In so ruling, the district court noted that:

> [A] practical consequence of this holding is that "creditors will request more frequent distributions from the Chapter 13 trustee." This may be inconvenient to trustees, since the most efficient manner of administering payments may be to accumulate them and distribute them to creditors at an established time. However, the Court concludes that the increased administrative burden, if any, is outweighed by the clearly expressed Congressional policy of encouraging debtors to attempt a Chapter 13 repayment plan over a Chapter 7 liquidation. Moreover, if a court finds that a debtor is attempting to "game the system," section 348(f)(2)'s bad-faith provision authorizes that court to punish such behavior by determining the Chapter 7 estate as of the date of conversion.[33]

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29. Order Compelling Return of Funds, *In re* Harris, No. 10-50655-C (Bankr. W.D. Tex. Nov. 21, 2011), ECF No. 45. The bankruptcy court did not issue detailed findings of fact or conclusions of law. *Id*.

30. *In re* Harris, 491 B.R. 866 (W.D. Tex. 2013) [hereinafter *Harris I*], *rev'd* 757 F.3d 468 (5th Cir. 2014), *rev'd sub nom.* Harris v. Viegelahn, 135 S. Ct. 1829 (2015).

31. *In re* Michael, 699 F.3d 305 (3d Cir. 2012).

32. *Harris I*, 491 B.R. at 873 (citation omitted).

33. *Id*. at 876 (quoting *In re Michael*, 699 F.3d at 317).

The district court disagreed with decisions holding that once the debtors pay sums to the Chapter 13 trustee, creditors have a vested right to those monies,[34] and it is inequitable to hold creditors at bay without payment while a debtor remains in possession of and uses property pledged to those creditors.[35]

B. On to the Fifth Circuit

Ms. Viegelahn appealed the district court decision to the United States Court of Appeals for the Fifth Circuit. At long last, she found a sympathetic ear. The Fifth Circuit, noting the issue of whether undistributed payments held by a Chapter 13 trustee should be refunded to the debtor or paid to creditors under the terms of the confirmed plan "has divided courts for thirty years," reversed the decisions of the bankruptcy and district courts, and ordered that Ms. Viegelahn had acted properly when she paid the monies to creditors.[36] The Fifth Circuit recognized its prior ruling that when a Chapter 13 case is converted *prior to* confirmation of a plan, all monies in possession of the Chapter 13 trustee must be returned to the debtor.[37] The Fifth Circuit held that, while 11 U.S.C. § 348(f) dictates that post-petition earnings of a Chapter 13 debtor do not become property of the subsequent Chapter 7 estate absent a finding of bad faith, neither § 348(f) nor any other provision in the Bankruptcy Code dictates the destiny of those funds.[38]

The Fifth Circuit rejected the notion that 11 U.S.C. § 348(e) terminates the services of a Chapter 13 trustee, noting that a Chapter 13 trustee, after conversion, still has several duties, and, in the case where he or she is in possession of funds, has to distribute them to someone. The Fifth Circuit stated that "[t]he language of § 348(e) terminating the trustee's services upon conversion cannot be taken too literally."[39] The court noted a Chapter 13 trustee has several ancillary duties after conversion of a case to Chapter 7, and stated "there is no logical reason why distribution of funds pursuant to the previously

34. *Id*. at 872 (disagreeing with *In re* Waugh, 82 B.R. 394, 400 (Bankr.W.D. Pa. 1988), and *In re* Milledge, 94 B.R. 218, 220 (Bankr. M.D. Ga. 1988)).

35. *Id*. at 872-73 (disagreeing with *In re* O'Quinn, 143 B.R. 408, 413 (Bankr. S.D. Miss. 1992)).

36. *In re* Harris, 757 F.3d 468, 470 (5th Cir. 2014) [hereinafter *Harris II*], *rev'd sub nom.* Harris v. Viegelahn, 135 S. Ct. 1829 (2015).

37. *In re* Stamm, 222 F.3d 216 (5th Cir. 2000). Interestingly in a footnote, the court in *Stamm* allowed the bankruptcy court to authorize 11 U.S.C. § 503(b) claims out of funds before returning to debtor. *See id*. at 218 n.2 ("In determining the proper distributions, the bankruptcy court may consider the Trustee's potential claims for compensation of professionals under § 503(b) of the Code").

38. *Harris II*, 757 F.3d at 473.

39. *Id*. at 474 (quoting *In re* Parrish, 275 B.R. 424, 430 (Bankr. D.D.C. 2002)). *See supra* note 27.

confirmed reorganization plan cannot be included as one of those administrative duties."[40] However, when a case is converted after confirmation of a plan, the Fifth Circuit held all monies in possession of the trustee must be paid to creditors under the terms of the plan, ruling that:

> We do not read so much into the fact that upon conversion, a Chapter 13 plan is "no longer in force." It is clear that after conversion, the debtor's continuing obligations under the plan (such as the obligation to keep making payments to the trustee) cease; likewise, the plan does not continue to bind creditors. However, it does not follow that the plan should thereafter be considered retroactively undone in full, and no statutory authority supports such an interpretation. To the contrary: as discussed above, under the Bankruptcy Code conversion does not eliminate the trustee's power and duty to wrap up certain affairs of the estate. Similarly, there is no reason why prospective termination of the plan necessarily prohibits the trustee from distributing the funds remaining in her possession—which were paid at a time when the plan was still in force, and the debtor was still obligated to make payments—pursuant to the plan.[41]

Interestingly, while the Fifth Circuit acknowledged the payment of the $1,200 to Mr. Harris's attorney from the trustee to pay legal fees incurred in connection with the conversion, it raised no issue regarding that use of the monies.[42] Mr. Harris, unhappy with the decision of the Fifth Circuit, sought review by the Supreme Court. More about that in a bit.

C. The Opposite View in the Third Circuit

The United States Court of Appeals for the Third Circuit, on virtually indistinguishable facts, has previously reached the opposite result of the Fifth Circuit in a case entitled *In re Michael*.[43] The case originated before the Bankruptcy Court for the Middle District of Pennsylvania. There, the debtor filed his Chapter 13 case at a time when he was seriously in arrears on a debt to GMAC Mortgage ("GMAC") secured by a first lien upon the debtor's home. The con-

40. *Harris II*, 757 F.3d at 474 (quoting In re Michael, 699 F.3d 305, 320 n.8 (3d Cir. 2012) (Roth, J., dissenting).

41. *Id*. at 475.

42. The idea that all monies in the hands of a Chapter 13 trustee no longer fall within the control of the debtor and must be paid to creditors in accordance with the terms of a confirmed plan seems inconsistent with the notion that the debtor can direct payment of a portion of those monies to his or her counsel to pay ongoing fees related to the conversion of the case from Chapter 13 to Chapter 7.

43. 699 F.3d 305 (3d Cir. 2012) [hereinafter *Michael*] (no relation to the author).

firmed Chapter 13 plan provided for a portion of debtor's payments to the Chapter 13 trustee to be remitted to GMAC for application to the debtor's pre-petition arrearage. The debtor was also obligated to continue making the regular monthly payments to GMAC as they fell due.[44] Shortly after the plan was confirmed, the debtor defaulted on his post-petition obligations to GMAC, and GMAC obtained relief from the automatic stay to foreclose on the property. The debtor continued to make his monthly payments to the Chapter 13 trustee, who held payment without distributing the portion of the plan payment that would have otherwise gone to GMAC on the arrearage. Payments continued for 3 years, until, in October of 2009, debtor filed a notice of conversion of the case to Chapter 7. By that time, the Chapter 13 trustee had accumulated over $9,100 in undistributed funds. The debtor filed a motion seeking their return. The Chapter 13 trustee objected, arguing that the monies should be distributed to unsecured creditors under the terms of the confirmed plan. In making this argument, the trustee relied on 11 U.S.C. § 1326(a)(2), which states that "a payment made under this subsection [§ 1326(a)] shall be retained by the trustee until confirmation or denial of confirmation of a plan. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan as soon as practicable."[45]

One is left to wonder why the trustee in *Michael* held on to so much money, notwithstanding the admonition in 11 U.S.C. § 1326(a)(2) to distribute funds "in accordance with the plan as soon as practicable." The answer is found in the trustee's trial court brief:

> The Trustee prepared a Schedule of Distribution on June 20, 2006. GMAC Mortgage Corporation ("GMAC") held a first lien mortgage on the Debtor's residence and began receiving disbursements pursuant to the plan in November, 2006. On August 15, 2006, GMAC obtained an Order granting relief from stay and started returning disbursement checks to the Trustee in February, 2007. At that time, it was the Trustee's practice to place such claims on hold and retain the funds for the benefit of the creditor pursuant to the confirmed plan. If the stay was reinstated, then the Trustee would resume dis-

44. Such a provision is commonplace in Chapter 13 plans and is in effect mandated by § 1322(b)(2), which provides that a Chapter 13 plan may "modify the rights of holders of secured claims, *other than a claim secured only by a security interest in real property that is the debtor's principal residence*, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims . . . ." 11 U.S.C. § 1322(b)(2) (2012) (emphasis added). For the definition of "debtor's principal residence," *see* 11 U.S.C. § 101(13A) (2012).

45. 11 U.S.C. § 1326(a)(2) (2012). *See In re* Michael, 436 B.R. 323, 326 (Bankr. M.D. Pa. 2010) [hereinafter *Michael I*], *aff'd sub nom* De Hart v. Michael, 446 B.R. 665 (M.D. Pa. 2011) [hereinafter *Michael II*], *aff'd sub nom In re* Michael, 699 F.3d 305 (3d Cir. 2012).

> bursements to the creditor pursuant to the plan. If the stay was not reinstated and the debtor failed to amend the plan to remove the mortgage arrearage claim prior to the closing of the case, then the funds that were assigned to the mortgage claim were disbursed to other creditors under the plan. In the case at bar, the Debtor did not amend his plan after GMAC obtained relief from stay. Rather, he continued to make plan payments to the Trustee. In August, 2009, the Trustee sent an email notice to Debtor's Counsel that indicated that more than $8,400.00 was assigned to GMAC's claim and that the Trustee intended to disburse the funds to unsecured creditors, and further requested that the Debtor amend his plan to remove the claim. Instead on October 26, 2009, the Debtor filed an Election to Convert to Chapter 7, and on October 29, 2009, he filed the instant Motion to Compel Chapter 13 Trustee to turnover the undistributed funds to the Debtor.[46]

The bankruptcy court rejected the trustee's arguments that all payments in his possession were held in "irrevocable trust" for the benefit of creditors, and held that the order of conversion effectively vacated the order confirming the Chapter 13 plan. The bankruptcy court also found that returning the funds held by the trustee to the debtor upon conversion would encourage the use of Chapter 13 by debtors,[47] and ordered the trustee to return all funds in his possession to the debtor. On appeal, the United States District Court for the Middle District of Pennsylvania affirmed.[48]

The trustee took his case to the United States Court of Appeals for the Third Circuit, which affirmed in a 2-1 decision.[49] Recognizing the split among other courts, the majority held that conversion to Chapter 7 terminates the Chapter 13 estate and that 11 U.S.C. § 348(f)(1) requires that property (namely, the post-petition earnings of the debtor) is not part of the Chapter 7 estate. As a result, unpaid funds in the hand of the Chapter 13 trustee upon conversion "revert[ ] to the debtor on conversion, assuming that the debtor does not convert in bad faith."[50] The majority found that returning post-petition earnings to the debtor was consistent with Congressional intent, and

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46. Brief filed by Trustee at 1-2, *In re* Michael, No. 05-06085-MDF (Bankr. M.D. Pa. Jan. 13, 2010), ECF No. 66.

47. *Michael I*, 436 B.R. at 325.

48. *Michael II*, 446 B.R. at 665 (M.D. Pa. 2011) *aff'd sub nom. In re Michael*, 699 F.3d 305 (3d Cir. 2012).

49. *Michael*, 699 F.3d at 319.

50. *Id*. at 313. Section 348(f)(2) provides that in cases where the debtor is found to have converted from Chapter 13 to Chapter 7 in bad faith, property acquired by the debtor after the filing of the case will be included in property of the estate and distributed to creditors.

would encourage Chapter 13 filings, as debtors would not run the risk of losing post-petition earnings and/or the appreciation in the value of assets (such as a home) in the event the case was later converted to Chapter 7.[51]

Judge Jane R. Roth dissented. She took the position that the funds became "attached" under the terms of the confirmed Chapter 13 plan, subject to the terms of that plan requiring their distribution to unsecured creditors. She opined that "the payments Michael made were in exchange for the benefits he derived from the plan. Therefore, if the undistributed funds revert to him, instead of being distributed to creditors in accordance with the plan's terms, Michael would receive a windfall."[52] Judge Roth went on to opine that:

> I hope that we will not see the reversal of a Third Circuit practice that over the years has balanced the benefits to both parties under a plan of reorganization by providing that the undistributed funds held by the trustee will be distributed to the creditors pursuant to the confirmed plan. If we adopt the Majority's position, we will be permitting a windfall in this unusual case where inaction by the debtor and by the trustee has permitted funds to accumulate in a situation in which that normally would not occur.[53]

No further appeal was taken from the decision of the Third Circuit. Thus the rule of law on this issue differed greatly between the Third and Fifth Circuits.

D. Harris at the Supreme Court

The Supreme Court granted certiorari in *Harris*, ostensibly to resolve the conflict between the decisions in *Harris II* and *Michael*.[54] The Supreme Court, in a unanimous decision, reversed the ruling of the Fifth Circuit in *Harris II*, holding that a Chapter 13 debtor who converts his or her case to Chapter 7 is entitled to the return of any funds derived from post-petition wages not yet distributed to creditors by the Chapter 13 trustee.[55]

Justice Ginsburg delivered the opinion of the Court. She focused upon the language of 11 U.S.C. §§ 348(f)(1)(A) and 348 (f)(2):

> (f)(1) Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title (A) property of the estate in the con-

51. *Id*. at 314-15.
52. *Id*. at 320 (Roth, J., dissenting) (citation omitted).
53. *Id*. at 321.
54. I use the term "ostensibly" because, as the various decisions cited in *Harris* and *Michael* demonstrate, courts throughout the federal system were split on the issue.
55. Harris v. Viegelahn, 135 S. Ct. 1829, 1839-40 (2015).

> verted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion; . . . (2) If the debtor converts a case under chapter 13 of this title to a case under another chapter under this title in bad faith, the property of the estate in the converted case shall consist of the property of the estate as of the date of conversion.[56]

Looking at 11 U.S.C. § 348(f), the Court noted that:

> Section 348(f), all agree, makes one thing clear: A debtor's postpetition wages, including undisbursed funds in the hands of a trustee, ordinarily do not become part of the Chapter 7 estate created by conversion. Absent a bad-faith conversion, § 348(f) limits a converted Chapter 7 estate to property belonging to the debtor "as of the date" the original Chapter 13 petition was filed. Postpetition wages, by definition, do not fit that bill.[57]

The Court also made this finding regarding the effect of conversion from Chapter 13 to Chapter 7:

> Viegelahn cites two Chapter 13 provisions in support of her argument that the Bankruptcy Code requires a terminated Chapter 13 trustee "to distribute undisbursed funds to creditors." The first, § 1327(a), provides that a confirmed Chapter 13 plan "bind[s] the debtor and each creditor." The second, § 1326(a)(2), instructs a trustee to distribute "payment[s] in accordance with the plan," and that, Viegelahn observes, is just what she did. But the cited provisions had no force here, for they ceased to apply once the case was converted to Chapter 7. *When a debtor exercises his statutory right to convert, the case is placed under Chapter 7's governance, and no Chapter 13 provision holds sway.* § 103(i) ("Chapter 13 . . . applies only in a case under [that] chapter"). Harris having converted the case, the Chapter 13 plan was no longer "bind[ing]." § 1327(a). And Viegelahn, by then the former Chapter 13 trustee, lacked authority to distribute "payment[s] in accordance with the plan."[58]

These statements cut with a wide swath. At the moment of conversion, whatever has transpired in the Chapter 13 case has no prospective effect. With respect to funds held in the hands of the Chapter 13 trustee, one can argue that no matter what the intended destination during the pendency of the Chapter 13 case, those funds are to be delivered to the debtor without question or exception. The question

56. 11 U.S.C. §§ 348(f)(1)(A) and 348(f)(2).
57. *Harris*, 135 S. Ct. at 1837.
58. *Id*. at 1838 (emphasis added).

remains as to whether the Supreme Court needed to make such broad pronouncements in *Harris*.

E. The (Unintended?) Consequences of *Harris v. Viegelahn*

The facts of *Harris* are relatively narrow, with the sole issue being the payment of general unsecured claims after conversion of a Chapter 13 case to Chapter 7. The Chapter 13 trustee distributed monies to unsecured creditors. Had there been a Chapter 7 filing from the onset, those creditors would have been entitled to no payments during the pendency of the Chapter 7 case. Had they been paid at all, they would have been paid out of the proceeds of unencumbered, non-exempt, pre-petition assets. All of the debtor's post-petition wages would have remained in his control, free and clear from the claims of pre-petition unsecured creditors. In addition, the monies held by the trustee in *Harris* were never intended to be paid to general unsecured creditors. Under the terms of the confirmed plan, those funds were earmarked to pay the arrearages on the debtor's home mortgage. *Harris* arrives at what seems to be a just result. However, *Harris* contains some very broad pronouncements of law. Under *Harris*, none of the operative provisions of the Chapter 13 plan survive conversion. Nor do any of the provisions contained in Chapter 13 of the Bankruptcy Code. It appears not to matter whether the conversion takes place before or after a Chapter 13 plan has been confirmed. There is potential fallout from this decision.

IV. ADEQUATE PROTECTION PAYMENTS

The facts of *Harris* (and *Michael* as well) involved monies that the Chapter 13 trustee intended to pay to *un*secured creditors. But what of secured creditors? During the pendency of a Chapter 13 case, the debtor remains in possession of and continues to use property of the estate. Much of that property may depreciate during the pendency of the case. Section 361 of the Bankruptcy Code requires a debtor to provide adequate protection in the event a secured creditor faces loss in the value of its collateral. Although 11 U.S.C. § 1326(a)(1)(C) contemplates payment of adequate protection payments (at least in some circumstances) directly to the creditor,[59] many courts have established

59. 11 U.S.C. § 1326(a)(1)(C). The section provides that:
(a)(1) Unless the court orders otherwise, the debtor shall commence making payments not later than 30 days after the date of the filing of the plan or the order for relief, whichever is earlier, in the amount . . . (C) that provides adequate protection directly to a creditor holding an allowed claim secured by personal property to the extent the claim is attributable to the purchase of such property by the debtor for that portion of the obligation that becomes due after the order for relief, reducing the payments under subparagraph (A) by the

local rules requiring those payments be made to the Chapter 13 trustee and held until a plan is confirmed. For example, Local Rule 3070-2 of the United States Bankruptcy Court for the Northern District of Oklahoma expressly requires that "[t]he Chapter 13 debtor shall not pay adequate protection payments directly to any creditor."[60] Instead, any required adequate protection payments are to be made to the Chapter 13 trustee, who holds those payments in accordance with the rule, which provides that:

> The trustee shall hold all plan payments received (including the portion of the plan payments upon which a lien has been provided for under the plan) until confirmation of a plan, dismissal or conversion of the case. If a plan is confirmed, the trustee shall disburse all payments held as provided in the confirmed plan. If the case is dismissed or is converted to another chapter prior to confirmation of a plan, the adequate protection lien provided for in the plan shall attach to plan payments received by the trustee on or before the date of conversion or dismissal and the Chapter 13 trustee is authorized to disburse the funds to which the adequate protection lien has attached to the creditor entitled thereto . . . .[61]

Other courts have similar rules.[62] They are founded in practicality. There are logistical difficulties in a scenario where a debtor makes direct payments to creditors prior to plan confirmation, only to have those payments made through the trustee after confirmation. A debtor is required to commence plan payments no later than thirty days after the filing of the case.[63] If an adequate protection payment is included in the plan, is the debtor to pay the entire plan payment to the Chapter 13 trustee pre-confirmation, or deduct the adequate protection payment and pay that sum directly to the creditor? Chapter 13

> amount so paid and providing the trustee with evidence of such payment, including the amount and date of payment.

Id.

60. BANKR. N.D. OKLA. R. 3070-2 (effective Dec. 1, 2009, revised Dec. 1, 2017).

61. *Id*.

62. *See, e.g,* BANKR. E.D. OKLA. R. 3070-2(F) (effective Dec. 1, 2017); BANKR. W.D. MICH. R. 3016(d) ("If a Chapter 13 case is dismissed or converted to another chapter before confirmation of the plan, the trustee will make pre-confirmation lease and adequate protection payments that are owed through the date of dismissal or conversion to the extent that funds are available for that purpose . . . ."); BANKR. W.D. MO. R. 3086-1(E)(2)(f). Stating:

> Upon the dismissal or conversion to another chapter of a case prior to confirmation of a Chapter 13 plan, the Chapter 13 trustee shall make the pre-confirmation adequate protection payments, or a portion thereof, to creditors that have filed proofs of claim prior to the date of the dismissal or conversion. Such payments shall be made from any funds available for that purpose received by the trustee on or before the date of the entry of the order of dismissal or conversion.

Id.

63. 11 U.S.C. § 1326(a)(1).

trustees like to track payments made by debtors. How are the adequate protection payments to be tracked? Moreover, most if not all trustees have systems in place allowing the Chapter 13 plan payment to be taken directly from a debtor's paycheck, thereby limiting the risk of default.

The practice is also founded in administrative convenience and docket management. For example, there is little doubt that an automobile depreciates with every mile driven.[64] As a result, auto lenders are universally entitled to adequate protection payments. Indeed, § 1326(a)(1)(C) recognizes this fact by allowing for such payments in an amount equal to the proposed monthly plan payment. If the plan could not automatically provide for such payment, then every creditor with a claim secured by a lien on a motor vehicle would be forced to file a motion for adequate protection, creating unnecessary expense for all involved and clogging bankruptcy court dockets with motions raising issues of fact and law not subject to reasonable dispute, seeking remedies that all agree the creditor is entitled to. *Harris* does not recognize this conundrum because the facts of that case (as well as *Michael*) did not bring this issue before the Court.

What then, is the correct result after *Harris* when the parties agree that the car lender is entitled to adequate protection, but the payments are in the hands of the Chapter 13 trustee at the time of conversion? The United States Bankruptcy Court for the Southern District of California was faced with this situation in *In re Beckman*.[65] In *Beckman*, the Chapter 13 trustee had been making adequate protection payments to Hyundai Motor Finance prior to plan confirmation. Before a plan was confirmed, Beckman chose to convert her case from Chapter 13 to Chapter 7. At the time of conversion, the Chapter 13 trustee had one remaining adequate protection payment due to Hyundai in the amount of $157.24. Ten days *after* conversion, the trustee made the payment to Hyundai. The trustee also held an additional $4,000 that prior to *Harris*, he would have used to pay adequate protection and administrative expense claimants. He sought guidance from the bankruptcy court.

Judge Adler joined those courts holding that the central principle of *Harris*—that funds in the possession of a Chapter 13 trustee at the time of conversion—applied equally in cases where no plan had yet

64. Unless the car in question is a 1953 Corvette, which is valued in excess of $300,000. Which begs the question: if you own this vehicle, why in the world would you ever drive it?

65. *In re* Beckman, 536 B.R. 446 (Bankr. S.D. Cal. 2015).

been confirmed.[66] Noting that the rules and procedures in place in the Southern District of California would have supported the payments to creditors and administrative claimants, she ruled that *Harris* "'holds no sway' in a converted case"[67] and rendered the local rules and Chapter 13 practices obsolete. The last adequate protection payment was returned to the debtor, and Hyundai withstood the loss. Query who received a windfall under these facts.

So what does this mean for day-to-day practice in Chapter 13 cases? While it is one thing to say that debtors have a superior claim to unsecured creditors when it comes to funds in the hands of a Chapter 13 trustee, the same cannot be said of creditors with liens on property used by the debtor while the Chapter 13 was pending. Cars are driven and houses are lived in. It is equitable for those creditors to be compensated for the use of their collateral.[68] Courts with procedures allowing the Chapter 13 trustee to collect and hold in trust adequate protection payments for creditors pending confirmation of a plan now have a potential problem if *Harris* is read broadly.[69]

V. ATTORNEYS' FEES AND A POTENTIAL ETHICAL DILEMMA

In both *Harris* and *Michael*, the issue was whether funds in the hands of the Chapter 13 trustee should be distributed to unsecured creditors or returned to the debtor. However, attorneys were not left out in the cold. In each case, the debtors executed assignments of any funds held by the Chapter 13 trustee and not distributed to creditors to pay attorneys' fees. The validity of these assignments was neither raised nor litigated in either case; they were honored and counsel got paid. However, an argument can be made that the ruling in *Harris* creates or exacerbates a potential conflict of interest for debtor's coun-

66. *Beckman*, 536 B.R. at 448 (citing *In re* Sowell, 535 B.R. 824 (Bankr. D. Minn. 2015)); *In re* Bauregard, 533 B.R. 826 (Bankr. D.N.M. 2015); *In re* Ulmer, No. 15-30220, 2015 WL 3955258 (Bankr. W.D. La. June 26, 2015).

67. *Beckman*, 536 B.R. at 449 (citing *Harris*, 135 S.Ct. at 1838).

68. 11 U.S.C. § 348(f)(2). Any argument that these creditors are protected by § 348(f)(2) is problematic. The section provides that if a debtor converts from Chapter 13 to Chapter 7 in bad faith, "the property of the estate in the converted case shall consist of the property of the estate as of the date of the conversion." *Id*. Nothing in this section contradicts the holding in *Harris* that, upon conversion, no Chapter 13 provision "holds sway." It would appear that the monies held by a Chapter 13 trustee, even if earmarked under a Chapter 13 plan as adequate protection payments, become property of the Chapter 7 bankruptcy estate, free and clear of any distribution schemes contained in the now obsolete Chapter 13 plan, to be distributed in accordance with the priorities set forth in 11 U.S.C. § 726 (2012).

69. *See* Bankr. D. Md. R. 3015-3(a)(1) (amended effective Aug. 1, 2016). At least one court has dealt with the issue in its local rules by requiring pre-confirmation adequate protection payments to be made by the debtor directly to the creditor.

sel in advising a client whether to dismiss a Chapter 13 case or convert to Chapter 7.

Even though *Harris* involved funds held by a trustee after conversion of a Chapter 13 case to a Chapter 7 case, it has also affected the way courts view a trustee's duties in dismissed cases. When a case is dismissed prior to confirmation of a debtor's plan, courts generally agree that *Harris* does not change the requirement under 11 U.S.C. § 1326(a)(2) that the trustee return such payments to the debtor after deducting 11 U.S.C. § 503(b) administrative claims.[70] But courts are divided on whether funds held by a Chapter 13 trustee should be distributed per the plan or returned to the debtor when a case is dismissed after a plan has been confirmed. Pre-*Harris*, a minority of courts found that § 1326(a)(2) dictates a trustee's duties even after dismissal, resulting in payment by the trustee to creditors according to the confirmed plan. A majority of courts, including those that have considered the issue post-*Harris*, find that 11 U.S.C. § 349(b)(3) controls, and that absent "cause," the trustee must return all funds to the debtor.[71] Still other courts have found that neither *Harris*, nor §§ 1326 or 349 provide a sufficient statutory solution, and look instead to state law.[72]

The same cannot be said where cases are converted rather than dismissed. For example, Judge Michael Romero of the United States Bankruptcy Court for the District of Colorado held:

> The above pronouncement [in *Harris*] that "no Chapter 13 provision holds sway," coupled with the Supreme Court's unequivocal holding that "under the governing provisions of the Bankruptcy Code, a debtor who converts to Chapter 7 is entitled to return of any postpetition wages not yet distributed by the Chapter 13 trustee[,]" warrants the broad application of

70. *See, e.g., In re* Wheaton, 547 B.R. 490, 497-98 (B.A.P. 1st Cir. 2016) ("Thus, a majority of courts have held that the *Harris* holding does not apply in a chapter 13 case that has been dismissed prior to confirmation").

71. 11 U.S.C. § 349(b)(3) (2012) ("(b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title . . . (3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title."). *See, e.g., In re* Demery, 570 B.R. 220, 224 (Bankr. W.D. La. 2017) (stating the court's holding was consistent with *Harris*.); *In re* Hooks, 577 B.R. 415, 419 (Bankr. M.D. Ala. 2017) (stating that *Harris* dealt with § 348 and a converted case, and thus did not govern its decision regarding a dismissed case).

72. *In re* Gonzales, 578 B.R. 627, 632 (Bankr. W.D. Mich. 2017). The court stated:

> [I]t would appear that the Bankruptcy Code does not answer the question confronting the court today, namely, as between the Debtor and her creditors, who is entitled the post-petition wages the Trustee holds at dismissal? The court, therefore, looks to the laws of the forum state to see how that separate and presumptively applicable body of law would answer the question.

Id.

> *Harris* to cases converted from Chapter 13 to Chapter 7. Ultimately, *Harris* stands for the proposition any undisbursed postpetition earnings must be returned to the debtor upon conversion from Chapter 13 to Chapter 7 under § 1307(a), absent a finding of bad faith under § 348(f)(2).[73]

The majority of other courts have reached the same conclusion.[74] Under this interpretation of *Harris*, counsel for the debtors suffer:

> Today's result is harsh. Chapter 13 debtor's attorneys are asked to provide services to individuals who are already in such financial distress that they have chosen to file bankruptcy. These services are generally provided in advance, with payment to come over time through the plan. Recognizing that these attorneys must be given some incentive to serve when the prospects for compensation are so uncertain, Congress granted the fees administrative priority. 11 U.S.C. § 507(a)(2). But administrative priority claimants are still creditors, and *Harris* is clear that creditors may not be paid by the chapter 13 trustee once the case is converted. In the absence of a different reading of *Harris* by a higher court, this Court is compelled to deny the Application.[75]

Moreover, courts that have denied payment of attorneys' fees even after confirmation of a plan note that, even though *Harris* dealt with a narrow issue—distribution of funds to creditors holding pre-petition unsecured claims—the Supreme Court chose to paint with a broad brush:

> We are mindful of the hardship *Harris* may impose on attorneys representing debtors in Chapter 13 cases, and of the deleterious effect Harris could have on the willingness of attorneys to represent debtors in Chapter 13 cases. *Harris* rejected the argument that returning held funds to the debtor after conversion would amount to a "windfall," reasoning that the debtor's post-petition wages would not have been included in a Chapter 7 bankruptcy estate if the debtor had started in Chapter 7 rather than 13. That may be true from the perspective of pre-petition creditors, but obtaining Chapter 13 representation without paying for it could well be considered a windfall to the debtor in a converted case. Payment of attorney's fees was not questioned or challenged in *Harris*. The attorney there obtained an assignment by the debtor of his right to the funds held by the Chapter 13 trustee, to se-

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73. *In re* Vonkreuter, 545 B.R. 297, 300 (Bankr. D. Colo. 2016) (footnotes omitted) (citing *Harris v. Viegelahn*, 135 S.Ct. 1829, 1835 (2015)).

74. *See, e.g., In re* Ivey, 568 B.R. 85 (Bankr. W.D. Ark. 2017); *In re* Post, 572 B.R. 678 (Bankr. W.D. Mich. 2017); *In re* Hoggarth, 546 B.R. 875 (Bankr. D. Colo. 2016).

75. *In re* Harris, No. 15-12618-JDW, 2016 WL 3517757, at *3 (Bankr. N.D. Miss. February 1, 2016).

> cure payment of post-conversion attorneys' fees. Debtor's counsel attached the assignment to the notice of conversion. The solution for Chapter 13 debtor's counsel might be to include in their engagement letters an assignment of and security interest in the debtor's post-petition wages held by the standing trustee on the date of conversion, to pay allowed unpaid attorney's fees and costs incurred during the Chapter 13 case.[76]

While counsel for the Chapter 13 debtor may have an administrative claim for her services in the converted Chapter 7 case, the granting of an administrative priority is most likely without substance. Under 11 U.S.C. § 726(b), administrative priority claims incurred in the course of the Chapter 13 case are junior in priority to all Chapter 7 administrative claims. Most Chapter 7 cases are "no-asset" cases, meaning that there are no funds to pay any unsecured claims, regardless of administrative priority. Moreover, the claim for attorneys' fees is discharged in the converted Chapter 7.[77] As a result, if a debtor converts to Chapter 7, his attorney will most likely not be paid for the services rendered in the Chapter 13 case, unless the debtor chooses to pay the fees voluntarily.[78]

One court has gone down a different path and allowed counsel in a converted Chapter 7 case to be paid from funds in the hands of the Chapter 13 trustee. In *In re Brandon*,[79] Bankruptcy Judge David E. Rice, Jr. framed the issue as follows:

> These cases require the court to consider the effect of the Supreme Court's recent decision in *Harris v. Viegelahn* on motions by debtor's counsel for allowance and payment by a Chapter 13 trustee of attorney's fees in a case that was either

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76. *In re* Beauregard, 533 B.R. 826, 832 (Bankr. D.N.M. 2015) (citations omitted).

77. *See In re* Fickling, 361 F.3d 172, 175 (2d Cir. 2004) (conversion from Chapter 11); *In re* Toms, 229 B.R. 646, 653 (Bankr. E.D. Pa. 1999) (quoting § 11 U.S.C. § 348(b) (recognizing, in reviewing a conversion from Chapter 13, "[t]he date of 'the order for relief' under chapter 7, in a converted case, refers to the date of conversion"). 11 U.S.C. § 727(b) (2012). This section provides:

> Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from *all debts that arose before the date of the order for relief under this chapter*, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

Id. (emphasis added).

78. *See* 11 U.S.C. § 524(f) (discharge does not "prevent[ ] a debtor from voluntarily repaying any debt").

79. 537 B.R. 231 (Bankr. D. Md. 2015).

> dismissed or converted to a Chapter 7 case before confirmation of a Chapter 13 plan.[80]

Brandon considered the issue of payment of attorneys' fees in four separate Chapter 13 cases. Three of the cases were dismissed prior to confirmation of a plan. The fourth case was converted to a Chapter 7. The court expressly stated that "[t]hese procedural differences have no bearing on the outcome of the issue now before the court."[81] Moreover, the court found that the issue before it was neither considered nor addressed by *Harris*:

> In these cases, this court is called upon to consider two questions not addressed by the Supreme Court in *Harris*—namely, whether postpetition wages of the debtor held by the Chapter 13 trustee may be used to pay the balance of the fee owed not to a creditor but rather to debtor's counsel when the debtor either dismisses or converts the case before a Chapter 13 plan is confirmed. In both instances, nothing precludes this court from issuing the requested order directing the Chapter 13 Trustee to pay debtor's counsel the remaining balance of a fee allowed as an administrative expense.[82]

The court in *Brandon* thus determined that it was writing upon a clean slate.

Turning first to the issue of dismissed cases, the court found that § 349 of the Bankruptcy Code had no effect on the operation of § 1326(a)(2) requiring the Chapter 13 trustee to pay administrative expenses prior to returning funds to the debtor.[83] The court thus concluded that in a dismissed case counsel for the debtors was to be paid his or her fees. This falls in line with the vast majority of cases on this issue. In other words, nothing to see here.

On the issue of converted cases, the *Brandon* court decision is more remarkable. The court found that, notwithstanding *Harris*, the responsibilities of the Chapter 13 trustee did not terminate upon conversion, and "those post-conversion responsibilities continue to include compliance with the third sentence of § 1326(a)(2) requiring the payment of administrative expenses such as the remaining allowed fees of debtor's counsel prior to returning unpaid funds to a debtor."[84] The *Brandon* court relied on the *Michael* decision:

> Conversion also "terminates the services" of the Chapter 13 trustee. Though [her] services are ended after conversion,

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80. *In re* Brandon, 537 B.R. 231, 232 (Bankr. D. Md. 2015) (citation omitted).
81. *Brandon*, 537 B.R. at 233 n.1.
82. *Id*. at 235.
83. Section 349 deals with the effect of dismissal of a bankruptcy case under any chapter of the Bankruptcy Code. It contains no provisions terminating the services of the Chapter 13 trustee upon dismissal.
84. *Brandon*, 537 B.R. at 236.

> the trustee is required to account for the funds that came into [her] possession by filing a final report under Federal Rule of Bankruptcy Procedure 1019(5)(B)(ii). In addition, *if the case is converted prior to confirmation of a plan, the trustee must return any payments held by [her] to the debtor after deducting adequate funds for [her] to pay allowed administrative expense claims.*[85]

The *Brandon* court determined that this portion of the ruling in *Michael* was not altered by *Harris*. *Brandon* is silent upon the issue of payment of attorneys' fees in cases converted to Chapter 7 after confirmation of a Chapter 13 plan. This may be because all attorneys' fees in Chapter 13 cases in Maryland are paid in full upon confirmation. Maryland uses Official Form B2300B, which provides that the balance of attorneys' fees owed at confirmation "are due and payable from the estate."[86]

Consider the conundrum faced by debtors' counsel when it becomes clear that: (1) the debtors are unable to propose a confirmable Chapter 13 plan; (2) debtors' counsel is owed monies for services rendered; and (3) there are funds in the possession of the Chapter 13 trustee. Unless the case is in Maryland,[87] conversion to Chapter 7 means counsel will most likely go unpaid. At best, counsel is forced to hope for funds to be generated in the Chapter 7 estate, or that his or her clients decide to pay the debt out of the goodness of their hearts. On the other hand, if the case is dismissed, counsel has a right to the funds in the hands of the Chapter 13 trustee, which is superior to the claim of the debtors.

VI. CONCLUSION: SO WHAT IS A BANKRUPTCY COURT TO DO?

It is unrealistic to expect the Supreme Court to have a rule limiting the precedential effect of its decisions. It is the court of last resort. It hears relatively few cases, and chooses those cases because it sees the issues they present as important and/or ones where scholarly minds differ (i.e., where the circuit courts have split on the issue). While on occasion the Supreme Court has sought to limit cases to their facts, or to a narrow issue of law, rarely do lower courts, counsel, or academics take the Supreme Court at its word.[88] The conundrums

85. *Id*. (quoting In re *Michael*, 699 F.3d 305, 310 (3d Cir. 2012)) (emphasis added) (citation omitted).

86. Fed. Bankr. Proc. Form B2300B (Order Confirming Chapter 13 Plan).

87. Even this is speculative, as *Brandon* is the ruling of one bankruptcy judge in a district with multiple judges.

88. *See* Stern v. Marshall, 131 S. Ct. 2594 (2011) (describing the ruling that a portion of the statute creating bankruptcy court jurisdiction, 28 U.S.C. § 157(b)(2)(C), was

created by *Harris* are merely illustrative of those created by most broad pronouncements of the Supreme Court.

Harris is a broad ruling on a narrow set of facts. According to the opinion, the Supreme Court issued the *Harris* decision to resolve a split between circuits on a single issue—whether, after conversion of a Chapter 13 case to Chapter 7, where a Chapter 13 plan has been confirmed and provides for payment to creditors, the Chapter 13 trustee should distribute post-petition earnings of the debtor in his or her possession to unsecured creditors or back to the debtor. The issue of payment of administrative claims was not before the Supreme Court. Nor was the issue of adequate protection payments earmarked for payment to secured creditors in exchange for a debtor's continued use of the secured creditor's collateral. The Supreme Court seems to have determined that payment of funds to unsecured creditors under the facts of *Harris* constituted a windfall. Arguably, when it comes to debtor's counsel or the creditor with a lien upon debtor's car or house, *Harris* causes the debtor to receive a windfall.

Bankruptcy courts have at least three options when it comes to *Harris*. The author submits that the same holds true with any Supreme Court decision. One is to limit *Harris* to its facts, distinguish the facts of the case before it from the facts in *Harris*, and move on. This would appear to be the course taken in *Brandon*. At the risk of sounding Machiavellian, this approach works unless and until an appellate court says otherwise. In cases like *Brandon*, where the choice is to distribute money to debtors or their counsel, arguably the only parties with standing to object are the debtors and the Chapter 13 trustee. Unless the debtors obtain new counsel (who also wants and needs to be paid), debtors are unlikely, as a practical matter, to object to the payment.[89] Chapter 13 trustees are, in the author's opinion, equally unlikely to appeal decisions that have no economic effect upon them. Counsel for the debtor, armed with *Brandon*, would be on solid ground when making a claim for fees and the Chapter 13 trustee has a basis for paying those fees. A court, also armed with *Brandon*, has

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unconstitutional as a "'narrow' one"). *Id*. Given that *Stern v. Marshall* has been cited no less than 2,426 times in judicial decisions, and has been the subject of at least 478 scholarly articles, it would appear that many have failed to take Chief Justice Roberts at his word.

89. The same is true with respect to adequate protection payments, with an even stronger twist. Oftentimes debtors, upon conversion to Chapter 7, want to keep their houses, or their cars, or something else near and dear. Their only options are to redeem the collateral by paying its full fair market value in cash (a daunting task for most debtors) or by reaffirming the debt (the far more likely option). To reaffirm a debt, the debt must be current unless the creditor agrees otherwise. It has been the experience of this judge that debtors are more than happy to see funds in the hands of a Chapter 13 trustee that were earmarked for secured creditors paid to those secured creditors for the process of reaffirmation to go forward.

authority for approving and paying those fees. As some of the courts that have rejected *Brandon* have noted, this approach may be considered directly contrary to the ruling in *Harris*. But, unless and until there is an appeal and a reversal, it works.

Another option is to petition Congress to amend the Bankruptcy Code to allow for the payment of Chapter 13 administrative expenses and undistributed adequate protection payments to creditors as part of a conversion from Chapter 13 to Chapter 7. Certainly this has happened in the past with other statutes as well as the Bankruptcy Code.[90] The problem is that the process of amending statutes is one part slow and two parts uncertain. Even if someone were to decide that such a statutory amendment is warranted, it would be years before the amendment became law. Many current judges will be long retired before such an amendment becomes law. Many counsel will go unpaid, and many cars will be driven and houses lived in without compensation for their use.

The third option is the one currently being used by the majority of courts: apply *Harris* across the board, placing the risk of nonpayment of attorneys' fees and adequate protection payments squarely upon debtors' counsel and creditors. Perhaps creditors will be able to protect themselves by demanding that their adequate protection payments be made immediately.[91] Debtors' counsel have no such remedy. The fear is that the inability of counsel to be assured of payment will result in fewer counsel being available to potential Chapter 13 debtors, especially those with significant risk of failure in the Chapter 13 process.

While the potential problems created by *Harris* may seem to be small problems in a relatively narrow slice of the legal world, *Harris* is

90. For example, in response to the ruling in *Hall v. United States*, 566 U.S. 506 (2012), Congress passed the Family Farmer Bankruptcy Clarification Act of 2017. *See* Additional Supplemental Appropriations for Disaster Relief Requirements Act, 2017, Pub. L. No. 11572, Div. B, § 1005(a), 131 Stat. 1232 (adding 11 U.S.C. § 1232 (2012)); 163 CONG. REC. S3215-01 (May 25, 2017) (statement of Sen. Grassley) ("This bipartisan bill addresses the 2012 United States Supreme Court case *Hall v. United States* . . . . The Family Farmer Bankruptcy Clarification Act of 2017 corrects this unfortunate result and restores Congress's original intent."). *See generally* Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEX. L. REV. 1317 (2014).

91. Indeed, the statute seems to contemplate the making of adequate protection payments by debtors directly to creditors prior to plan confirmation. *See* 11 U.S.C. § 1326(a)(1)(C). In the experience of the author, Chapter 13 trustees discourage this practice, and prefer to see the adequate protection payments made to the Chapter 13 trustee even prior to confirmation. Many courts have local rules governing their practice. Some courts require the payments to be held by the Chapter 13 trustee until confirmation, imposing a lien upon the funds for the benefit of the creditor, while others allow or require the Chapter 13 trustee to distribute adequate protection payments on a monthly basis. *See supra* notes 60-62 and accompanying text.

illustrative of what can happen with a broadly written appellate opinion in any area of the law. When an appellate court writes on a narrow issue using a broad stroke of the pen, it takes the trial court's best and most powerful tools—namely, its subject matter expertise, familiarity with the facts, and understanding of the practical consequence of its decisions—away. Everyone, including litigants, trial courts, and maybe even the appellate courts, suffer as a result. Perhaps the lesson to be learned is when a court decides an issue, it offers guidance on that issue and that issue alone. Guidance by analogy is a practice fraught with danger and unexpected consequences.

Faculty

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