AMERICAN BANKRUPTCY INSTITUTE

Southwest Bankruptcy Conference 2021

Judicial Roundtable

Lindsi M. Weber, Moderator
The Burgess Law Group; Phoenix

Hon. Trish M. Brown
U.S. Bankruptcy Court (D. Ore.); Portland

Hon. Scott C. Clarkson
U.S. Bankruptcy Court (C.D. Cal.); Santa Ana

Hon. Daniel P. Collins
U.S. Bankruptcy Court (D. Ariz.); Phoenix

Hon. Natalie M. Cox
U.S. Bankruptcy Court (D. Nev.); Las Vegas

Hon. Harlin DeWayne Hale
U.S. Bankruptcy Court (N.D. Tex.); Dallas

Hon. Mary Jo Heston
U.S. Bankruptcy Court (W.D. Wash.); Tacoma

Hon. Christopher M. Klein
U.S. Bankruptcy Court (E.D. Cal.); Sacramento

Hon. Paul Sala
U.S. Bankruptcy Court (D. Ariz.); Phoenix

Hon. David T. Thuma
U.S. Bankruptcy Court (D. N.M.); Albuquerque

Hon. Martin R. Barash, Virtual Attendee Host
U.S. Bankruptcy Court (C.D. Cal.); Woodland Hills

2021

ABI Southwest Judicial Roundtable Discussion
Conversion from Chapter 13 to Chapter 7
Post-Petition Appreciation of Assets

Issue

Does the debtor or the chapter 7 bankruptcy estate receive the benefit of appreciation in property value between filing of a chapter 13 case and conversion of that case to chapter 7?

Summary

Judge Barreca recently held in *in re Castleman* that any post-petition, pre-conversion equity belongs to the bankruptcy estate for chapter 13 cases converted to chapter 7 not to the debtor. 19-12233-MLB, 2021 WL 2309994 (Bankr. W.D. Wash. June 4, 2021).

In *Castleman*, the chapter 7 Trustee filed a § 348(f)(1) motion requesting the Court rule that the bankruptcy estate included the current market value of the debtors' real property and requesting authorization to market and sell the property for the benefit of the estate and its creditors. Debtors opposed, contending that the property's value appreciation between filing the chapter 13 petition and conversion to chapter 7 belonged to them rather than the estate.

Section 348(f)(1) & (f)(2) read in relevant part as follows:

> (1) Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title—
>
> (A) property of the estate in the converted case shall consist of **property of the estate, as of the date of filing of the petition,** that remains in the possession of or is under the control of the debtor on the date of conversion;
>
> (B) valuations of property and of allowed secured claims in the chapter 13 case shall apply only in a case converted to a case under chapter 11 or 12, but not in a case converted to a case under chapter 7, with allowed secured claims in cases under chapters 11 and 12 reduced to the extent that they have been paid in accordance with the chapter 13 plan;
>
> . . .
>
> (2) IF a debtor converts a case under chapter 13 of this title to a case under another chapter of this title in bad faith, the property of the estate in the converted case shall consist of the property of the estate as of the date of conversion.
>
> (Emphasis added)

Judge Barreca addressed the two approaches courts have taken in interpreting § 348(f)(1) on the issue of who receives the benefit of an increase in post-petition value in a case converted from Chapter 13 to Chapter 7.

First, courts applying the majority "*Cofer* Approach" have held that any increase in net value of an asset owned by the debtor on the date of filing their petition that remains in the debtor's possession or control at conversion inures to the benefit of the debtor, absent bad faith. Conversely, courts applying the minority "*Goins* Approach" including *Castleman* have held that any appreciation in net value inures to the benefit of the bankruptcy estate. The courts applying both approaches have

uniformly held that the 2005 amendment to Section 348(f) clearly clarifies that absent bad faith post-petition assets in a case converted from Chapter 13 to Chapter 7 remain property of the debtor. The difference between the two approaches hinges in part on whether the use of the language in Section 348(f)(1) highlighted above (i.e., "property of the estate as of the date of the filing of the petition") Is ambiguous or plain and what the language intended concerning post-petition pre conversion increases in equity. The *Cofer* courts have viewed the statute as ambiguous and relied upon the legislative history in reasoning that the foregoing language in Section 348(f) means the converted estate includes only the property that existed on the petition date (absent bad faith) with all its then attendant attributes as of the petition date (e.g., value, amount of secured claim). The Goins courts have held that the statute is not ambiguous and largely relied on Section 541(a)(6) in holding that the increase in equity constitutes proceeds of pre-petition property that comes into the estate and that such appreciation in value is not a separate asset.

In adopting the minority *Goins* approach Judge Barreca acknowledged that a House Report on the 2005 amendments to Section 348(f) discussed the disincentive to file a case under chapter 13 that would be created by holding that post- petition, pre-conversion increases in equity in property belongs to the estate. Specifically, the Report provided a scenario in which a chapter 13 debtor creates $10,000 equity in a home by paying off a $10,000 second mortgage. If all the debtor's property at the time of conversion to chapter 7 belongs to the estate, the trustee would sell the home to realize the equity for unsecured debtors and the debtor would lose the home.

Judge Barreca noted, however, that while the Report created confusion it was not sufficient to create an ambiguity. He reasoned that while the addition of § 348(f)(1)(A) resolved the issue of whether new assets acquired after the date of petition belonged to the estate, it does not specifically address the scenario discussed in the Report. He also noted that Section 348(f)(1)(A) is silent regarding the effect of conversion on paydown of secured debt during the chapter 13 case as well as changes in the value of pre-petition assets.

Judge Barreca went on to discuss two Ninth Circuit cases that held that appreciation in value of a debtor's home inures to the bankruptcy estate under § 541(a)(6). *Wilson v. Rigby*, 909 F.3d 306, 309 (9th Cir. 2018); *Schwaber v. Reed (In re Reed)*, 940 F.2d 1317, 1323 (9th Cir. 1991). Although post-petition assets belong to chapter 7 debtors, post-petition appreciation is **not** considered a separate asset from pre-petition property. *See Wilson*, 909 F.3d at 312; *see also In re Hyman*, 967 F.2d 1316, 1321 (9th Cir. 1992); *In re Reed*, 940 F.2 1317, 1323 (9th Cir. 1991).

Finding the meaning of § 348(f)(1)(A) clear, despite the scenario discussed in the House Report, Judge Barreca held that the full value of the real property belonged to the Chapter 7 estate—including any post-petition appreciation and increases in equity.

This decision is currently on appeal in the U.S. District Court, Western District of Washington under case no. 21-cv-00829-RSL.

ABI Southwest Judicial Roundtable Discussion
Conversion from Chapter 13 to Chapter 7
Post-Petition Appreciation of Assets

Possible Discussion Points

(1) Which approach, *Cofer* Approach, or the *Goins* Approach, do you find more persuasive? Why?
(2) What should debtors' attorneys counsel their clients on the risks associated with filing under chapter 13 considering this decision?
(3) Do you find ambiguity in § 348(f)?
(4) When should valuation be determined? At filing or on conversion?
(5) Would debtors get the benefit of plan payments made under chapter 13 before their case is converted to chapter 7?
(6) If a chapter 13 converts to a chapter 7, could waiver and estoppel compel acceptance of the debtor's valuation of the property if no objection had previously been made?

Secondary Sources Used

Chapter 13 Debtors Lost Appreciation in Property After Conversion to '7', Rochelle's Daily Wire, https://www.abi.org/newsroom/daily-wire/chapter-13-debtors-lost-appreciation-in-property-after-conversion-to-%E2%80%987%E2%80%99 (June 15, 2021).

Outline for Creditors' Rights Moratoria Discussion

Hon. David T. Thuma
Bankruptcy Judge, District of New Mexico

1. What creditor remedies were put on hold?

    Mortgage foreclosure (see exhibit A)

    Tenant eviction (see exhibit B)

        Consumer

        Business

    Garnishment

    Utility disconnect

    Other?

2. By whom?

    Federal government

    State government

    Local government

3. Current status of federal gov't moratoria (see exhibit C)

4. Current status of state and local government moratoria (see exhibit C)

5. Federal and state money to assist consumers

6. Constitutionality of the moratoria (see exhibit B)

7. Effect on bankruptcy filings of lifting the moratoria and ending federal subsidies—will the forecasted "tsunami" of bankruptcy filings ever materialize?

Exhibit A

News Release

FHFA EXTENDS COVID-19 MULTIFAMILY FORBEARANCE THROUGH SEPTEMBER 30, 2021

Multifamily property owners entering into new or modified forbearance plans must offer tenant protections

FOR IMMEDIATE RELEASE

6/3/2021

Washington, D.C. — Today, the Federal Housing Finance Agency (FHFA) announced that Fannie Mae and Freddie Mac (the Enterprises) will continue to offer COVID-19 forbearance to qualifying multifamily property owners through September 30, 2021, subject to the continued tenant protections FHFA has imposed during the pandemic. This is the third extension of the programs, which were set to expire June 30, 2021.

"While COVID-19 cases are declining and many homeowners continue to emerge from forbearance, many renters, who are unable benefit from rising home prices, have not financially recovered from the pandemic. To help those families still struggling to pay their rent and to help multifamily property owners maintain their properties, FHFA is extending the multifamily COVID-19 forbearance and tenant protections through the end of September 2021," said Director Mark Calabria.

Property owners with Enterprise-backed multifamily mortgages can enter a new or, if qualified, modified forbearance if they experience a financial hardship due to the COVID-19 emergency. Property owners who enter into a new or modified forbearance agreement must:

- Inform tenants in writing about tenant protections available during the property owner's forbearance and repayment periods; and
- Agree not to evict tenants solely for the nonpayment of rent while the property is in forbearance.

Additional tenant protections apply during the repayment periods. These protections include:

- Giving tenants at least a 30-day notice to vacate;
- Not charging tenants late fees or penalties for nonpayment of rent; and
- Allowing tenant flexibility in the repayment of back-rent over time, and not necessarily in a lump sum.

In addition to requiring written tenant notification, the Enterprises have posted the tenant protections to their respective online multifamily property lookup tool websites. The property lookup tools make it easier for tenants to find out if the multifamily property in which they reside has an Enterprise-backed mortgage.

These actions are just the latest steps FHFA has taken to benefit renters, property owners and the mortgage market during the pandemic. FHFA will continue to monitor the data and the coronavirus' impact on tenants, borrowers, and the mortgage market and update policies as needed. FHFA may extend or sunset its policies based on updated data and health risks. Homeowners and renters can visit **consumerfinance.gov/housing** for up-to-date information on their relief options, protections, and key deadlines.

News Release

FHFA EXTENDS COVID-19 FORECLOSURE AND REO EVICTION MORATORIUMS

FOR IMMEDIATE RELEASE

6/24/2021

Washington, D.C. – Today, the Federal Housing Finance Agency (FHFA) announced that Fannie Mae and Freddie Mac (the Enterprises) are extending the moratoriums on single-family foreclosures and real estate owned (REO) evictions until July 31, 2021. The foreclosure moratorium applies to Enterprise-backed, single-family mortgages only. The REO eviction moratorium applies to properties

that have been acquired by an Enterprise through foreclosure or deed-in-lieu of foreclosure transactions. The current moratoriums were set to expire on June 30, 2021.

This action is just the latest step FHFA has taken to benefit homeowners and the mortgage market during the pandemic. FHFA continues to monitor the effect of the COVID-19 servicing policies on borrowers, the Enterprises and their counterparties, and the mortgage market. FHFA may extend or sunset its policies based on updated data and health risks. Homeowners and renters can visit **consumerfinance.gov/housing** for up-to-date information on their relief options, protections, and key deadlines.

Exhibit B

Federal judge strikes down CDC's national moratorium on evictions

By DAVID YAFFE-BELLANY,
NOAH BUHAYAR
BLOOMBERG
MAY 5, 2021 **UPDATED** 5:27 PM PT

A federal judge blocked a nationwide eviction moratorium the U.S. Centers for Disease Control and Prevention established last year as COVID-19 lockdowns put millions of renters out of work.

U.S. District Judge Dabney Friedrich in Washington said Wednesday that the agency exceeded its authority by issuing a broad moratorium on evictions across all rental properties. "The CDC order must be set aside," she said in a 20-page opinion. In recent months, other judges issued rulings blocking the ban in certain jurisdictions. Friedrich's decision goes further, saying the entire ban should be overturned nationwide.

The ruling is a setback for the Biden administration, which also has seen its proposed freeze on deportations halted by a court. The White House is facing several other legal challenges, including on offshore drilling, on the Keystone XL pipeline permit and on COVID relief legislation from Republican-led state attorneys general.

Renters have been protected against eviction by a patchwork of state and federal laws. That means in many places tenants who've fallen behind on rent are still covered by other measures.

In California, residential tenants with a pandemic-related hardship cannot be evicted over nonpayment of rent until July at the earliest. A Los Angeles rule gives such tenants within city limits extra time to pay the rent they owe.

The Justice Department immediately moved to appeal Friedrich's Wednesday decision. "Scientific evidence shows that evictions exacerbate the spread of COVID-19," said Brian Boynton, the acting assistant attorney general for the civil division. "The harm to the public that would result from unchecked evictions cannot be undone."

Eric Dunn, director of litigation at the National Housing Law Project, said the U.S. should move quickly to overturn the ruling or risk "mass evictions just as we seem to be on the verge of reaching herd immunity in the U.S."

But landlord groups welcomed the judge's decision. Paula Cino, vice president for construction, development and land-use policy at the National Multifamily Housing Council, said the country is in a far different place than it was early in the pandemic. By continuing the CDC moratorium, she said, the federal government was "ignoring the progress made."

The CDC moratorium, first enacted by President Trump and extended by President Biden, was designed to prevent mass evictions in the face of a public health emergency that saw millions of Americans lose their jobs and fall deeper into debt. Officials also warned that ejecting swaths of renters during the U.S. winter would exacerbate the virus' spread.

Still, it came with loopholes that allowed evictions to move forward in states and cities that didn't enact their own more stringent rules.

While government measures sought to prevent mass homelessness, there was no targeted help for mom-and-pop property owners who provide much of America's affordable housing. For these landlords, mortgage, maintenance and tax bills have been piling up, putting them in danger of losing their property or being forced to sell to wealthier investors hunting for distressed deals.

# # #

THE SUPREME COURT LEAVES THE CDC'S MORATORIUM ON EVICTIONS IN PLACE

The U.S. Supreme Court left intact the nationwide moratorium on evictions put in place by the CDC until July 31.

Jose Luis Magana/AP

The U.S. Supreme Court on Tuesday refused to lift a ban on evictions for tenants who have failed to pay all or some rent during the coronavirus pandemic.

By a 5-4 vote, the court left in place the nationwide moratorium on evictions issued by the Centers for Disease Control and Prevention. The Alabama Association of Realtors had challenged the moratorium.

Justice Brett Kavanaugh, who cast the fifth and deciding vote, wrote in a concurring opinion that he voted not to end the eviction program only because it is set to expire on July 31, "and because those few weeks will allow for additional and more orderly distribution" of the funds that Congress appropriated to provide rental assistance to those in need due to the pandemic. He added, however, that in his view Congress would have to pass new and clearer legislation to extend the moratorium past July 31.

The Biden administration has said it does not plan to extend the moratorium any further.

Also voting to leave the program intact until July 31 were Chief Justice John Roberts and Justices Stephen Breyer, Sonia Sotomayor and Elena Kagan.

Dissenting were Justices Clarence Thomas, Samuel Alito, Neil Gorsuch and Amy Coney Barrett. They would have blocked the moratorium from continuing for another month.

# # #

141 S. Ct. 2320

Supreme Court of the United States.

ALABAMA ASSOCIATION OF REALTORS, et al.

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.

No. 20A169

June 29, 2021

Opinion

The application to vacate stay presented to THE CHIEF JUSTICE and by him referred to the Court is denied.

Justice THOMAS, Justice ALITO, Justice GORSUCH, and Justice BARRETT would grant the application.

Justice KAVANAUGH, concurring.

I agree with the District Court and the applicants that the Centers for Disease Control and Prevention exceeded its existing statutory authority by issuing a nationwide eviction moratorium. See *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324, 134 S. Ct. 2427, 189 L. Ed. 2d 372 (2014). Because the CDC plans to end the moratorium in only a few weeks, on July 31, and because those few weeks will allow for additional and more orderly distribution of the congressionally appropriated rental assistance funds, I vote at this time to deny the application to vacate the District Court's stay of its order. See *Barnes v. E-Systems, Inc. Group Hospital Medical & Surgical Ins. Plan*, 501 U.S. 1301, 1305, 112 S. Ct. 1, 115 L. Ed. 2d 1087 (1991) (Scalia, J., in chambers) (stay depends in part on balance of equities); *Coleman v. Paccar Inc.*, 424 U.S. 1301, 1304, 96 S. Ct. 845, 47 L. Ed. 2d 67 (1976) (Rehnquist, J., in chambers). In my view, clear and specific congressional authorization (via new legislation) would be necessary for the CDC to extend the moratorium past July 31.

Exhibit C

Emergency Bans on Evictions and Other Tenant Protections Related to Coronavirus

Information on eviction moratoriums and tenant protections being enacted due to outbreak of COVID-19.
By Ann O'Connell, Attorney and legal editor at Nolo (reprinted with permission—Thanks Ann!) (see www.nolo.com/evictions-ban)

Federal Eviction Protection
On September 1, 2020 the Centers for Disease Control and Prevention (CDC) issued an Agency Order titled Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19 (Order). The Order went into effect on September 4, 2020, and was extended on December 27, 2020. (See Section 502 of the Consolidated Appropriations Act, 2021.) The CDC's latest order extends the residential eviction ban through July 31, 2021. The CDC said in its June 24, 2021 press release that this is intended to be the final extension of the eviction ban.
The Order prohibits residential landlords nationwide from evicting certain tenants through July 31, 2021. The Order protects tenants who:

- have used their best efforts to obtain government assistance for housing
- are unable to pay their full rent due to a substantial loss of income
- are making their best efforts to make timely partial payments of rent, and
- would become homeless or have to move into a shared living setting if they were to be evicted.

In addition to the above requirements, one of the following financial criteria must apply. To qualify for protection, tenants must:

- expect to earn no more than $99,000 (individuals) or $198,000 (filing joint tax return) in 2020
- not have been required to report any income to the IRS in 2020, or
- have received an Economic Impact Payment (stimulus check) pursuant to Section 2201 of the

CARES Act, Section 9601 of the American Rescue Plan Act of 2021, or to any other similar

federally authorized payments made to individuals in 2021 and 2021.
Tenants must complete a declaration under penalty of perjury that they meet the criteria listed in the Order.
Anyone who violates the Order may be subject to criminal penalties including fines and jail time.
Even with the Order in place, states can still ban evictions and enact other tenant protections that provide more protection than the Order. This means that tenants who do not meet the criteria for protection under the federal ban might still be protected from eviction under any applicable state or local orders (see State Eviction Protection below). Visit FAQs About the CDC Eviction Ban for more details and answers to frequently asked questions.
Note that each state's courts are handling the CDC eviction ban differently. See the chart below for any information your state has issued regarding the CDC eviction ban.
Other Federal Tenant Protections
The FHA has extended its ban on evictions from properties secured by FHA-insured single family mortgages through July 31, 2021.
Additionally, the government-backed mortgage buyers Freddie Mac and Fannie Mae have prohibited landlords of single-family properties with Freddie Mac- and Fannie Mae-backed mortgages from evicting tenants until at least September 30, 2021. Also, certain owners of multifamily properties backed by Freddie Mac and Fannie Mae can extend their loan forbearance,

and, if they do so, cannot evict tenants during the term of the forbearance. To find out if your rental is covered by the Fannie Mae or Freddie Mac eviction bans, visit Fannie Mae and Freddie Mac and enter your address. You can also use the National Low Income Housing's federal eviction moratorium lookup tool to see if your address is covered by one of the federal eviction bans. The Consumer Financial Protection Bureau is maintaining a detailed explanation of the federal eviction bans.

State Eviction Protection

The chart below attempts to capture the latest information on coronavirus-related tenant protections by state (and county and major cities, if applicable). Please note that this information is changing hourly, and the chart might not reflect all current protections. For the best information about the status of evictions where you live, check your state's judicial system or governor's website. You can also contact a legal aid organization in your area.

In the chart, click on the state's name to be directed to its official COVID-19 website.

State	Hold On Evictions	Hold on Utility Shutoffs	Other Tenant Protections/Notes
Alabama	No	No	-Alabama's emergency rental assistance program -Visit ALtogether to find resources for assistance in Alabama. -Alabama's Coronavirus Relief Fund -Public Service Commission states that it is confident no customers will experience interruption during crisis, and that after crisis period utilities will help with past-due accounts. However, the decision is left to individual utility providers.
Alaska	No	No	-See the Regulatory Commission of Alaska's COVID-19 utility information page. -Information for renters about 2021 rent relief programs. -Alaska Info re: CDC Eviction Ban (9/4/2020)
Arizona	No	No	-Arizona Corporation Commission's ban on utility disconnects has ended, but many providers are extending the hold on disconnects and are offering assistance to customers. Check with your provider. -Resources for individuals in Arizona. -Arizona utility assistance programs. -Arizona Department of Housing Eviction Prevention program. -Arizona Info re: CDC Eviction Ban (9/4/2020)
Arkansas	No	No	-Arkansas Public Service Commission ended moratorium on disconnections on May 3, 2021. -Courts are still open and conducting hearings (not in person) when possible. Check with courts re: status. -Arkansas Fresh Start rental assistance program.

State	Hold On Evictions	Hold on Utility Shutoffs	Other Tenant Protections/Notes
California	Yes: through 9/30/2021	Yes: through 9/30/2021	-The governor has announced an extension of the eviction ban through September 30, 2021. -Also see California Eviction Moratorium (Bans) and Tenant Protections for the status of bans in various California cities and counties. -Utility shutoff moratorium for nonpayment until at least September 30, 2021 for most utilities. See the CPUC's website on consumer protections during the COVID-19 outbreak for details. -California Info re: CDC Eviction Ban (9/2/2020)
Colorado	No	No	-See Colorado statewide utility tracker for information about whether your utility provider has put a moratorium on shutoffs during the crisis. You can also get current information about utility assistance programs on the PUC's website. -Check your court's website to see status. -Colorado's Emergency Housing Assistance Program (EHAP).
Connecticut	No	No	-Governor has ordered new steps landlords must take before delivering a notice to quit for nonpayment of rent, as well as other tenant protections. -Connecticut Temporary Rental Housing Assistance Program (TRHAP) -Connecticut Info re: CDC Eviction Ban (9/14/2020)
Delaware	Yes	No	-Delaware Housing Assistance Program -By order of governor, landlords can file eviction lawsuits, but courts must stay any proceedings. Law enforcement cannot physically remove tenants. Landlords cannot charge late fees. Utilities must work with customers who are struggling due to pandemic. Lasts until end of public health emergency. -Delaware Info re: CDC Eviction Ban (9/11/2020)
District of Columbia	Yes: until after emergency	Yes	-No evictions during state of emergency. Lawmakers have suspended the filing of eviction complaints until 60 days after the end of the state of emergency. Mayor's order extends the state of emergency (and with it the eviction ban) for as long as D.C. law extends the emergency (currently until July 25, 2021). Also, landlords cannot send tenants notices to vacate during the ban. -Utility shutoff moratorium during the state of emergency. -D.C.'s COVID-19 Housing Assistance Program (CHAP)

State	Hold On Evictions	Hold on Utility Shutoffs	Other Tenant Protections/Notes
Florida	No	No	-Eviction ban expired October 1, 2020. -Most major utilities providers have said they will not shut off services. Check with your local provider. -Florida Housing's COVID-19 Information and Resources.
Georgia	No	No	-State of Georgia has a COVID-19 hotline: (844) 442-2681. -Courts have discretion as to whether eviction hearings can proceed; check individual Georgia courts' status here. -Check the State of Georgia Public Service Commission's website for a list of GA services that have suspended disconnections due to COVID.
Hawaii	Yes: through 8/6/2021	No	-By order of governor, evictions for nonpayment of rent suspended through August 6, 2021. Governor has stated that the eviction ban will not be renewed after August 6, 2021.
Idaho	No	No	-Landlords and tenants in Ada County who are involved in an eviction for nonpayment of rent will be invited to negotiate an agreement through an online portal. -For financial and other assistance, the Idaho Public Utilities Commission has a county-specific resource guide.
Illinois	Yes: through 8/1/2021 (but see notes)	No	-Governor has announced that an executive order will be issued that allows landlords to file for eviction as of August 1, 2021, but that enforcing any eviction order will be banned until August 31, 2021. -Tenants and landlords might be able to get assistance through the Illinois Rental Payment Program (ILRPP).
Indiana	No	No	-Indiana COVID-19 Rental Assistance Program. -Indiana resource guide. -Indiana Info re: CDC Eviction Ban (9/9/2020)
Iowa	No	No	-Iowa Info re: CDC Eviction Ban (9/10/2020)
Kansas	No	No	-Kansas legislature voted to end eviction ban on May 28, 2021 (vote marks end of Executive Order 21-13.) -Kansas Emergency Rental Assistance (KERA) -Utilities are required to offer payment plans.
Kentucky	No	No	-Kentucky's Healthy at Home Eviction Relief Fund. -Many utilities have voluntarily agreed to not shutoff for nonpayment. Please contact your utility provider for options. -Kentucky Info re: CDC Eviction Ban (9/4/2020)

State	Hold On Evictions	Hold on Utility Shutoffs	Other Tenant Protections/Notes
Louisiana	No	No	-Louisiana's Emergency Rental Assistance Program -For information on utilities, visit the Louisiana Public Service Commission's website. -Louisiana Law Help is regularly updating its website with COVID-19 information for Louisiana residents.
Maine	No	No	-By order of governor, evictions will occur under expanded time frames (meaning landlords must give tenants a longer notice period to move out/pay rent before they can be evicted). -Maine's Emergency Rent Relief Program. -MaineHousing has created a $5 million COVID-19 Rent Relief Program.
Maryland	Yes: through 8/15/2021	No	-By governor's order, no evictions statewide during emergency. Emergency declaration lifted effective July 1, 2021, but there is a 45-day grace period (until August 15, 2021) during which the eviction ban remains in place. -Maryland's Emergency Rental Assistance Program -The Maryland Court of Appeals put a hold on all eviction proceedings that ended July 25, 2020. The court has issued a communication about procedures for and timing of eviction cases. See court's August 11, 2020 Administrative Order for more information. -Utility shutoff moratorium ended 11/15/2020. Maryland PSC is providing energy assistance programs. -Maryland Info re: CDC Eviction Ban (9/4/2020)
Massachusetts	No	No	-Massachusetts state resources for renters. -For utility information, see the DPU list of utility assistance resources. -Massachusetts Info re: CDC Eviction Ban
Michigan	No	No	-Michigan is offering an Eviction Diversion Program for renters who need assistance. -Michigan's COVID Emergency Rental Assistance (CERA). -Many Michigan utility providers are agreeing to suspend shutoffs. Check the MPSC website for your carrier's current policies. -Michigan Info re: CDC Eviction Ban (9/3/2020) and FAQs.
Minnesota	See notes	Maybe (see notes)	-MN legislature has passed an "eviction off ramp" law. As of August 13, 2021, landlords can terminate the lease of renters who are behind in rent and are not eligible for a COVID-19 emergency assistance plan. As of September 12, 2021, landlords can file evictions. For detailed information visit Minnesota Housing's RentHelpMN website (see particularly it's FAQs and timeline for off ramp).

State	Hold On Evictions	Hold on Utility Shutoffs	Other Tenant Protections/Notes
			-Minnesota Public Utilities Commission required state regulated utilities to extend consumer protections throughout the COVID emergency.
Mississippi	No	No	-Mississippi has established a COVID-19 information website. -Check the Mississippi Judiciary's website for information about evictions, trials, and court access.
Missouri	No	No	-Missouri Housing Development Commission is administering emergency rent and utility assistance funds. -Supreme Court of Missouri has directed courts to exercise discretion regarding cases (effective May 16, 2020) and appearances subject to certain Operational Directives. Whether or not your case will be held is left to discretion of judge. -Check Missouri Public Service Commission's website for information about utility shutoffs.
Montana	No	No	-Renters can seek relief from the Montana Emergency Rental Assistance program. -Visit the Montana Public Service Commission's website to locate your utility service provider's website and find out about status. -Montana Info re: CDC Eviction Ban (9/4/2020)
Nebraska	No	No	-Visit Nebraska Public Service Commission's website to see list of utility providers who have agreed to not shut off service. -Nebraska Public Service Commission is allowing utility carriers to seek reimbursement for providing service to low-income families.
Nevada	No	No	-Governor ordered extension of eviction ban ended May 31, 2021. -NV Energy suspended disconnections for nonpayment until September; check the State of Nevada Public Utilities Commission's website.
New Hampshire	No	No	-New Hampshire Emergency Rental Assistance Program -New Hampshire Info re: CDC Eviction Ban (9/4/2020)
New Jersey	Yes: until end of emergency +2 months	No	-Governor's order prohibits removal of tenants from residential properties, and postpones enforcement of all judgments for possessions, warrants of removal, and writs of possession. See New Jersey Eviction Moratorium Information + Question Form for more information. -See NJ's Board of Public Utilities FAQs on End of Shutoff Moratorium and Grace Period -New Jersey utility assistance programs.

State	Hold On Evictions	Hold on Utility Shutoffs	Other Tenant Protections/Notes
New Mexico	Yes	No	-See New Mexico's website on the utilities' response to COVID-19. -New Mexico residents who have received an eviction notice should call the state's COVID-19 general hotline at 1-833-551-0518. -NM courts have placed a temporary moratorium on eviction. You must provide the court with evidence of current inability to pay rent at your hearing on the eviction petition. Eviction hearings will be held by video or phone, unless parties file a motion for in-person hearing. The NM Supreme Court has a FAQ page for more information. Moratorium in place until end of emergency. -New Mexico Emergency Rental Assistance Program -Many utilities have suspended shutoffs. Check with your provider for information.
New York	Yes: through 8/31/2021	Yes	-The state legislature's COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 was extended through August 31, 2021. It prohibits evictions and puts various tenant protections in place. -HomeownerHelpNY -The New York Unified Court System issued memo on November 17, 2020 about procedures. -No utility shutoffs due to nonpayment during the state of emergency +180 days. See DPS's website for FAQs and more information. -Apply for New York Heating and Cooling Assistance (HEAP) program here.
North Carolina	No	No	-North Carolina's Housing Opportunities and Prevention of Evictions Program (HOPE). -Also see the state's FAQ regarding the eviction ban.
North Dakota	No	No	-North Dakota COVID Emergency Rent Bridge -North Dakota Public Service Commission information on financial assistance with phone or internet service.
Ohio	No	No	-Ohio Home Relief Grant (for landlords and tenants). -Ohio Public Utilities Commission's information on utility plans. -Ohio resources for economic support. -Ohio Info re: CDC Eviction Ban (9/4/2020)

State	Hold On Evictions	Hold on Utility Shutoffs	Other Tenant Protections/Notes
Oklahoma	No	No	-Evictions may proceed, but, by order of the Supreme Court of Oklahoma, anyone filing an eviction must certify that the property is not covered under the federal CARES Act. -Oklahoma's Coronavirus Aid Relief Application -Oklahoma's COVID-19 resources and assistance website. -Oklahoma COVID-19 call center: 877-215-8336
Oregon	No	Yes: through 7/31/2021	-Oregon's eviction ban has ended, but there is still a grace period for repayment of rent accrued from April 1, 2020 through June 30, 2021. The City of Portland's website provides detailed information about the eviction ban and the dates by which deferred rent payments are due. -Oregon PUC's announcement about utility shutoff moratorium; PUC information about debt relief programs -Oregon landlord and tenant resources. -Oregon Lifeline (a program for assistance with phone or broadband service).
Pennsylvania	No	No	-Information about Pennsylvania CARES Rent Relief Program. -Pennsylvania Low Income Home Energy Assistance Program (LIHEAP) -Each court handles CDC Eviction Ban procedures individually. Notices are posted here.
Rhode Island	No	Yes for certain customers through 7/25/2021	-By order of supreme court, evictions can resume after June 1, 2020. -Rhode Island HomeSafe Initiative (financial assistance for people with short-term housing crises) -Rhode Island Public Utilities Commission ordered that the winter moratorium will be extended for "protected status" customers through July 25, 2021. This will be the last extension. -Rhode Island Info re: CDC Eviction Ban (9/3/2020)
South Carolina	No	No	-South Carolina SCStay program (COVID-19 housing assistance) -SC Housing COVID-19 Mortgage Relief Assistance -SC Housing's list of resources for rental assistance. -Any party pursuing an eviction must submit to court a signed, original Certification of Compliance with the Coronavirus Aid, Relief, and Economic Security Act.
South Dakota	No	No	-South Dakota CARES Housing Assistance Program -Check South Dakota Unified Judicial System for status of cases. -Check South Dakota PUC website for resources related to utilities.

State	Hold On Evictions	Hold on Utility Shutoffs	Other Tenant Protections/Notes
Tennessee	No	No	-Tennessee Housing Development's list of energy assistance programs for renters. -Tennessee Office of the Courts' list of eviction resources.
Texas	No	No	-Texas Coronavirus Relief Bill Rental Assistance Program -Texas Department of Housing and Community Affairs' Help for Texas site allows renters to search for available assistance. -For Texas-specific information and resources, see TexasLawHelp.org's website on Property Law Issues During COVID-19 and its publication, Evictions During the COVID-19 Pandemic. -TXU Energy is offering customer support resources. -Texas Info re: CDC Eviction Ban (9/17/2020)
Utah	No	No	-Utah Home Energy Assistance Target (HEAT) Program -Utah Housing Assistance Program -Utah Info re: CDC Eviction Ban
Vermont	Yes: through 7/15/21	Yes: until 7/15/2021	-Evictions are banned until the end of the state's declared emergency plus 30 days. The state of emergency ended on June 15, 2021, so the eviction ban will be in place through July 15, 2021. (More info here.) -The ban on utility shutoffs (electricity, telephone landlines, and natural gas) is in place until July 15, 2021.
Virginia	No	Yes: until at least 60 days after end of state of emergency	-Virginia Rent Relief Program -Information about the Statement of Tenant Rights and Responsibilities that landlords must provide to tenants. -StayHomeVirginia.com -HB 5005 (regarding moratorium on utility disconnections). State of emergency ended effective July 1, 2021. See Virginia Utility Assistance Program.
Washington	See notes re: eviction moratorium "bridge" through 9/30/2021	Yes: through 9/30/2021	-Governor has announced an eviction moratorium "bridge" that will extend the eviction moratorium through September 30, 2021. Landlords cannot evict for unpaid rent due from 2/29/2020 through 7/31/2021. Beginning 8/1/2021, landlords may evict under certain circumstances. -Utility shutoff moratorium extended through September 30, 2021. -Washington Eviction Rent Assistance Program (ERAP)/Treasury Rent Assistance Program (T-RAP) -Washington Utilities and Transportation Commission's information on COVID-19 utility assistance.

State	Hold On Evictions	Hold on Utility Shutoffs	Other Tenant Protections/Notes
			-Washington mortgage relief and assistance information.
West Virginia	No	No	-Mountaineer Rental Assistance Program
Wisconsin	No	No	-State launched the Wisconsin Rental Assistance Program for people who have lost income. -Wisconsin Emergency Rental Assistance (WERA) -Wisconsin Home Energy Assistance Program (WHEAP) -PSC of Wisconsin launched a customer service phone line for internet and phone service.
Wyoming	No	No	-Wyoming Emergency Rental Assistance Program -Wyoming Supreme Court ordered suspension of all in-person proceedings (with certain exceptions). Check court for status. -Check Wyoming's COVID-19 website for more information.

Other Resources:

- You can check to see if your utility providers have taken the Federal Communications Commission's (FCC's) Keep Americans Connected pledge to not disconnect residential or small business customers during the coronavirus pandemic.
- Sources of Coronavirus Assistance for Landlords and Tenants: A list of federal, state, local, non-profit, and private sources of financial assistance and other resources for both tenants and landlords.
  Updated: June 15, 2021
  In the chart, click on the state's name to be directed to its official COVID-19 website.

ABI Southwest Judges Roundtable Discussion Topic # 3

The Small Business Reorganization Act of 2019

--Measurements of Success--

Topic Question –

The Small Business Reorganization Act of 2019 (the "SBRA"), signed into law on August 23, 2019, enacted a new subchapter V of chapter 11 of the Bankruptcy Code, codified as new 11 U.S.C. §§ 1181 – 1195. It took effect on February 19, 2020, 180 days after its enactment.

The purpose of SBRA is "to streamline the process by which small business debtors reorganize and rehabilitate their financial affairs." A sponsor of the legislation stated that it allows small business debtors "to file bankruptcy in a timely, cost-effective manner, and hopefully allows them to remain in business," which "not only benefits the owners, but employees, suppliers, customers, and others who rely on that business."6 Courts have taken the legislative purpose of SBRA into account in their application of the new law.

Under § 101(51D), as amended, a debtor could not qualify as a small business debtor if its debts (with some exceptions) exceeded $ 2,725,625. The Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), enacted and effective March 27, 2020, amended the SBRA to increase the debt limit to $ 7.5 million for purposes of subchapter V for one year.

Congress again extended for another one year period the debt limit extension inn March 2021, expiring in March, 2022.

This discussion topic is divided into three subparts:

A. The Eligibility Question.

i. Should the Debtor be required to be actively conducting business at the time of filing, or may Subchapter V be used to wind-down a business and resolve the debts and asset distribution?

ii. Should the $7.5 million debt limit be made permanent?

B. The Value of the New Subchapter V Trustee. How has the presence of a Subchapter V in a case resulted in positive or negative outcomes, vis-à-vis plan confirmation successes?

C. Plan Confirmation Rates are surpassing 50% nationally. What are the primary causes for this success rate?

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The Pandemic Safety Net Is Coming Apart. Now What?

One by one, pandemic relief programs that financially supported millions of Americans are going away, the *New York Times* reported. With legislative packages worth trillions of dollars, the federal government wove a temporary safety net that provided help for people dealing with lockdowns, job losses and worse. But many of the most far-reaching protections, including eviction moratoriums and expanded unemployment benefits, are about to expire. Provisions affecting student loans, food stamps and more are scheduled to follow in the coming months. It's not all bad: This month, millions of households are receiving the first of six monthly payments that are part of an expanded child tax credit. But if you rely on any of the programs that are going away, this is an anxious time. Last year, the federal Centers for Disease Control and Prevention imposed a nationwide eviction moratorium and then extended the pause until July 31. But the agency declared that was "intended to be" the last extension. Barring some last-minute change because of rising numbers of coronavirus cases — which would probably have to overcome legal challenges — the moratorium will end in a few weeks. Unless your state or local government has extended the moratorium further — the prohibition in New York State ends Aug. 31, for instance, and an organization called Eviction Lab has a list of others on its website — landlords may be able to move quickly. This is especially true for tenants whose evictions were in progress when the pandemic started, or those whose landlords have already taken legal actions that remained allowable during the moratorium, which included parts of the eviction process short of the actual removal of tenants. Pandemic relief legislation made transformative — but temporary — changes to the way the unemployment insurance system works. It expanded eligibility, increased payments and extended benefits for longer periods, augmenting the programs run by each state. But federal support for those changes expires on Sept. 6.

Monday, July 19, 2021

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https://www.nytimes.com/2021/07/18/your-money/coronavirus-relief-expiration.html

2021 WL 3121373
Only the Westlaw citation is currently available.
United States Court of Appeals, Sixth Circuit.

TIGER LILY, LLC, et al., Plaintiff-Appellees,
v.
UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, et al., Defendants-Appellants.

No. 21-5256
|
Decided and Filed: July 23, 2021

On Appeal from the United States District Court for the Western District of Tennessee at Memphis. No. 2:20-cv-02692—Mark S. Norris Sr., District Judge.

Attorneys and Law Firms

ON BRIEF: Alisa B. Klein, Brian J. Springer, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellants. S. Joshua Kahane, Aubrey B. Greer, GLANKLER BROWN, PLLC, Memphis, Tennessee, for Appellees. Brianne J. Gorod, CONSTITUTIONAL ACCOUNTABILITY CENTER, Washington, D.C., Jay R. Carson, THE BUCKEYE INSTITUTE, Columbus, Ohio, for Amici Curiae.

Before: NORRIS, THAPAR, and BUSH, Circuit Judges.

BUSH, J., delivered the opinion of the court in which NORRIS and THAPAR, JJ., joined. THAPAR, J. (pp. ——– – ——–), delivered a separate concurring opinion.

OPINION

JOHN K. BUSH, Circuit Judge.

***1** Ten months ago, the Centers for Disease Control and Prevention imposed an eviction moratorium on rental properties across the country. It found authority for its unprecedented action in a provision of the Public Health Service Act of 1944. Plaintiffs sued, arguing that the provision does not grant the CDC the sweeping authority it claims. The district court found in their favor and granted them declaratory relief. We affirm.

I.

In March of 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security Act. Pub. L. No. 116-136, 134 Stat. 281 (2020). Among other things, the CARES Act imposed a 120-day moratorium on evictions from rental properties that participated in federal assistance programs or had federally backed loans. *Id.* § 4024.

After that congressionally enacted moratorium ended, the CDC stepped in. It issued an order entitled "Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19." 85 Fed. Reg. 55,292. The Halt Order imposed a broader eviction moratorium than Congress had, one that prohibited eviction of all "covered persons"—without regard to whether the rental property relied on federal funds or loans—through December 31, 2020. *Id.* The CDC explained that the Order is a necessary measure to facilitate self-isolation, support state lockdown orders, and prevent congregation in settings like homeless shelters. *Id.* at 55,294.

The CDC found authority for its entry into the landlord-tenant relationship in the Public Health Service Act of 1944, which authorizes the Secretary of Health and Human Services [1] to "make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases." 42 U.S.C. § 264(a). To carry out and enforce "such regulations," the Secretary can "provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary." *Id.*

In late December, before the Halt Order elapsed, Congress included a provision in the Consolidated Appropriations Act that extended the order through January 31, 2021. Pub. L. No. 116-260, § 502, 134 Stat. 1182 (2020). Since then, the CDC has thrice extended the order beyond that congressionally authorized date—first until March 31, then until June 30, and now through July 31. 86 Fed. Reg. 8020; 86 Fed. Reg. 16,731; 86 Fed. Reg. 34,010.

Soon after the CDC issued the original Halt Order, Plaintiffs, who own or manage rental properties, filed suit seeking a declaratory judgment that the Halt Order exceeds the government's statutory grant of power, that it

violates the Constitution, and that its promulgation violated the Administrative Procedures Act. They also sought a preliminary injunction barring the order's enforcement.

***2** The district court denied the preliminary-injunction motion because it found that Plaintiffs' loss of income did not rise to the level of an irreparable injury. The government then moved for judgment on the pleadings, and Plaintiffs for judgment on the administrative record. The district court ruled for Plaintiffs, finding that the Halt Order exceeded the government's statutory authority under 42 U.S.C. § 264(a). *Tiger Lily v. U.S. Dep't of Hous. & Urb. Dev.*, No: 2:20-cv-02692-MSN-atc, —— F.Supp.3d ——, ——, 2021 WL 1171887, *10 (W.D. Tenn. Mar. 15, 2021). The next day, the government appealed and moved in both the district court and our court for an emergency stay pending appeal. We denied the motion because the government was not likely to succeed on the merits. *See Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev.*, 992 F.3d 518, 522–23 (6th Cir. 2021). We now address the merits.

II.

On appeal, the government argues only that the district court erred in declaring the CDC's Halt order an unlawful exercise of the agency's authority. We review that question of law de novo. *M.L. Johnson Fam. Properties, LLC v. Bernhardt*, 924 F.3d 842, 848 (6th Cir. 2019); *see also* 5 U.S.C. § 706(2). Notably, the government does not ask us to grant *Chevron* deference to its interpretation of the relevant statute. "We therefore decline to consider whether any deference might be due" the Halt Order. *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Ass'n*, —— U.S. ——, 141 S. Ct. 2172, 2180, —— L.Ed.2d —— (2021); *see also* *CFTC v. Erskine*, 512 F.3d 309, 314 (6th Cir. 2008).

III.

The government claims that the Public Health Act of 1944, 42 U.S.C. § 264(a), authorizes the CDC's Halt Order. Section 264(a) reads:

> The Surgeon General, with the approval of the Secretary, is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.

That text does not grant the CDC the power it claims.

The first sentence authorizes the HHS Secretary "to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases." 42 U.S.C. § 264(a). Following the D.C. Circuit's interpretation of § 264(a), the government argues that that text alone authorizes the CDC's order. *See Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.* (*AAR*), No. 21-5093, 2021 WL 2221646, at *1–2 (D.C. Cir. June 2, 2021). We agree that the first sentence grants the Secretary rulemaking authority. But that authority is not as capacious as the government contends.

When we interpret statutes, we must give effect to each clause and word. *See, e.g.*, *Loughrin v. United States*, 573 U.S. 351, 358, 134 S.Ct. 2384, 189 L.Ed.2d 411 (2014). So in determining what authority Congress statutorily delegated to an agency, we look "not only [to] the ultimate purposes Congress has selected, but [to] the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 n.4, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994).

Here, those principles require us to interpret the scope of the grant of rulemaking authority in the first sentence

of § 264(a) by reference to the means it authorizes in the second. Again, that second sentence details: "For purposes of carrying out and enforcing such regulations," the Secretary "may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary." 42 U.S.C. § 264(a). Read in conjunction with the first sentence, the second lists how the Secretary might enforce the regulations that are, in his judgment, "necessary to prevent the introduction, transmission, or spread of communicable diseases." *Id.* Plainly, the second sentence narrows the scope of the first. *See Brown v. Sec'y, U.S. Dep't of Health & Hum. Servs.*, No. 20-14210, —— F.3d ——, ——, 2021 WL 2944379, at *2 (11th Cir. July 14, 2021) (reasoning that the second sentence in § 264(a) "clarif[ies] any ambiguity about the scope of the CDC's power under the first."). And the CDC is "bound" by those means that Congress has deemed "appropriate" and has "prescribed." *MCI*, 512 U.S. at 231 n.4, 114 S.Ct. 2223 (1994); *see also Merck & Co. v. United States Dep't of Health & Hum. Servs.*, 962 F.3d 531, 536 (D.C. Cir. 2020).

***3** The government contends that the second sentence does not circumscribe the power granted in the first, but instead expands on it. It reasons, again parroting the D.C. Circuit's analysis in *AAR*, that Congress penned the second sentence because it had reason to believe in 1944 that the measures listed required explicit authorization given that they might raise Fourth Amendment concerns. For support, it cites *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946).

In *Oklahoma Press*, the Court cited *FTC v. American Tobacco Co.*'s instruction that absent "the most explicit language," courts should not read statutes as authorizing agencies to "sweep" constitutional traditions "into the fire." 327 U.S. at 201 & n.26, 66 S.Ct. 494 (quoting *FTC v. Am. Tobacco Co.*, 264 U.S. 298, 305–06, 44 S.Ct. 336, 68 L.Ed. 696 (1924)). Both cases simply articulate the well-settled rule that courts "should never ... construe an Act in a sense which would render it unconstitutional if a different and permissible construction will save it." *Addison v. Holly Hill Co.*, 322 U.S. 607, 623, 64 S.Ct. 1215, 88 L.Ed. 1488 (1944). Neither supports the government's attempt to explain away the second sentence of § 264(a). [2]

Shorn of its *Oklahoma Press* explanation, the government's reading reduces the other provisions in § 264 to mere surplusage. *See Yates v. United States*, 574 U.S. 528, 543, 135 S.Ct. 1074, 191 L.Ed.2d 64 (2015). If the first sentence really did grant the Secretary plenary authority to impose any regulation he thought "necessary to prevent the introduction, transmission, or spread of communicable diseases," there would be no need to specifically authorize the apprehension and detention of infected individuals in § 264(d), or the inspection and fumigation of contaminated properties in § 264(a). Those specific grants of power would be superfluous. We will not adopt such an interpretation where a more reasonable one exists. *See Yates*, 574 U.S. at 543, 135 S.Ct. 1074.

This approach also accords with the expectation that Congress would "speak clearly if it wish[ed] to assign to an agency decisions of vast economic and political significance," like the decision to shut down evictions across the entire country. *Utility Air Regul. Grp. v. EPA.*, 573 U.S. 302, 324, 134 S.Ct. 2427, 189 L.Ed.2d 372 (2014) (plurality opinion) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000)). There is no clear expression of congressional intent in § 264 to convey such an expansive grant of agency power, and we will not infer one. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001) ("Congress ... does not, one might say, hide elephants in mouseholes."); *see also Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, —— U.S. ——, 141 S. Ct. 2320, —— L.Ed.2d —— (2021) (Kavanaugh, J., concurring) (citing the major-questions doctrine in determining that the CDC "exceeded its existing statutory authority by issuing a nationwide eviction moratorium").

Therefore, we conclude that the first sentence of § 264(a) authorizes the Secretary to take action and the second dictates what actions he may take. That means that if the CDC has the authority to impose a nationwide eviction moratorium, it must come from the second sentence of § 264(a). The government does not argue that it does, so we need not

belabor the point. We adhere to our prior reasoning. *See Tiger Lily*, 992 F.3d at 522–23. Applying the *ejusdem generis* canon of statutory construction, the residual phrase in the second sentence of § 264(a)—which allows the Secretary to take "other measures" he deems necessary to stop the spread of disease—encompasses measures that are similar to inspection, fumigation, destruction of animals, and the like. *Id.* Plainly, an eviction moratorium does not fit that mold. *Id.*

***4** What's more, even if we construed the phrase "other measures" more expansively, we cannot read § 264(a) to grant the CDC the power to insert itself into the landlord-tenant relationship without clear textual evidence of Congress's intent to do so. *Id.* at 523. Our reading of the statute's text accords with the principle that "Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–73, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001). That principle has yet greater force when "the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power," *id.* at 173, 121 S.Ct. 675, like landlord-tenant relations, *see* *Lindsey v. Normet*, 405 U.S. 56, 68, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972) ("The Constitution has not federalized the substantive law of landlord-tenant relations."). Agencies cannot discover in a broadly worded statute authority to supersede state landlord-tenant law. Instead, Congress must "enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property." *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, —— U.S. ——, 140 S. Ct. 1837, 1849–1850, 207 L.Ed.2d 186 (2020). The absence of any such clarity in § 264(a) indicates that the CDC cannot nationalize landlord-tenant law.

Finally, to put "extra icing on a cake already frosted," the government's interpretation of § 264(a) could raise a nondelegation problem. *Van Buren v. United States*, —— U.S. ——, 141 S. Ct. 1648, 1661, —— L.Ed.2d —— (2021) (quoting *Yates v. United States*, 574 U.S. 528, 557, 135 S.Ct. 1074, 191 L.Ed.2d 64 (2015) (Kagan, J., dissenting)). Under that interpretation, the CDC can do anything it can conceive of to prevent the spread of disease. That reading would grant the CDC director near-dictatorial power for the duration of the pandemic, with authority to shut down entire industries as freely as she could ban evictions. *See* *Florida v. Becerra*, No. 821-839-SDM-AAS, —— F.Supp.3d ——. ——— – ———, 2021 WL 2514138, *29–31 (M.D. Fla. June 18, 2021) (discussing the possible actions the government could take under its interpretation). In applying the nondelegation doctrine, the "degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Am. Trucking*, 531 U.S. at 475, 121 S.Ct. 903. Such unfettered power would likely require greater guidance than "such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases." *See* *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645–46, 100 S.Ct. 2844, 65 L.Ed.2d 1010 (1980) (plurality opinion) ("[I]t is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view .... A construction of the statute that avoids this kind of open-ended grant should certainly be favored.").

IV.

The government argues that even if the CDC initially lacked the power to impose the eviction moratorium, that changed in December 2021 when Congress passed the appropriations act that contained a provision extending the expiration date of the CDC's Halt Order. That provision reads:

> The order issued by the Centers for Disease Control and Prevention under section 361 of the Public Health Service Act (42 U.S.C. 264), entitled "Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID–19" (85 Fed. Reg. 55292 (September 4, 2020) is extended through January 31, 2021, notwithstanding the effective dates specified in such Order.

Pub. L. No. 116-260, § 502. The government's interpretation is incorrect. The provision is better understood to give force to the moratorium for the period it covers, not to alter the CDC's power beyond that period.

There are two possible understandings of what the extension provision means. The first is that, as the government argues, it constitutes Congress's acquiescence in the agency's assertion of power. But we recognize congressional acquiescence to

an agency's interpretation only "with extreme care." *Solid Waste Agency*, 531 U.S. at 169, 121 S.Ct. 675. The second possibility is that Congress ratified the moratorium for the period from September 4, 2020 through January 31, 2021, giving "the force of law to official action unauthorized when taken." *Swayne & Hoyt v. United States*, 300 U.S. 297, 302, 57 S.Ct. 478, 81 L.Ed. 659 (1937). Especially in light of the high bar to prove the former, the latter is the better understanding here.

***5** The government's argument is premised on the notion that when Congress goes along with an agency's interpretation of a statute, courts can assume that it agrees with the agency. *See* *Bob Jones Univ. v. United States*, 461 U.S. 574, 600–01, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983). Here, the government says, Congress did not just go along; it enacted a statute explicitly approving of the CDC's interpretation. If that were the case, then it would "amount to a legislative declaration of ... meaning" that would "govern the construction of the first statute." *Branch v. Smith*, 538 U.S. 254, 281, 123 S.Ct. 1429, 155 L.Ed.2d 407 (2003) (plurality opinion) (quoting *United States v. Freeman*, 44 U.S. (3 How.) 556, 565, 11 L.Ed. 724 (1845)). But, again, we must exercise "extreme care" in determining that Congress has authoritatively agreed with an agency's interpretation of a statute. *See* *Solid Waste Agency*, 531 U.S. at 169, 121 S.Ct. 675. That is all the more true where, as discussed above, the agency's interpretation is both textually implausible and constitutionally dubious.

Instead of granting an agency new power, Congress can give force to particular agency actions that were originally unlawful. "An old Supreme Court case—rarely cited but never overruled—stands for the proposition that Congress 'has the power to ratify the acts which it might have authorized' in the first place, so long as the ratification 'does not interfere with intervening rights.' " *Thomas v. Network Sols., Inc.*, 176 F.3d 500, 506 (D.C. Cir. 1999) (quoting *United States v. Heinszen & Co.*, 206 U.S. 370, 384, 27 S.Ct. 742, 51 L.Ed. 1098 (1907)). In *Thomas*, the D.C. Circuit applied that principle when Congress, responding to a district court decision holding an agency action unlawful, passed a statute that made the action lawful "as if the same had, by prior act of Congress, been specifically authorized and directed." *Id.* at 505. There, the ratification was wholly retrospective, addressing the exact period for which litigants sought relief. *Id.* Here, by contrast, Congress gave force to the otherwise-unlawful order both retrospectively and prospectively, blessing it for the period from September 4 to January 31. But that ratification did not purport to alter the meaning of § 264(a), so it did not grant the CDC the power to extend the order further than Congress had authorized.

V.

For those reasons, we conclude that 42 U.S.C. § 264(a) does not authorize the CDC to implement a nationwide eviction moratorium.[3] We therefore affirm.

CONCURRENCE

THAPAR, Circuit Judge, concurring.

If the separation of powers meant anything to our framers, it meant that the three necessary ingredients to deprive a person of liberty or property—the power to make rules, to enforce them, and to judge their violations—could never fall into the same hands. For that reason, our Founders did not just "split the atom of sovereignty" by dividing powers between the Federal Government and the States. *Alden v. Maine*, 527 U.S. 706, 751, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) (cleaned up). They also separated powers *within* the Federal Government: The legislative power went to Congress; the executive to the president; and the judicial to the courts. That is the equilibrium the Constitution demands. And when one branch impermissibly delegates its powers to another, that balance is broken.

Of the three branches, Congress is the most responsive to the will of the people. And the Founders designed it that way for a reason: Congress wields the formidable power of "prescrib[ing] the rules by which the duties and rights of every citizen are to be regulated." The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961). If legislators misused this power, the people could respond, and respond swiftly.

So, naturally, Congress has an incentive to insulate itself from the consequences of hard choices. That was clear from the start. Consider one prominent example. The Constitution

empowers Congress "[t]o establish Post Offices and post Roads." U.S. Const. art. I, § 8, cl. 7. For 18th-century Americans, this was high-stakes stuff. A federal post road could change a town's fortunes overnight, so debates over their placement captured the national attention. When the Second Congress debated an early bill laying out a detailed plan for post roads running from Maine to Georgia, one Congress introduced an amendment "to strike the enumerated routes and replace them with the provision 'by such route as the President of the United States shall, from time to time, cause to be established.' " Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. 1490, 1506 (2021). In other words, the amendment promised to transfer this set of hard choices from Congress to the executive branch.

***6** It was a clever dodge, but it didn't work. Congress rejected the proposal after several prominent Congressmen raised a nondelegation challenge. *See id.* at 1506–12. James Madison was representative when he argued that this proposal to "*alienat[e]* the powers of the House ... would be a violation of the Constitution." *Id.* at 1507.

Madison was right. The constitutional design is frustrated if "Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals." *Gundy v. United States*, —— U.S. ——, 139 S. Ct. 2116, 2133, 204 L.Ed.2d 522 (2019) (Gorsuch, J., dissenting). By shifting responsibility to a less accountable branch, Congress protects itself from political censure—and deprives the people of the say the framers intended them to have.

And yet, over the years, the guardrails have crumbled. *See, e.g.*, *Dep't. of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 77, 135 S.Ct. 1225, 191 L.Ed.2d 153 (2015) (Thomas, J., concurring in judgment) (noting that the Court's test for enforcing the nondelegation doctrine "largely abdicates our duty to enforce that prohibition"). Thus, the Supreme Court should consider breathing new life into the doctrine.

But one common critique stands in the way: Congress simply isn't up to the job. According to some, Congress is incapable of acting quickly in response to emergencies. Others say modern society is too complex to be run by legislators—better to leave it to the agency bureaucrats. In light of the original meaning, history, and structure of our Constitution, these arguments should not carry any weight. But even on their own terms, neither argument washes.

Start with concerns that Congress cannot act fast enough in a crisis. The government's response to the coronavirus pandemic proves otherwise. Congress acted swiftly to pass broad relief for the general public. But it also switched out the hammer for the scalpel when necessary.

Take student veterans as an example. As the pandemic tore through the country, universities abruptly moved their lessons online. Under a Department of Veterans Affairs regulation, student veterans faced the specter of losing their housing stipends under the G.I. Bill if they stopped attending in-person classes. *See* 38 C.F.R. § 21.9640(b)(1)(ii). The VA could have changed that regulation through the Administrative Procedure Act's emergency rulemaking provision. *See* 5 U.S.C. § 553(b)(3)(B), (d)(3). But Congress beat the administrative state to the punch. On March 21, 2020, just two days after California announced the country's first statewide stay-at-home order, Congress passed Public Law 116-128 to temporarily override the VA regulation and prevent any disruption in veterans' educational benefits.

The contention that Congress lacks the expertise to legislate on complicated topics appears similarly attractive at first glance. But the executive branch need not have a monopoly on experts. For example, Congress manages to pass tax legislation and annual budgets without outsourcing the job to the administrative agencies. If you took the critics of the nondelegation doctrine seriously, you might think that only the administrative state could predict how these laws would affect our nation's long-term fiscal health. But Congress has famously maintained a strong grip on these issues.

How? It has experts of its own. Professors Cross and Gluck have meticulously documented how nonpartisan structures like the Congressional Budget Office and the Joint Committee on Taxation—which are housed under Article I and ultimately accountable to Congress's leadership—have provided Congress with "technical expertise" that "safeguards the legislative process from executive and interest-group encroachment." Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. Pa. L. Rev. 1541, 1544 (2020). If Congress can manage the world-class economists at the CBO, then there's no reason to think it could not "meaningfully reassert itself as the top-line decision-maker on [other] important matters pertaining to our administrative state." Philip Wallach & Kevin R. Kosar, *The Case for a Congressional Regulation Office*, 48 Nat'l Affs.

(Fall 2016). A strong nondelegation doctrine could compel Congress to strengthen its roster of expert institutions.

***7** What's the difference between executive-branch experts and congressional ones? Executive-branch experts make regulations; congressional experts make recommendations. Congressional bureaucracy leaves the law-making power with the people's representatives—right where the Founders put it. Regardless of who came up with the idea, "[t]he sovereign people would know, without ambiguity, whom to hold accountable for the laws they would have to follow." *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting).

This case proves the point. As is often true, there are two sides to today's story. *Compare* Matthew Haag, *A Landlord Says Her Tenants Are Terrorizing Her. She Can't Evict Them*, N.Y. Times (July 9, 2021), *with Eviction Moratoriums Are Expiring, but Millions of Tenants Are Still Relying on Them*, N.Y. Times (June 16, 2021). It is not our job as judges to make legislative rules that favor one side or another. But nor should it be the job of bureaucrats embedded in the executive branch. While landlords and tenants likely disagree on much, there is one thing both deserve: for their problems to be resolved by their elected representatives.

All Citations

--- F.4th ----, 2021 WL 3121373

Footnotes

1 The statute actually grants the authority to the Surgeon General, but it has since been transferred to the Secretary. 20 U.S.C. § 3508; 31 Fed. Reg. 8855.

2 Additionally, *Oklahoma Press* was decided in 1946, two years after the Public Health Act of 1944, and *American Tobacco* involved a regulatory demand for corporate documents. *See* *Oklahoma Press*, 327 U.S. at 186, 66 S.Ct. 494; *American Tobacco* Co., 264 U.S. at 305–06, 44 S.Ct. 336. Neither case placed Congress on notice that giving the Secretary authority to order inspections and fumigations would implicate the Fourth Amendment, and thus require some explicit text.

3 Because we reach that conclusion, we need not address Plaintiffs' myriad other arguments in favor of affirmance.

End of Document

Entered on Docket June 4, 2021

Below is a Memorandum Decision of the Court.

Marc Barreca
U.S. Bankruptcy Court Judge

(Dated as of Entered on Docket date above)

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In re: John Felix Castleman, Sr. and Kimberly Kay Castleman, Debtors.	Case No. 19-12233-MLB **MEMORANDUM DECISION**

INTRODUCTION

The issue before me is whether the debtor or the Chapter 7 bankruptcy estate receives the benefit of appreciation in property value for the period between filing of a Chapter 13 case and conversion of that case to Chapter 7. Choosing between conflicting judicial approaches, I determine that the Chapter 7 estate receives the benefit as appreciation is not a distinct and separate asset under the Bankruptcy Code and nothing in the statute fixes the value of estate assets at the date of petition.

The Chapter 7 Trustee (hereafter the "Trustee") has filed a Motion RE: Section 348(f)(1) (hereafter the "Motion," Dkt. No. 72) seeking a determination that property of the Chapter 7 estate includes the current market value of John and Kimberly Castleman's (hereafter collectively the

Below is a Memorandum Decision of the Court.

"Debtors") real property and that the Trustee be authorized to market the residence of the Debtors. Debtors respond, asserting that the appreciation in value between the filing of the Chapter 13 petition and conversion to Chapter 7 is not property of the bankruptcy estate (Dkt. No. 75). The Trustee filed a reply in support of his position (Dkt. No. 78).

I heard oral argument on May 12, 2021 and took the matter under advisement. Having reviewed the relevant pleadings and having heard arguments from the parties, I conclude that the full present value of the real property, including any appreciation between the Chapter 13 petition date and date of conversion, is property of the Chapter 7 bankruptcy estate.

JURISDICTION

I have jurisdiction over the parties and the subject matter of this Motion pursuant to 28 U.S.C. §§ 157(b)(2)(A) and (O) and 1334.

FACTS

On June 13, 2019, the Debtors filed for relief under Chapter 13 of the Bankruptcy Code (Dkt. No. 1). On September 25, 2019, the Debtors' Chapter 13 plan was confirmed (Dkt. No. 32). On February 5, 2021, the Debtors' case converted to Chapter 7 (Dkt. No. 53).

Debtors listed real property located at 5857 Everson Goshen Road, Bellingham, WA (hereafter the "Real Property") in their original schedules with a value of $500,000.00 (Dkt. No. 10). Debtors also listed debt secured by the Real Property in the amount of $375,077.00 and claimed a homestead exemption in the amount of $124,923.00 (Dkt. No. 10). The Trustee asserts that the Real Property is currently worth at least $700,000.00.[1] *See* Declaration of Kai Rainey, Dkt. No. 72. The Trustee further asserts that any increase in value should inure to the benefit of the Chapter 7 bankruptcy estate (Dkt. No. 72).

[1] It is unclear whether the Trustee agrees that the date of petition value was $500,000.00 or whether the date of petition equity in the Real Property was greater than the exempted amount of $124,923.00.

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ANALYSIS

I. Declaratory Relief

Before turning to the substantive legal arguments there is a procedural issue that should be addressed. Normally, both requests for determination of whether an asset is property of the estate and for declaratory relief require an adversary proceeding. *See* Federal Rule of Bankruptcy Procedure 7001(2) and (9). Parties, however, may waive this right. *See In re Cogliano*, 355 B.R. 792, 806 (B.A.P. 9th Cir. 2006) ("When the question of whether property is part of the estate is in controversy, Rule 7001(2) requires an adversary proceeding, *absent waiver or harmless error* . . . .") (emphasis added).

Here, neither party requests an adversary proceeding and there is no procedural detriment to either party in addressing the legal issues as a contested matter. Moreover, at oral argument both parties agreed that the issue should be resolved through this contested matter rather than through an adversary proceeding. I will therefore adjudicate the matter in its current procedural posture.

II. Two Approaches to Interpreting § 348(f)(1)

Section 348(f)(1) provides:

> (1) Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title—
> (A) property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion;
> (B) valuations of property and of allowed secured claims in the chapter 13 case shall apply only in a case converted to a case under chapter 11 or 12, but not in a case converted to a case under chapter 7, with allowed secured claims in cases under chapters 11 and 12 reduced to the extent that they have been paid in accordance with the chapter 13 plan . . . .

11 U.S.C. §§ 348(f)(1)(A) and (B).

Courts have adopted two major approaches when analyzing the impact of 11 U.S.C. § 348(f)(1) on changes in property value or net equity between the petition date and the date of conversion from

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Chapter 13 to Chapter 7. Some courts have held that any increase in net value of an asset the debtor owned at the date of petition that remains in the debtor's possession or control at conversion to Chapter 7 inures to the benefit of the debtor, absent bad faith. *See In re Barrera*, 620 B.R. 645, 652–54 (Bankr. D. Colo. 2020), *aff'd*, BAP No. CO-20-003, 2020 WL 5869458 (B.A.P. 10th Cir. (Colo.) Oct. 2, 2020); *In re Cofer*, 625 B.R. 194, 202 (Bankr. D. Idaho 2021); *In re Lynch*, 363 B.R. 101, 107 (B.A.P. 9th Cir. 2007); *In re Niles*, 342 B.R. 72, 76 (Bankr. D. Ariz. 2006). I will hereafter refer to this as the "*Cofer* Approach." Other courts have held that any appreciation or increase in net value inures to the Chapter 7 estate. *See In re Goins*, 539 B.R. 510, 516 (Bankr. E.D. Va. 2015); *see also In re Peter*, 309 B.R. 792, 795 (Bankr. D. Or. 2004).[2] I will hereafter refer to this as the "*Goins* Approach."

A. The *Cofer* Approach

In *Cofer*, the debtor converted her case from Chapter 13 to Chapter 7. Following conversion, the Chapter 7 trustee sought to limit the amount of the debtor's homestead to the value at the date of petition and argued that any post-petition appreciation in value inured to the Chapter 7 estate. In analyzing Section 348(f)(1), the court held that the statute was ambiguous and relied on the statute's legislative history to determine that the post-petition, pre-conversion appreciation in value of the Chapter 13 debtor's home inured to the benefit of the debtor. 625 B.R. at 200–02.

Similarly, in *Barrera*, the court determined that Section 348(f)(1) is ambiguous and that the statute should be interpreted in light of the legislative history of the 1994 Amendments. The court also concluded that any appreciation in value inures to the benefit of the debtor as that outcome follows the intention of Congress to encourage debtors to file under Chapter 13. 620 B.R. 652–54.

[2] One court, based on the same reasoning, has concluded that a debtor does not have to account for a decline in the value of an automobile between the date of a Chapter 13 petition and conversion to Chapter 7. *In re Lang*, 437 B.R. 70, 72–73 (Bankr. W.D.N.Y. 2010).

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The Ninth Circuit Bankruptcy Appellate Panel ("BAP") also concluded that the statute is ambiguous and relied on the legislative history of the 1994 Amendments in determining that any post-petition, pre-conversion appreciation inures to the debtor's benefit. *See In re Lynch*, 363 B.R. at 107. In *Lynch*, the Chapter 7 trustee appealed from an ordering compelling him to abandon the debtor's residence. *Id.* at 102. The BAP ultimately reversed the bankruptcy court as there had been no binding valuation of the real property as of the date of petition. However, the BAP also noted that the legislative history indicates that debtors should retain equity created during the Chapter 13 case. *Id.* at 107.

B. The *Goins* Approach

In *Goins*, following conversion of the debtor's case from Chapter 13 to Chapter 7, the trustee sought to sell the debtor's real property and the debtor moved to compel abandonment. The real property had increased in value between the date of petition and conversion and the debtor had made payments reducing debt secured by the property. The trustee asserted that the Chapter 7 estate was entitled to the appreciation in value but stipulated that the debtor would receive any increase in equity due to his payments on the secured debt during the Chapter 13 case. The court determined that the Chapter 7 estate was entitled to the appreciation. *Goins*, 539 at 511–15.[3]

Similarly, in *In re Peter*, the court held that even if the net value of an asset changes during the Chapter 13 case due to the debtor's payments on secured debt, the increase in equity inures to the Chapter 7 estate. In *Peter*, the debtor paid off debt secured by a vehicle prior to conversion of his Chapter 13 to Chapter 7. The court concluded that "pursuant to § 348(f)(1)(A), upon conversion, property of the Chapter 7 estate consists of property of the estate as of the date of filing of the petition,"

[3] As noted, in *Goins*, the trustee and the debtor stipulated to the debtor receiving the benefit of the post-petition, pre-conversion payment of secured debt. As discussed below, the legislative history of Section 348(f) only references pre-conversion paydown of debt, not market-based appreciation. Interestingly, in one case, *In re Wegner*, the court, without referencing legislative history, ruled that the debtor receives the benefit of market-based appreciation during the Chapter 13 but does not receive the benefit of debtor's paydown of secured debt. 243 B.R. 731, 737 (Bankr. D. Neb. 2000).

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the vehicle was property of the estate on the date of petition, and that "[t]he statute does not limit the subsequent Chapter 7 estate to equity in property of the estate" at the petition date. 309 B.R. 793–95.

I conclude that the *Goins* Approach is the correct interpretation of Section 348(f)(1).

III. Appreciation Inures to the Bankruptcy Estate

A. Legislative History of § 348(f)(1)

> The plain meaning of legislation should be conclusive, except in the "rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S. Ct. 3245, 3250, 73 L. Ed. 2d 973 (1982). In such cases, the intention of the drafters, rather than the strict language, controls. [*Id.*]

United States v. Ron Pair Enterprises, *Inc.*, 489 U.S. 235, 242–43, 109 S. Ct. 1026, 1030, 103 L. Ed. 2d 290 (1989).

> When faced with interpreting the meaning of a statute, the Court begins with the language of the statute itself. *United States v. Ron Pair Enterprises*, *Inc.*, 489 U.S. 235, 241, 109 S. Ct. 1026, 1030, 103 L. Ed. 2d 290 (1989). If the language is clear, the Court's inquiry ends, and the Court will enforce the statute according to its terms. *See Ron Pair*, 489 U.S. at 241, 109 S. Ct. at 1030 ("where ... the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'") (quoting *Caminetti v. United States*, 242 U.S. 470, 485, 37 S. Ct. 192, 194, 61 L. Ed. 442 (1917)).

In re Martinez, No. 7-10-11101 JA, 2015 WL 3814935, *5 (Bankr. D.N.M. June 18, 2015). *See also In re Catapult Entm't, Inc.*, 165 F.3d 747, 753 (9th Cir. 1999) (citing *Auburn v. United States*, 154 F.3d 1025, 1029 (9th Cir. 1998) (courts consider legislative history (1) where the statute is ambiguous, or (2) where it is unambiguous but "the legislative history clearly indicates that Congress meant something other than what is said.")).

11 U.S.C. § 348(f) was added to the Bankruptcy Code as part of substantial changes to the Code enacted in 1994. The House Report discussion regarding Section 348(f) is as follows:

> This amendment would 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 the case, in a State with a $10,000 homestead exemption, would have to be counseled concerning the risk that after he or she paid off a $10,000 second mortgage in the chapter 13 case, creating $10,000 in equity, there would be a risk that the home could be lost if the case were converted to chapter 7 (which can occur involuntarily). If all of the debtor's property at the time of conversion is property of the chapter 7 estate, the trustee would sell the home, to realize the $10,000 in equity for the unsecured creditors and the debtor would lose the home.
>
> This amendment overrules the holding in cases such as *Matter of Lybrook*, 951 F.2d 136 (7th Cir. 1991) and adopts the reasoning of *In re Bobroff*, 766 F.2d 797 (3d Cir. 1985). However, it also gives the court discretion, in a case in which the debtor has abused the right to convert and converted in bad faith, to order that all property held at the time of conversion shall constitute property of the estate in the converted case.

H.R. Rep. No. 103-835, at 57 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 3340, 3366.

The addition of Section 348(f)(1)(A), by its plain terms, accomplishes the apparent goal of eliminating a "serious disincentive to [C]hapter 13 filings." In the referenced *Lybrook* case, the court ruled that a post-Chapter 13 petition, pre-Chapter 7 conversion inheritance became property of the Chapter 7 bankruptcy estate. Conversely, in *Bobroff*, the court ruled that a post-Chapter 13 petition, pre-Chapter 7 conversion tort claim inured to the benefit of the debtor, not the Chapter 7 estate. Both of the referenced cases dealt with new assets acquired after the date of petition, not value changes to existing assets. By providing that "property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion," Section 348(f)(1)(A) clearly adopts the *Bobroff* approach and rejects *Lybrook*. Thus, as referenced in the House Report, Section 348(f)(1)(A) eliminates a disincentive to Chapter 13 debtors regarding the risk of losing assets acquired between the date of petition and conversion to the Chapter 7 trustee if the Chapter 13 case is eventually converted.

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Unfortunately, the House Report creates some confusion. The example it provides of the risks of conversion from Chapter 13 to Chapter 7 describes the debtor's risk of losing a homestead to sale by a Chapter 7 trustee due to equity created by payments on secured debt during the Chapter 13 case. H.R. Rep. No. 103-835, at 57. Section 348(f) provides that assets such as a homestead held by the debtor at the date of petition become property of the Chapter 7 estate. The new Section 348(f) does not at all address the effect of conversion on paydown of secured debt during the Chapter 13 case or changes in the value of pre-petition assets. However, the provision is not ambiguous. It simply does not address the scenario referred to in the House Report. Where, as here, the statute is clear and consistent with overall legislative intent, the failure to in any manner address the example provided in the legislative history does not create ambiguity. Nor do I believe it makes the statutory language, "demonstrably at odds with the intentions of its drafters." It is therefore not appropriate to read into the statute an unstated provision regarding treatment of post-petition, pre-conversion changes in property value.[4]

B. Consistency with Ninth Circuit Treatment of Post-Petition Appreciation

In an individual Chapter 7 case new post-petition assets belong to the debtor not the bankruptcy estate. *See In re Smith*, 235 F.3d 472, 477–78 (9th Cir. 2000). Post-petition appreciation is not treated as a separate asset from pre-petition property and inures to the bankruptcy estate, not the debtor. *See Wilson v. Rigby*, 909 F.3d 306, 312 (9th Cir. 2018); *see also In re Hyman*, 967 F.2d 1316, 1321 (9th Cir. 1992); *In re Reed*, 940 F.2d 1317, 1323 (9th Cir. 1991).

As discussed in *Goins*,

> There is an irreconcilable conflict between these cases, which look to Section 541(a)(6), and the cases cited in Part A above [cases taking the "*Cofer* Approach"] . . . , which look to Section 348(f)(1)(A) for the answer. In the Court's view, the cases under Section 541(a)(6) are applicable because the equity attributable to the post-petition appreciation of the property is not separate, after-acquired property, to which we might look to Section

[4] Under the *Cofer* Approach, it is unclear what language would be read into the statute to address the referenced secured debt paydown scenario. Should courts read in language creating, in essence, an exemption for either the amount of secured debt reduction during the Chapter 13 case or for any increase in net value that occurs prior to conversion?

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> 348(f)(1)(A). The equity is inseparable from the real estate, which was always property of the estate under Section 541(a).

Id. at 516.

In this respect the Ninth Circuit has held:

> [A] transfer of interest is subject to the debtor's exemptions under § 522(b)(1), but the reference point for such exemptions is the commencement of the bankruptcy action. Following this transfer, all "proceeds, product, offspring, rents, or profits" [i]nure to the bankruptcy estate. *Id.* § 541(a)(6). This includes the appreciation in value of a debtor's home. *E.g., Schwaber v. Reed (In re Reed)*, 940 F.2d 1317, 1323 (9th Cir. 1991) (interpreting 11 U.S.C. § 541(a)(6) "to mean that appreciation [i]nures to the bankruptcy estate, not the debtor").

Wilson, 909 F.3d at 309.

Here, it is undisputed that the Real Property was property of the bankruptcy estate at the petition date, the Debtors were in possession of the Real Property at the date of conversion, and pursuant to Section 348(f)(1), the Real Property is property of the Chapter 7 estate. Nothing in Section 348(f) indicates that a post-petition increase in value of such property is to be treated differently than post-petition changes in value under *In re Reed*.[5]

CONCLUSION

The meaning of Section 348(f)(1)(A) is clear. The failure of the provision to address the example of a risk of conversion from Chapter 13 to Chapter 7 discussed in the House Report does not

[5] Prior to 2005, Section 348(f)(1)(B) provided that "valuations of property and of allowed secured claims in the chapter 13 case shall apply in the converted case, with allowed secured claims reduced to the extent that they have been paid in accordance with the chapter 13 plan." 11 U.S.C. § 348(f)(1)(B) (1994), *amended by* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Some courts had construed this earlier version of Section 348(f)(1)(B) regarding valuations as supporting the conclusion that the value of property for the Chapter 7 estate was fixed at the date of petition when a Chapter 13 case converted to Chapter 7. *See In re Lynch*, 363 B.R. at 106–07 (holding that "the relevant valuation date for purposes of Section 348(f)(1)(B) is the Chapter 13 filing date," and absent bad faith, appreciation inures to the debtors).

In 2005, Section 348(f)(1)(B) was amended to indicate that valuations made prior to conversion from Chapter 13 to Chapter 7 are not binding. The Trustee argues that this change indicates that the Chapter 7 estate includes any post-petition, pre-conversion appreciation in value. However, as one court correctly noted, valuation does not mean value and the valuation provision in Section 348(f)(1)(B) was irrelevant to interpretation of Section 348(f)(1)(A) even prior to the 2005 amendment. *In re Lang*, 437 B.R. at 72–73. The 2005 amendment to Section 348(f)(1)(B) is therefore irrelevant to interpretation of Section 348(f)(1)(A).

Below is a Memorandum Decision of the Court.

create ambiguity or put the provision at odds with overall legislative intent. There is no reason to read into the statute words which are not there. I therefore conclude that the full value of the Real Property is property of the Chapter 7 estate including any post-petition appreciation. Accordingly, I grant the Trustee's Motion. The Trustee may present an order consistent with this memorandum decision.

/// End of Memorandum Decision ///

363 B.R. 101
United States Bankruptcy Appellate Panel
of the Ninth Circuit.

In re Gerald Adolphus LYNCH and Doris Mae Gill, Debtors.
John T. Kendall, Chapter 7 Trustee, Appellant,
v.
Gerald Adolphus Lynch; Doris Mae Gill, Appellees.

BAP No. NC–06–1223–DBPA.
|
Bankruptcy No. 05–43135–RN.
|
Argued and Submitted Nov. 17, 2006.
|
Filed Jan. 11, 2007.

Synopsis

Background: After debtors' Chapter 13 case was converted to Chapter 7, the United States Bankruptcy Court for the Northern District of California, Randall J. Newsome, Chief Judge, granted debtors' motion to compel trustee to abandon their residence, and trustee appealed.

Holdings: The Bankruptcy Appellate Panel, Dunn, J., held that:

any valuation of debtors' residence that was made in their Chapter 13 case applied in their Chapter 7 case upon conversion, and

remand was necessary to determine whether debtors acted in bad faith.

Reversed and remanded.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

***102** Eric A. Nyberg, Kornfield, Paul, Bupp & Nyberg, Oakland, CA, for Appellant.

Stanley A. Zlotoff, Bluer & Zlotoff, San Jose, CA, for Appellees.

Before: DUNN, BRANDT and PAPPAS, Bankruptcy Judges.

OPINION

DUNN, Bankruptcy Judge.

The chapter 7 trustee appeals an order compelling him to abandon debtors' residence. We REVERSE and REMAND.

FACTS

Gerald Adolphus Lynch and Doris Mae Gill ("debtors") filed a joint chapter 13[1] petition on June 8, 2005, together with the required schedules. In their schedules, the debtors valued their residence at $560,000, subject to a deed of trust held by Downey Savings Bank in the approximate amount of $422,000, and to the debtors' $150,000 homestead exemption. The debtors' chapter 13 plan ("Confirmed Plan") was confirmed without opposition by order entered July 27, 2005. When the debtors were no longer able to perform the Confirmed Plan, the case was converted, on their motion, to chapter 7 on January 20, 2006.

Asserting that the value of the residence was $669,000, John T. Kendall, the chapter ***103** 7 trustee ("Trustee"), obtained an order authorizing him to employ counsel to assist in the sale of the debtors' residence. Because he anticipated that such a sale would result in a distribution to creditors, the Trustee requested that a claims bar date be set in the chapter 7 case. In response, the debtors moved to compel the Trustee to abandon the residence, arguing pursuant to § 554(b) that the residence was of inconsequential value and benefit to the estate. The bankruptcy court granted the motion to compel abandonment, holding that in connection with confirmation of the plan, the residence had been implicitly valued in the amount scheduled by the debtors, and pursuant to § 348(f)(1), that value was binding on all the parties upon conversion of the case to chapter 7. The Trustee filed this timely appeal.

JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(1). We have jurisdiction over this appeal pursuant to 28 U.S.C. § 158(a)(1).

ISSUE

Whether an implied valuation of the debtors' residence occurred in conjunction with confirmation of the Confirmed Plan, binding on a chapter 7 trustee in a converted case.

STANDARD OF REVIEW

We review a bankruptcy court's interpretation of the Bankruptcy Code de novo. *See Einstein/Noah Bagel Corp. v. Smith (In re BCE West, L.P.),* 319 F.3d 1166, 1170 (9th Cir.2003).

DISCUSSION

1. A Valuation of the Residence Made in the Chapter 13 Case Is Binding on the Trustee.
Any valuation of the debtors' residence that was made in a chapter 13 case applies in the chapter 7 case upon conversion.

> Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title—
>
> (A) property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion; and
>
> (B) valuations of property and of allowed secured claims in the chapter 13 case shall apply in the converted case.

11 U.S.C. § 348(f)(1).

In this case, the debtors scheduled their residence at a value of $560,000. No one challenged that value in the context of plan confirmation or otherwise while the case was pending in chapter 13. In fact, after an investigation of recent sales in the area of the debtors' residence, the chapter 13 trustee concluded that the debtors' valuation of their residence in their schedules was correct.

Because no party raised any objection to confirmation, the bankruptcy court confirmed the debtors' chapter 13 plan without a hearing. In its order confirming the Confirmed Plan, the bankruptcy court made the requisite findings pursuant to § 1325(a), including a finding that:

> The value, as of the effective date of the Plan, of property to be distributed under the Plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the Debtor were liquidated under Chapter 7 of this title on such date[.]

The question before us is whether the explicit finding made in the confirmation ***104** order pursuant to § 1325(a)(4) was also an implicit finding that the value of the debtors' residence was $560,000 as scheduled, i.e., an implicit valuation.

2. How Courts Have Approached the Issue.
The majority of courts that have considered the issue have held that, in the absence of a contested valuation proceeding, the order confirming a chapter 13 plan incorporates an implicit finding that the value of the debtor's residence is the value at which the debtor scheduled the residence. *See, e.g., Warren v. Peterson,* 298 B.R. 322 (N.D.Ill.2003); *In re Niles,* 342 B.R. 72 (Bankr.D.Ariz.2006); *In re Slack,* 290 B.R. 282 (Bankr.D.N.J.2003); *In re Page,* 250 B.R. 465 (Bankr.D.N.H.2000).

Three primary rationales have been advanced for the majority position. First, when the bankruptcy court concludes in the confirmation order that the value of property to be distributed under the plan to unsecured creditors is not less than they would receive in a chapter 7 liquidation, as required pursuant to § 1325(a)(4), if there is no explicit valuation of the debtor's property in a contested proceeding, the bankruptcy court must rely on the scheduled values of the debtor's assets. If the chapter 13 trustee or unsecured creditors believe that the debtor's property is valued too low in the schedules, they have the opportunity to object prior to confirmation. *Warren v. Peterson,* 298 B.R. at 325–26.

Second, treating the confirmation order as incorporating an implicit valuation of property appears consistent with the legislative history of § 348(f)(1).

> This amendment would 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 ..., any property acquired after the petition becomes property of the estate, at least until confirmation of the 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 the 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 the case, in a State with a $10,000 homestead exemption, would have to be counseled concerning the risk that after he or she paid off a $10,000 second mortgage in the chapter 13 case, creating $10,000 in equity, there would be a risk that the home could be lost if the case were converted to chapter 7 (which can occur involuntarily). If all of the debtor's property at the time of conversion is property of the chapter 7 estate, the trustee would sell the home, to realize the $10,000 in equity for the unsecured creditors and the debtor would lose the home.

H.R.Rep. No. 103–835 at 57 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 3340, 3366. *See, e.g., Warren v. Peterson,* 298 B.R. at 326 n. 1 ("Section 348(f) was adopted to ensure that property, such as Warren's residence, would not be liquidated as a result of converting to chapter 7."); and *In re Wegner,* 243 B.R. 731, 734 (Bankr.D.Neb.2000) ("Section 348(f)(1)(B) assures that property of a successor Chapter 7 case excludes the amount by which property ***105** appreciates during the pendency of a Chapter 13 case.").

Finally, treating a chapter 13 confirmation order as incorporating an implicit valuation of the debtor's property arguably serves judicial economy.

> Establishing the valuation of property at an early stage in the proceedings ensures both stability and finality. Valuations need not be re-examined if the case converts from chapter 13 to chapter 7. Determining the present value of property, such as real estate, is already a complicated issue, and calculating the historic value of property is even more complicated.

Warren v. Peterson, 298 B.R. at 326.

One court has rejected the implicit valuation concept. *In re Jackson,* 317 B.R. 511, 513 (Bankr.N.D.Ill.2004). The *Jackson* court concluded that the provisions of § 348(f)(1)(B) and congressional intent could be met by a valuation made, if necessary, after a chapter 13 case has been converted to chapter 7.

> [T]he bankruptcy court can simply hold a valuation hearing at or near the time of a proposed sale in the chapter 7 to determine what the real property was worth when the chapter 13 petition was originally filed. The court could refuse to approve any sale proposed by the trustee if the property had insufficient equity at the start of the chapter 13 case and/or had not appreciated sufficiently after conversion.

Id. at 516.

The *Jackson* analysis has the attraction of avoiding the reliance, inherent in the implicit valuation cases, on a fictional valuation based solely upon the value in the debtors' schedules. In this case, while it eventually was persuaded to accept the debtors' argument, the bankruptcy court expressed concern about the implications of relying on a "valuation" that never occurred:

> But, you know, when you think about it, here's the problem. I find this case law disturbing because it's obvious that—to me, that nobody—if there's no objection, and if—supposing you've got a hundred percent plan in a chapter 13 case and the debtor values—low-balls the value of the house. There's not an incentive really for a chapter 13 trustee to object. There's not any incentive obviously for creditors to object. So when I confirm that plan, under this, I've made an implicit valuation when nothing of the kind has really happened.

Transcript of June 7, 2006 Hearing, page 4, lines 10–20.

Ultimately, we find the *Jackson* approach more logically compelling because it avoids reliance on the fiction that the court has determined the value of the debtors' residence in an uncontested chapter 13 confirmation. Determining that the "best interest" test of § 1325(a)(4) has been met involves an evaluation of what creditors would receive in a hypothetical chapter 7 liquidation of all of a debtor's assets, not just the residence. Where there is no evidence that the court even looked at the scheduled value of the debtor's residence prior to confirming a chapter 13 plan, it is impossible to determine if the court considered the relative values of the debtor's scheduled assets, including the residence, in deciding that the "best interest" test was met.

In addition, we believe it is the *Jackson* approach that better serves judicial economy by recognizing that valuation determinations need be made only when required in the context of contested proceedings. Section 348(f)(1)(B) does not require that a valuation occur while the chapter 13 case is pending. In contrast, if, as the debtors contend, parties are bound to the debtors' ***106** values by confirmation of a plan, prudent chapter 13 trustees and unsecured creditors may demand that debtors produce actual valuation evidence at confirmation, even though the valuation may not necessarily impact the amount to be paid to creditors, solely to protect the creditors' rights in the event of a subsequent conversion.

Endorsing implicit valuation in connection with confirmation of chapter 13 plans, especially of residential real estate, ignores the realities of the bankruptcy process. Debtors lack any motivation to list the values of assets in their schedules at any higher amounts than necessary to satisfy the requirements of good faith. Mortgage lenders have little reason to care about the scheduled values of houses; their claims generally must be paid without regard to the scheduled values. And unsecured creditors are primarily concerned about the extent of the debtor's disposable income and the amounts to be distributed on their claims. If a plan proposes what are perceived to be sufficiently generous payments to unsecured creditors, they will pay little attention to the debtor's position concerning the values of assets, since those assets will not be liquidated. Finally, and perhaps most important, bankruptcy courts, whose chapter 13 calendars may include several dozen cases in a single session, cannot be expected to consider and rely specifically upon the values placed by debtors on their homes and other assets. The notion that the bankruptcy court makes a reasoned decision in confirming an uncontested chapter 13 plan is patently unrealistic. A chapter 13 trustee may look beyond debtors' scheduled residence values in selected cases. However, chapter 7 trustees generally are motivated, on behalf of the unsecured creditors collectively, to ensure that true market values are assigned to the debtor's assets. As a result, it makes sense that a valuation occur, if necessary, in the converted chapter 7 case.

The *Jackson* court recognized that in adopting the amended version of § 348(f)(1) in 1994, Congress intended to encourage chapter 13 filings rather than chapter 7 liquidations. *Jackson,* 317 B.R. at 516. The *Jackson* court further found nothing in its approach that was inconsistent with that policy.

> [I]t is the assurance that debtors may keep any appreciation of their property during the chapter 13 case that promotes reorganization over liquidation. If the judicial gloss of implicit valuation becomes binding precedent, savvy debtors may purposely underestimate the value of real property on their schedules, stay in chapter 13 long enough to confirm a plan, and then convert to chapter 7 to capture the "appreciation." Such a result undermines the policy of protecting appreciation by encouraging dishonest appraisals of property value.

Id.

3. In a Case Converted from Chapter 13 to Chapter 7, the Value of the Residence on the Chapter 13 Petition Date Controls.

In this case, the Trustee seeks to sell the debtors' residence in hopes of realizing approximately $43,000 in net proceeds to the chapter 7 estate and creditors, based upon February 2006 values. However, the relevant valuation date for purposes of § 348(f)(1)(B) is the chapter 13 filing date, June 8, 2005. *See Jackson,* 317 B.R. at 516; and *In re Wegner,* 243 B.R. at 734.

There is nothing in the record indicating that the value of the debtors' residence on the chapter 13 petition date was any higher than the $560,000 value that they scheduled. In fact, the chapter 13 trustee's ***107** analysis confirmed that the debtors had not undervalued their residence.

Excluding equity resulting from debtors' payments on loans secured by their residence and property appreciation subsequent to their chapter 13 filing in a case converted to chapter 7 serves the congressional purpose of encouraging chapter 13 reorganizations over chapter 7 liquidations, as reflected in the legislative history. *See* Section 2 *supra.* That interpretation is buttressed by the language of § 348(f)(2), that provides, in contrast to § 348(f)(1)(B), if a debtor converts a chapter 13 case to chapter 7 in bad faith, "the property in the converted case shall consist of the property of the estate *as of the date of conversion.*" (Emphasis added).

If Congress intended in § 348(f)(1)(B) that, in the absence of a contested valuation proceeding in chapter 13, the chapter 7 trustee would capture postpetition appreciation upon conversion, the "bad faith" provision in § 348(f)(2) would appear to be unnecessary.[2] The record does not reflect any allegation that the debtors filed either their chapter 13 petition or the Confirmed Plan in bad faith. If, on remand, the Trustee determines that, based on a retrospective valuation as of the chapter 13 petition date, selling the debtors' residence would result in no meaningful distribution to unsecured creditors, he can acquiesce to abandonment.

CONCLUSION

The bankruptcy court erred in granting the debtors' motion to compel abandonment of their residence by the Trustee in the absence of a valuation determined as of the chapter 13 petition date. Accordingly, we REVERSE and REMAND.

All Citations

363 B.R. 101, 07 Cal. Daily Op. Serv. 2153, 2007 Daily Journal D.A.R. 1779

Footnotes

1	Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001–9036, as enacted and promulgated prior to the effective date (October 17, 2005) of most of the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L. 109–8, April 20, 2005, 119 Stat. 23 ("BAPCPA").
2	In BAPCPA, with its focus on debtor personal responsibility, § 348(f)(1)(B) has been amended to provide that "valuations of property...in [a] chapter 13 case" shall not apply "in a case converted to a case under chapter 7."

539 B.R. 510
United States Bankruptcy Court, E.D. Virginia,
Alexandria Division.

IN RE: Wendell GOINS, Debtor.

Case No. 11–17766–BFK
|
Signed October 15, 2015

Synopsis

Background: In case converted from Chapter 13 to one under Chapter 7, trustee sought to sell mortgaged property, and debtor moved to compel abandonment of property to him, and dispute arose as to whether any postpetition, preconversion appreciation in value of property belonged to trustee, and was realizable following sale for benefit of creditors, or belonged to Chapter 7 debtor.

The Bankruptcy Court, Brian F. Kenney, J., held that trustee, rather than debtor, was entitled to any postpetition, preconversion appreciation in value of mortgaged property, as being in nature, not of separate, after-acquired property whose disposition was controlled by bankruptcy statute dealing with effects of conversion on bankruptcy estate, but of "proceeds, product, offspring, rents or profits" from mortgaged property that was always part of estate.

Trustee's motion granted; debtor's motion denied.

Attorneys and Law Firms

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MEMORANDUM OPINION

Honorable Brian F. Kenney, United States Bankruptcy Judge

This matter comes before the Court on an issue of importance in cases converted from Chapter 13 to Chapter 7: whether the Debtor or the Chapter 7 Trustee is entitled to any appreciation in property of the estate that accrued post-petition while the case was pending in Chapter 13. The Debtor in this case filed a voluntary petition under Chapter 13 on October 27, 2011. Docket No. 1. He listed his home with a value of $98,000.00, with a mortgage in the amount of $107,791.80. Docket No. 10, Schedule A. The Court confirmed the Debtor's Amended Chapter 13 Plan on June 18, 2012. Docket No. 36. Although the Plan treated certain homeowners association's liens against the Debtor's property, it did not address any mortgage arrearages

with respect to the property (apparently, there were none).[1]

The Debtor filed a Notice of Voluntary Conversion to Chapter 7 on May 8, 2015. Docket No. 47. The case was converted to Chapter 7 on May 12, 2015. Docket No. 52.

On July 15, 2015, the Chapter 7 Trustee filed an Application to Employ a real estate agent in order to sell the Debtor's property. Docket No. 68. The Trustee seeks to list the property for $147,500.00. Docket No. 69 ¶ 5 (Listing Agreement). The Debtor filed an Objection to the Trustee's Application and a Motion to Compel the Abandonment of the property. Docket Nos. 70, 71. The Trustee subsequently filed an Opposition to the Debtor's Motion to Compel Abandonment. Docket No. 78.[2]

The parties stipulated at the hearing that, when the Debtor initially filed his petition under Chapter 13, the mortgage debt had a balance of approximately $103,000.00. The parties further stipulated that, as of today, the mortgage debt has a balance of approximately $76,000.00. The Chapter 7 Trustee agrees with the Debtor that the decrease in the mortgage balance of approximately $27,000.00 is due to the Debtor's having paid the mortgage during his Chapter 13 case. The Trustee further agrees that the Debtor is entitled to the buildup of equity attributable to the Debtor's post-petition mortgage payments. The parties disagree, however, on who is entitled to the equity that accrued as a result of the appreciation of the property during the pendency of the Debtor's Chapter 13 case. If the Trustee's estimate of value ($147,500.00) is borne out by a sale, then the mortgage balance of roughly $76,000.00 would be paid, costs of sale would be paid, the Chapter 7 Trustee would be entitled to a commission, and there would be equity left over from the sale of the property (after payment of the ***512** aforementioned $27,000.00 to the Debtor). The Trustee properly further concedes that if the equity attributable to post-petition appreciation is payable to the Debtor, then the creditors would not benefit from a sale of the property, and the Debtor's Motion to Compel Abandonment should be granted.[3]

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and the Order of Reference entered by the U.S. District Court for this District on August 15, 1984. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) (matters concerning the administration of the estate), and (N) (orders approving the sale of property).

A. Bankruptcy Code Section 348(f)(1), Pre–BAPCPA.

Prior to its amendment in 2005, Bankruptcy Code Section 348(f)(1) read as follows:

> Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title—
>
> (A) property of the estate in the converted case shall consist of property of the estate, *as of the date of filing of the petition,* that remains in the possession of or is under the control of the debtor on the date of conversion; and
>
> (B) valuations of property and of allowed secured claims in the chapter 13 case *shall apply in the converted case,* with allowed secured claims reduced to the extent that they have been paid in accordance with the chapter 13 plan.

11 U.S.C. § 348(f)(1) (pre-BAPCPA) (emphasis added).[4]

The legislative history to Section 348(f) states as follows:

> This amendment would 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 ..., any property acquired after the petition becomes property of the estate, at least until confirmation of the 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 the 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 the case, in a State with a $10,000 homestead exemption, would have to be counseled concerning the risk that after he or she paid off a $10,000 second mortgage in the chapter 13 case, creating $10,000 in equity, there would be a risk that the home could be lost if the case ***513** 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.

H.R.Rep. No. 103–835 at 57 (1994), *as reprinted* in 1994 U.S.C.C.A.N. 3340, 3366.

A number of pre-BAPCPA case law held that the debtor was entitled to any post-petition appreciation in his or her property. These cases usually relied on the theory that confirmation of the debtor's Chapter 13 Plan constituted an implicit finding that the property had the value ascribed to it in the debtor's Schedules and Plan. *Warren v. Peterson,* 298 B.R. 322 (N.D.Ill.2003); *In re Niles,* 342 B.R. 72 (Bankr.D.Ariz.2006); *In re Slack,* 290 B.R. 282 (Bankr.D.N.J.2003); *In re Page,* 250 B.R. 465 (Bankr.D.N.H.2000).

Two cases rejected the "implicit finding of value" approach, but ended up in the same place: the courts used the Chapter 13 filing date, not the date of conversion, for purposes of valuation in the converted Chapter 7 case. *In re Lynch,* 363 B.R. 101, 106 (9th Cir. BAP 2007) (rejecting the implicit finding approach, but holding that "the relevant valuation date for purposes of § 348(f)(1)(B) is the chapter 13 filing date"); *In re Jackson,* 317 B.R. 511, 518 (Bankr.N.D.Ill.2004) ("Creditors would be entitled to the equity that existed at the beginning of the chapter 13 case while debtors retain appreciation that occurs during the chapter 13 case.")[5]

B. The 2005 Amendment to Section 348(f)(1)(B), and The Post–BAPCPA Case Law Under Section 348(f).

In 2005, Congress amended Section 348(f)(1)(B), as part of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) Amendments to the Code. As a result, Section 348(f)(1)(B) now reads:

> valuations of property and of allowed secured claims in the chapter 13 case shall apply only in a case converted to a case under chapter 11 or 12, *but not in a case converted to a case under chapter 7,* with allowed secured claims in cases under chapters 11 and 12 reduced to the extent that they have been paid in accordance with the chapter 13 plan[.]

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

The legislative history from the BAPCPA Amendments states as follows, with respect to the amended Section 348(f)(1)(B):

> **Sec. 309.** *Protecting Secured Creditors in Chapter 13 Cases.* Section 309(a) of the Act amends Bankruptcy Code section 348(f)(1)(B) to provide that valuations of property and allowed secured claims in a chapter 13 case only apply if the case is subsequently converted to one under chapter 11 or 12. If the chapter 13 case is converted to one under chapter 7, then the creditor holding security as of the petition date shall ***514** continue to be secured unless its claim was paid in full as of the conversion date. In addition, unless a prebankruptcy default has been fully cured at the time of conversion, then the default in any bankruptcy proceeding shall have the effect given under applicable nonbankruptcy law.

H.R.Rep. No. 109–31(I), at 73 (2005), *as reprinted* in 2005 U.S.C.C.A.N. 88, 140.

One commentator has suggested that the purpose of the 2005 amendment was to protect secured creditors from the effect of any bifurcation of their liens that may have occurred during the course of the Chapter 13 case. David G. Carlson, *"Cars and Homes in Chapter 13 After the 2005 Amendments to the Bankruptcy Code,"* 14 Am. Bankr.Inst. L.Rev. 301, 385 (Winter 2006).

There have not been many post-BAPCPA cases interpreting the amended version of Section 348(f)(1)(B). The case of *In re Robinson,* 472 B.R. 854 (Bankr.M.D.Fla.2012), involved equity that accrued in the debtors' vehicles as a result of payments made to secured creditors under a confirmed Chapter 13 plan. The court, relying on the pre-BAPCPA cases of *Burt* and

Pruneskip, held that the equity in the vehicles attributable to the debtors' post-petition payments belonged to the debtors. *Id.* at 857. The court noted that "[t]he legislative history of the 1994 amendments to section 348(f) indicates that debtors are to be encouraged to make payments in Chapter 13 rather than filing under Chapter 7, and that they should not be penalized for attempting to repay their debts in Chapter 13 even though they may later find it necessary to convert to a Chapter 7 case." *Id.* at 856.

The case of *In re Hodges,* 518 B.R. 445 (Bankr.E.D.Tenn.2014), like *Robinson,* involved equity built up in the debtors' residence as a result of payments made to their mortgagee during the Chapter 13 case. The court in *Hodges* first noted that "although § 348(f)(1)(B) was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), because the issue in this case is controlled by § 348(f)(1)(A), which was not amended by BAPCPA, the Court may rely on cases construing § 348(f)(1)(A) before BAPCPA came into effect." *Id.* at 448. The court further noted that post-BAPCPA Section 348(f)(1)(B) "addresses the rights of a *secured creditor* in the context of valuation of specific property at the end of the Chapter 13 bankruptcy." *Id.* at 450 (emphasis in original). The court held that the issue was "squarely answered by § 348(f)(1)(A) and the case law interpreting it," and therefore, the debtors were entitled to the post-petition equity created by the mortgage payments made in the Chapter 13 case. *Id.* at 451.

The Trustee in this case relies on the case of *In re Martinez,* No. 7–10–11101 JA, 2015 WL 3814935, at *1 (Bankr.D.N.M. June 18, 2015), which involved a Debtor's motion for avoidance of a judicial lien under Section 522(f) of the Code. In *Martinez,* the debtor and the judicial lien creditor stipulated to a valuation of the property while the Debtor was in Chapter 13 and was attempting to avoid the lien. *Id.* at *2. The debtor's efforts were unsuccessful, because the court found that the debtor was not entitled to the exemption claimed in the property (and, therefore, the judicial lien did not impair an exemption to which the debtor was entitled). *Id.* at *3. The court confirmed the debtor's Chapter 13 plan, which provided for the payment of an allowed secured claim in favor of the creditor. *Id.* at *3. The debtor later converted his case to one under Chapter 7. *Id.* The debtor then amended his schedules, and again sought to avoid the judicial lien pursuant to Section ***515** 522(f). *Id.* The court held that the creditor could not hold the debtor to the stipulated value from the Chapter 13 phase of the case, owing to Section 348(f)(1)(B)'s plain language. The court also found the language of the stipulation to be ambiguous, and held that the parties would be entitled to an evidentiary hearing on whether the debtor "knowingly and intentionally" waived the protections of Section 348(f)(1)(B). *Id.*

The Court finds the *Martinez* case to be distinguishable from the current case because *Martinez* involved a motion to avoid a judicial lien under Section 522(f). *See Martinez,* 2015 WL 3814935, at *1. The relevant statute directs that valuation for purposes of judicial lien avoidance be made "as of the date of the filing of the petition." *See* 11 U.S.C. § 522(a)(2) ("value" means "fair market value as of the date of the filing of the petition"). There is no similar language in Section 348, regarding the valuation of property—only Section 348(f)(1)(A)'s direction that property of the estate consists of property as of the time of the petition, not the time of conversion. *See* 11 U.S.C. § 348(f)(1)(A) ("property of the estate in the converted case shall consist of property of the estate, as of the date of filing petition"). The opinion in *Martinez* also relied on redemption cases under Section 722. *See Martinez,* 2015 WL 3814935, at *6, citing *In re Nance,* No. 07–81057, 2013 WL 2897527, at *1, *2 (Bankr.M.D.N.C. June 12, 2013), and *In re Airhart,* 473 B.R. 178, 185 (Bankr.S.D.Tex.2012). The Section 722 redemption cases look to Section 506(a)(2) of the Code for the valuation standard. Section 506(a)(2) specifically requires the court to look to replacement value of the property "as of the date of the petition." 11 U.S.C. § 506(a)(2). Other than *Martinez,* which the Court finds to be distinguishable for the reasons stated, there do not appear to be any post-BAPCPA cases directly addressing post-petition appreciation in property of the estate.

C. The Estate is Entitled to any Post–Petition Appreciation in the Property Pursuant to Bankruptcy Code Section 541(a)(6).

This brings the Court back to the issue: which party is entitled to the post-petition appreciation of the property? The Trustee argues that the 2005 amendment to Section 348(f)(1)(B) did away with any notion of implicit valuation as a result of confirmation in a Chapter 13 case, because Section 348(f)(1)(B) now expressly provides that valuations from Chapter 13 do not carry over into converted Chapter 7 cases. The Court finds in favor of the Trustee here, but not because the 2005 amendment to Section 348(f)(1)(B) legislatively overruled the implicit valuation cases. *See* 11 U.S.C. § 348(f)(1)(B). Rather, the Court agrees that the Trustee is entitled to the post-petition appreciation in the property because the real estate was *always* property of the estate under Section 541(a) of the Code. Section 541(a)(1) broadly defines property of the estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case," "wherever located and by whomever held." 11 U.S.C. § 541(a)(1). Further, Section 541(a)(6) provides that all "proceeds, product, offspring, rents or profits of or from property of the estate" constitutes property of the estate. 11 U.S.C. § 541(a)(6). Numerous cases relying on Section 541(a)(6) have held that post-petition appreciation in property belongs to the estate. *See In re Hyman,* 967 F.2d 1316

(9th Cir.1992); *In re Reed,* 940 F.2d 1317, 1323 (9th Cir.1991) ("appreciation [i]nures to the bankruptcy estate, not the debtor"); *In re Potter,* 228 B.R. 422, 424 (8th Cir. BAP 1999) ("Except to the extent of the debtor's potential exemption rights, post-petition appreciation ***516** in the value of property accrues for the benefit of the trustee"); *In re Moyer,* 421 B.R. 587, 594 (Bankr.S.D.Ga.2007); *In re Shipman,* 344 B.R. 493, 495 (Bankr.N.D.W.Va.2006) ("the trustee is entitled to any post-petition appreciation in value of the property"); *In re Bregni,* 215 B.R. 850, 854 (Bankr.E.D.Mich.1997); *In re Paolella,* 85 B.R. 974, 977 (Bankr.E.D.Pa.1988) ("Because sale does not generally, if ever, occur simultaneously with formation of a bankruptcy estate, § 541(a)(6) mandates that the estate receive the value of the property at the time of the sale. This value may include appreciation or be enhanced by other circumstances creating equity which occur postpetition").

There is an irreconcilable conflict between these cases, which look to Section 541(a)(6), and the cases cited in Part A above (*Warren v. Peterson, In re Slack, In re Niles,* and *In re Page*), which look to Section 348(f)(1)(A) for the answer. In the Court's view, the cases under Section 541(a)(6) are applicable because the equity attributable to the post-petition appreciation of the property is not separate, after-acquired property, to which we might look to Section 348(f)(1)(A). The equity is inseparable from the real estate, which was always property of the estate under Section 541(a).

The example in the legislative history to Section 348 ("a debtor who had $10,000 equity in a home at the beginning of the case, in a State with a $10,000 homestead exemption, would have to be counseled concerning the risk that after he or she paid off a $10,000 second mortgage in the chapter 13 case, creating $10,000 in equity ...") arguably sheds light on the "paydown" cases, i.e., the cases where the Debtor creates equity by paying down secured debt during the course of the case. *See* H.R.Rep. No. 103–835 at 57 (1994), as reprinted in 1994 U.S.C.C.A.N. 3340, 3366. It is not helpful, however, in determining which party, the Debtor or the Trustee, is entitled to the equity created by appreciation of the property while the Debtor is in Chapter 13.

For the foregoing reasons, the Court holds that the Debtor is not entitled to the appreciation in his property that accrued during the course of his Chapter 13 case, and the Trustee is entitled to sell the property.

Conclusion

For the foregoing reasons, the Court will enter a separate Order under which:

1. The Trustee's Motion for appointment of a real estate agent will be granted. Counsel for the Trustee will submit an Order approving the employment of the real estate agent within ten days.

2. The Debtor's Motion to compel an abandonment of the property will be denied. Counsel for the Trustee also will submit an Order denying the Debtor's Motion within ten days.

The Clerk will mail copies of this Memorandum Opinion, or will provide cm-ecf notice of its entry, to the parties below.

All Citations

539 B.R. 510, 74 Collier Bankr.Cas.2d 976

Footnotes

1	The Debtor filed a separate adversary proceeding to avoid the homeowners association's liens as being wholly unsecured. Adv. Pro No. 12–01186–BFK. This was resolved by the entry of a Consent Judgment Order on July 30, 2012. *Id.,* Docket No. 7.

2	Section 554(b) of the Code provides: On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate. 11 U.S.C. § 554(b).
3	Using round numbers, if the property were to sell for $147,500.00, there would be a 6% real estate commission ($8,850), the Debtor would be entitled to $27,000.00, there would be other costs of sale of up to 5% ($7,375), the mortgage of $76,000.00 would be paid, and the Trustee would be entitled to a statutory commission of $10,625.00, leaving approximately $17,650.00 either for distribution to the creditors or to be returned to the Debtor as his post-petition equity. The Debtor did not claim an exemption in the property.
4	Section 348(f)(2) makes an exception for debtors who are found to have converted their cases in bad faith; if so, property of the estate includes all property as of the date of the conversion. 11 U.S.C. § 348(f)(2). There is no suggestion that the Debtor in this case converted his case in bad faith.
5	A number of pre-BAPCPA cases also held that the Debtor is entitled to any equity buildup resulting from the payment of his or her mortgage or other secured debt during the course of the Chapter 13 case. *See In re Burt,* No. 01–43254–JJR–7, 2009 WL 2386102, at *1, *6 (Bankr.N.D.Ala. July 31, 2009); *In re Sparks,* 379 B.R. 178 (Bankr.M.D.Fla.2006); *In re Pruneskip,* 343 B.R. 714 (Bankr.M.D.Fla.2006). Other cases held to the contrary, that the debtor is not entitled to equity resulting from post-petition payments on secured debt. *See In re Peter,* 309 B.R. 792 (Bankr.D.Or. 2004); *In re Wegner,* 243 B.R. 731 (Bankr.D.Neb.2000). As noted above, the Trustee in this case does not dispute that the Debtor is entitled to the equity resulting from the Debtor's post-petition mortgage payments.

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625 B.R. 194
United States Bankruptcy Court, D. Idaho.

IN RE: Michelle Louise COFER Debtor.

Bankruptcy Case No. 19-40361-JMM
|
Signed 01/08/2021

Synopsis
Background: Chapter 7 trustee filed a motion for an order confirming amount of debtor's homestead exemption post-conversion.

Holdings: The Bankruptcy Court, Joseph M. Meier, J., held that:

fact that property of the Chapter 13 estate, including debtor's residence, may have vested in debtor once plan was confirmed did not prevent the property from entering the estate when debtor converted her Chapter 13 case to a case under Chapter 7;

conversion of debtor's Chapter 13 case to a case under Chapter 7 did not affect state law homestead exemption that debtor could claim, which remained the $32,020.56 exemption that debtor had on petition date; but

postpetition, pre-conversion appreciation in value of Chapter 13 debtor's home inured to the benefit of the debtor.

Motion granted in part and denied in part.

Procedural Posture(s): Other.

Attorneys and Law Firms

Daniel C. Green, RACINE OLSON, Pocatello, Idaho, Attorney for chapter 7 trustee.

Paul Ross, Paul, Idaho, Attorney for Debtor.

MEMORANDUM OF DECISION

JOSEPH M. MEIER, CHIEF U. S. BANKRUPTCY JUDGE

*195 *Introduction*

Before the Court is "Trustee's Motion for an Order Confirming the Amount of Debtor's Homestead Exemption Following Conversion to Chapter 7," Dkt. No. 97 (the "Motion"), filed by Gary Rainsdon ("Trustee").[1] The Motion seeks a determination that Debtor's homestead exemption is limited to the value determined when the case was under chapter 13, $32,020.56, and that appreciation inures to the chapter 7 estate. *Id*. Michelle Cofer ("Debtor") objects to the Motion, arguing property which vested in the Debtor upon confirmation of its chapter 13 plan is not property for the estate upon conversion,

and, alternatively, that appreciation inures to the Debtor. Dkt. No. 98 (the "Objection"). Trustee submitted a brief in reply to the Objection. Dkt. No. 102. A hearing was held on December 8, 2020, and the parties made oral arguments. The Court took the matter under advisement. The Court has now considered the parties arguments and the applicable law and issues the following decision which resolves the matter. Fed. R. Bankr. P. 7052; 9014.

Facts

Debtor filed a chapter 13 petition on April 17, 2019. Dkt. No. 1. Her schedules reflect that she owns real property located at 28 West Clark Street in Paul, Idaho (the "Home"), valued on the date of the petition at $100,250. *Id.* at 10. Debtor claimed an exemption of $100,000 in the Home. *Id.* at 16. The Home was encumbered by a $61,073.75 mortgage held by Ditech and an $868.79 judgment lien owed to Outsource Materials. *Id.* at 20–21. On June 6, 2020, the Court granted Debtor's motion to avoid the judgment lien under § 522(f) held by Outsource Materials.[2] Dkt. No. 27. On September 24, 2019, the Court issued an order limiting the amount of the Debtor's exemption in the Home to $32,020.56. Dkt. No. 59.[3]

On September 25, 2019, the Court entered an order confirming Debtor's chapter 13 plan. Dkt. Nos. 3, 60 (the "Plan"). Debtor's Plan provided that all property of the estate vested in the debtor upon confirmation. Dkt. No. 3 at 4. On March 6, 2020, the chapter 13 trustee moved to dismiss the chapter 13 case because Debtor was delinquent in making plan payments. Dkt. No. 66. After initially objecting to the motion to dismiss, Debtor filed a motion to convert to chapter 7. Dkt. No. 68. The Court granted Debtor's motion to convert on March 27, 2020. Dkt. No. 70.

Trustee now seeks an order "limiting the amount of Debtor's exemption in the Property in the Chapter 7 case to $32,020.56, and that any appreciation in the value of the Property is property of the Chapter 7 bankruptcy estate." Dkt. No. 97. Trustee seeks this relief so he may sell the Home for the benefit of the estate. ***196** Debtor objects, arguing the vesting provision in the plan and under § 1327(b) prevents the Home from becoming property of the chapter 7 estate under § 348(f)(1)(A). Dkt. No. 98 at 3. Alternatively, Debtor argues even if the Home revested to the estate under § 348(f)(1)(A), any appreciation in the value of the home belongs to the Debtor and the amount of the homestead exemption is determined based on the date of conversion. *Id.* at 3–5.

Analysis and Disposition

A. Property of the Estate Upon Conversion

Property of the estate is broadly defined by § 541 and includes "all legal or equitable interests of the debtor in property as of the commencement of the case," and "[p]roceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case." § 541(a)(1), (6). In a chapter 13 case, property of the estate also includes earnings and property defined in § 541 acquired postpetition. § 1306(a). Upon conversion from a case under chapter 13, "property of the estate in the converted case [ ] consist[s] 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." § 348(f)(1)(A). The phrase "date of the petition" means the date of the filing of the original petition because "[c]onversion of a case from a case under one chapter of this title to a case under another chapter of this title ... does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief." § 348(a).

Debtor contends the vesting provision in the Plan, which is consistent with § 1327(b)–(c), vested absolute ownership of the Home in Debtor upon confirmation of the Plan, and the Home ceased to be property of the estate. Dkt. No. 98 at 2–3. Debtor claims this precludes the Home from being property of the estate in the converted case. *Id.* Debtor's position, which, in effect, implies an inherit conflict exists between § 348(f)(1) and § 1327(b), misconstrues the plain language of § 348(f)(1). This Court recently summarized the standards for interpreting provisions of the Code:

> When interpreting a statute, the court's "task is to construe what Congress has enacted." *Duncan v. Walker*, 533 U.S. 167, 172, 121 S. Ct. 2120, 2124, 150 L.Ed. 2d 251 (2001). Courts will "look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the intent of Congress." *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 830 (9th Cir. 1996) (internal quotation marks and citation omitted). "A primary canon of

> statutory interpretation is that the plain language of a statute should be enforced according to its terms, in light of its context." *ASARCO, LLC v. Celanese Chem. Co.*, 792 F.3d 1203, 1210 (9th Cir. 2015) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S. Ct. 843, 846, 136 L.Ed. 2d 808 (1997); *Wilshire Westwood Assocs. v. Atl. Richfield Corp.*, 881 F.2d 801, 803 (9th Cir. 1989)). "If the terms are ambiguous, [the Court] may look to other sources to determine congressional intent, such as the canons of construction or the statute's legislative history." *United States v. Nader*, 542 F.3d 713, 717 (9th Cir. 2008) (citing *Jonah R. v. Carmona*, 446 F.3d 1000, 1005 (9th Cir. 2006)). However, courts will resort to legislative history, even where the plain language is unambiguous, "where the legislative history clearly indicates that Congress meant something other than what it said." ***197** *Perlman v. Catapult Entm't, Inc.* (*In re Catapult Entm't, Inc.*), 165 F.3d 747, 753 (9th Cir. 1999).

In re Evans, 615 B.R. 290, 294 (Bankr. D. Idaho 2020). Further, "[u]nder accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *Boise Cascade Corp. v. U.S. E.P.A.*, 942 F.2d 1427, 1432 (9th Cir. 1991).

For Debtor's argument to hold water, § 348 would have to read "property of the estate in the converted case shall consist of property of the estate, as of the date of *conversion*[4], that remains in the possession of or is under the control of the debtor on the date of conversion." However, § 348(f)(1)(A) states that "property of the estate in the converted case shall consist of property of the estate, *as of the date of filing of the petition*, that remains in the possession of or is under the control of the debtor on the date of conversion" *Id*. (emphasis added). A plain language reading of § 348(f)(1)(A) results in the Home, which was owned by the Debtor on the date she filed her chapter 13 petition, and remained in the Debtor's possession on the date of conversion, being property of the chapter 7 estate upon conversion.

Further, interpreting § 1327(b)–(c) as preventing the operation of § 348(f)(1)(A) on conversion would create an inconsistency in the code. Such an inconsistency can be prevented because these two sections can be read in harmony with one another. That harmony is that a debtor is vested with property of the chapter 13 estate upon plan confirmation, but upon conversion, any such property that was property of the estate as of the date of the petition that a debtor still possesses or controls (*i.e.*, has not already exercised rights to sell the property) is recaptured into the chapter 7 estate.

This reading is consistent with the case law on point. The Debtor cited several cases in support of her argument that the Home is not property of the estate. Only one, however, *Sender v. Golden (In re Golden)*, 528 B.R. 803 (Bankr. D. Colo. 2015), discussed the suggested conflict between § 348(f)(1)(A) and § 1327(b). *Golden* cuts deeply against Debtor's argument:

> Property of the estate vests in the debtor upon confirmation of a Chapter 13 plan. 11 U.S.C. § 1327(b). Pursuant to the revesting provision of Section 1327(b), upon confirmation, the debtor enjoys full ownership and control over such revested property. Section 1327(b), however, must be reconciled with Section 348, which mandates the effect of conversion. Section 348(f)(1)(A) provides that when a Chapter 13 case is converted to Chapter 7, property of the estate in the Chapter 7 case includes "property of the estate, *as of the date of the filing of the petition, that remains in the possession or is under the control of the debtor on the date of conversion*" (emphasis added).
>
> Based on the Black's Law definition of "revesting," the Ninth Circuit concluded that the automatic stay did not apply to property that revested in the debtor upon confirmation of the Chapter 13 plan. *Cal. Franchise Tax Bd. v. Kendall (In re Jones),* 657 F.3d 921, 928–29 (9th Cir. 2011). *See also In re Van Stelle,* 354 B.R. 157, 168 (Bankr. W.D. Mich. 2006) (finding that the term vest in Section 1327(b) means "an absolute transfer of the bankruptcy estate's interest in property"). ***198** *But see In re Brensing,* 337 B.R. 376, 383 (Bankr. D. Kan. 2006) ("Section 1327(b) does not operate to remove property of the estate from the bankruptcy estate but merely places control of this estate property in the debtor pending conclusion of the Chapter 13 proceedings.").... This Court declines to adopt an interpretation of Section 1327(b) that renders Section 348(f)(1)(A) a nullity.

Golden, 528 B.R. at 808–09. Though the court in *Golden* identified and rejected a different interpretation of § 1327(b) than the Ninth Circuit's approach to § 1327(b), it importantly read § 348(f)(1)(A) as revesting in the chapter 7 estate property that had been vested in a debtor upon confirmation of its chapter 13 plan. *Id.* The only reason *Golden* concluded that the subject property in that case was not property of the estate in the converted case was because debtor had sold the property during the chapter 13 case and lawfully disposed of the proceeds prior to conversion. *Id.* at 809.

Courts in other jurisdictions have generally taken this approach. For example, the court in *In re John*, 352 B.R. 895 (Bankr. N.D. Fla. 2006) stated:

> [The debtors] refer to 11 U.S.C. § 1327 to support the assertion that, since the Property at issue vested in the Debtors under the Chapter 13 plan, it is not part of the converted estate and therefore the Trustee has no interest in such Property. This argument is meritless. The Debtors are correct that the Property did indeed vest in the Debtors upon confirmation of their plan—in Chapter 13. 11 U.S.C. § 1327(b). However, this is no longer a Chapter 13 case. Once a case is converted from Chapter 13 to Chapter 7, the provisions of Chapter 13 that define the effect of a plan's confirmation have no application in determining the composition of the Chapter 7 estate. *Compare* § 348 *with* § 1327. It is elementary that, upon conversion, the provisions of the chapter to which the case is converted apply, while the provisions of the chapter from whence it came cease to be determinative, unless the Code provides otherwise. That is the whole concept of conversion. Moreover, reading § 1327 as determining the property of the estate after conversion to Chapter 7 would render § 348 entirely superfluous.

Id. at 899–900. *See also Murdock v. Holquin*, 323 B.R. 275, 285 n.8 (N.D. Cal. 2005) (distinguishing between conversion from chapter 13 to chapter 7 and conversion from chapter 11 to chapter 7); *In re Campbell*, 313 B.R. 313, 321 (10th Cir. BAP 2004) (analogizing to property revested in debtor under § 1327(b) in determining whether property revested under § 522(l) becomes estate property on conversion); *In re Simmons*, 286 B.R. 426, 430–31 (Bankr. D. Kan. 2002) (distinguishing between plans that allow revesting and those that do not). *But see In re Brown,* 375 B.R. 362, 381 (Bankr. W.D. Mich. 2007) (concluding subject property removed from the estate by operation of § 1327(b) was not subject to administration upon conversion).

In sum, sound statutory interpretation and the relevant authorities support the conclusion that the plain language of § 348(f)(1)(A) revests in the estate of the converted case all property of the estate of the original filing still in the possession or control of Debtor despite the provisions of § 1327.

B. Exemptions upon Conversion

Trustee argues the Debtor's homestead exemption should remain at $32,020.56—the amount determined to be Debtor's equity on the date of the petition. ***199** Dkt. No. 97 at 4; Dkt. No. 102 at 11–12. Debtor argues the valuation of her homestead exemption during the chapter 13 case does not apply to the converted case by operation of § 348(f)(1)(B), and Debtor can claim an exemption of $100,000[5] in the Home. Dkt. No. 98 at 4–5. Section 348(f)(1)(B) provides:

> valuations of property and of allowed secured claims in the chapter 13 case shall apply only in a case converted to a case under chapter 11 or 12, but not in a case converted to a case under chapter 7, with allowed secured claims in cases under chapters 11 and 12 reduced to the extent that they have been paid in accordance with the chapter 13 plan[.]

However, this section is inapplicable to exemptions because exemptions are determined as of the petition date pursuant to § 522(a)(2), and § 348(a) makes clear that conversion does not change the date of the petition. *In re Whitman*, 106 B.R. 654, 656–57 (Bankr. S.D. Cal. 1989); In re Thurmond, 71 B.R. 596, 597–98 (Bankr. D. Or. 1987); 3 Collier on Bankruptcy ¶ 348.07[3] (16th 2020).

Debtor's homestead exemption was previously limited to $32,020.56 based on the value of the Home and the Diatec mortgage at the time of the filing of the chapter 13 petition. *See* Dkt. No. 59. Under the "snapshot rule" the exemptions that can be claimed and the amount of such exemptions are frozen as of the date of the petition. *Wilson v. Rigby*, 909 F.3d 306, 308-09 (9th Cir. 2018). The conversion of this case does not change the value of the Home or the exemption against it as they existed at the time of the petition. Thus, Debtor's homestead exemption remains limited to $32,020.56—the amount this Court previously determined Debtor could claim as an exemption based on the date of the petition.

C. Postpetition Appreciation upon Conversion

Trustee asserts the current value of the home is around $140,000 and seeks an order that states "appreciation in the value of the [Home] is property of the chapter 7 estate." Dkt. No. 97 at 3–4. Debtor argues that postpetition, pre-conversion appreciation in the value of the Home belongs to the Debtor, equating such appreciation with postpetition earnings which must be returned absent bad faith as held in *Harris v. Viegelahn*, 575 U.S. 510, 135 S. Ct. 1829, 1837, 191 L.Ed.2d 783 (2015).[6] Dkt. No. 98 at 3–4. Trustee counters that post-BAPCPA § 348(f)(1)(B) prevents such a conclusion. Dkt. No. 102 at 11–12. The parties cite two recent cases from outside the Ninth Circuit. Debtor cites *In re Barrera*, 2020 WL 5869458 (10th Cir. BAP Oct. 2, 2020), *appeal filed* (*Barrera II)* (this is an unpublished 10th Cir. BAP decision). Trustee cites *In re Goins*, 539 B.R. 510 (Bankr. E.D. Va. 2015).

Goins concluded postpetition appreciation belongs to the estate upon conversion:

> The Trustee argues that the 2005 amendment to Section 348(f)(1)(B) did away with any notion of implicit valuation as a result of confirmation in a ***200** Chapter 13 case, because Section 348(f)(1)(B) now expressly provides that valuations from Chapter 13 do not carry over into converted Chapter 7 cases. The Court finds in favor of the Trustee here, but not because the 2005 amendment to Section 348(f)(1)(B) legislatively overruled the implicit valuation cases. *See* 11 U.S.C. § 348(f)(1)(B). Rather, the Court agrees that the Trustee is entitled to the post-petition appreciation in the property because the real estate was *always* property of the estate under Section 541(a) of the Code. Section 541(a)(1) broadly defines property of the estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case," "wherever located and by whomever held." 11 U.S.C. § 541(a)(1). Further, Section 541(a)(6) provides that all "proceeds, product, offspring, rents or profits of or from property of the estate" constitutes property of the estate. 11 U.S.C. § 541(a)(6). Numerous cases relying on Section 541(a)(6) have held that post-petition appreciation in property belongs to the estate.

In re Goins, 539 B.R. at 515–16 (citing *e.g., See In re Hyman,* 967 F.2d 1316 (9th Cir. 1992); *In re Reed,* 940 F.2d 1317, 1323 (9th Cir. 1991)).[7]

Barrera II, on the other hand, concludes that postpetition appreciation belongs to the Debtor upon conversion. *Barrera II*, 2020 WL 5869458 at *9. While Debtor cites the Tenth Circuit BAP decision in *Barrera II*, the United States Bankruptcy Court for the District of Colorado provides the most thorough analysis of the issue in *In re Barrera*, 620 B.R. 645 (Bankr. D. Colo. 2020), *aff'd,* No. BAP CO-20-003, 2020 WL 5869458 (10th Cir. BAP Oct. 2, 2020) (*Barrera I*). *Barrera I* based its conclusion that appreciation inures to the debtor upon conversion on the legislative history of § 348. *Id.* at 649–53 (citing *e.g., In re Niles*, 342 B.R. 72, 76 (Bankr. D. Ariz. 2006)).[8] *Barrera I* concluded that the meaning of property in § 348(f)(1)(A) was ambiguous, and turned to the legislative history of § 348(f), stating:

The House Report indicates that § 348(f)(1)(A) was enacted 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 ... 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 ***201** 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 the 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 the case, in a State with a $10,000 homestead exemption, would have to be counseled concerning the risk that after he or she paid off a $10,000 second mortgage in the chapter 13 case, creating [another] $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 [non-exempt] 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 has abused the right to convert and converted in bad faith, to order that all property held at the time of conversion shall constitute property of the estate in the converted case.

Id. at 652–53 (quoting H.R. Rep. No. 103-835, at 57 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 3340, 3366) (emphasis added).[9]

Barrera I reasoned that the legislative history, which demonstrates "Congress' concern that the chapter 7 trustee was getting the postpetition increase in equity in the debtor's home," supports a conclusion that "property" in § 348(f)(1)(A) means "property *as it existed on the petition date*, with all its attributes, including the amount of equity that existed on that date." *Id.* at 653. The court found no distinction between equity increases due to the debtor's paydown of liens or that due to changes in the market because "the legislative history points toward is Congress' intent to leave a debtor who attempts a repayment plan no worse off than he would have been had he filed a chapter 7 case at the outset." *Id.*

Barrera I also cited commentary by Keith M. Lundin and William H. Brown in support of this interpretation:

> [I]t seems to have been congressional intent to take a snapshot of the estate at the filing of the original Chapter 13 petition and, based on that inventory, include in the Chapter 7 estate at conversion only the portion that remains in the possession or control of the debtor. The spirit of § 348(f)(1)(A) is best captured by a rule that property acquired by the Chapter 13 estate or by the debtor after the Chapter 13 petition does not become property of the Chapter 7 estate at a good-faith conversion. The method of acquisition after the Chapter 13 petition ***202** should not matter: post-petition property does not become property of the Chapter 7 estate at conversion, whether acquired with earnings by the debtor, by transfer to the debtor—for example, an inheritance after 180 days after the petition—*or by appreciation in the value of a pre-petition asset*.

Id. (quoting Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy*, § 316.1, at ¶ 26 (4th ed. 2004) (the "House Report")) (emphasis added).

Lastly, *Barrera I* addressed public policy concerns that such an interpretation would lead to a windfall to debtors. *Id.* at 653–54. *Barrera I* dismissed this concern, reasoning a chapter 7 debtor would usually seek abandonment of the property if the debtor believes the case will remain open for a significant period to avoid the possibility that the trustee can reap the benefits of an increase in equity. *Id.* In addition, the court reasoned that where the case will be administered quickly, the trustee is unlikely to benefit from significant increases in equity. *Id.*

As noted earlier, a portion of the analysis of the Ninth Circuit BAP in *Lynch*, 363 B.R. 101 (9th Cir. BAP 2007), is helpful here. There the BAP was addressing, and ultimately rejecting, arguments based on a number of reported cases that the confirmation of a chapter 13 plan has an implicit finding that the value of the debtor's home is what was scheduled by the Debtor. *Id* at 104–06. While the 2005 BACPA amendments to 348(f)(1)(B) have essentially eliminated the holdings in cases regarding implicit value, the BAP concluded that use of an implicit valuation in a case converted from a chapter 13 to a chapter 7 was improper. The BAP, however, recognized that equity not only created by payments to secured claims but also property appreciation subsequent to the chapter 13 petition should be excluded as estate property in a case converted to chapter 7. *Id.* at 107. That debtors should retain equity created during the chapter 13 case, according to the BAP, is not only reflected in the legislative purpose of § 348(f) but is also buttressed by § 348(f)(2) which directs the bankruptcy court to look to the date of conversion when a 13 is converted in bad faith. *Id.*

The Court finds the reasoning of *Barrera I* and *Lynch* more persuasive than that of *Goins* because it better reflects the legislative intent of § 348. Conversion from chapter 13 to chapter 7 creates an estate in the property that would have been property of the estate as of the date of the petition that is still possessed or controlled by the debtor. Based on the comments in the House Report, Congress took issue with the remedy Trustee seeks in this motion. Further, as Debtor had equity in the Home on the date of the petition, the home would likely have been abandoned to the Debtor if this case had proceeded under chapter 7 from its commencement. Thus, the appreciation should not belong to the estate now merely because the case began as a chapter 13 case and was converted to a chapter 7 case. The Court also notes that a trustee maintains a recourse against a debtor who converts in bad faith which includes all postpetition assets in the estate of the converted case. § 348(f)(2). Trustee has pointed to nothing indicating Debtor converted this case in bad faith. Therefore, the Court concludes that the appreciation in the Home inured to the Debtor upon conversion.

Conclusion

Based on the foregoing, Trustee's Motion, Dkt. No. 97, will be granted in part and denied in part. The portion of the Motion

seeking a determination that Debtor's homestead exemption is limited to $32.020.56 will be granted. The Court rejects Debtor's contentions that the Home ***203** is not property of the estate and that, if it were property of the estate, the Debtor could claim an exemption as of the date of conversion. However, Trustee's argument that the estate is entitled to postpetition appreciation upon conversion fails. Thus, Trustee's Motion will be denied to the extent that it seeks a determination that postpetition appreciation is property of the estate. The Court will enter an appropriate order.

All Citations

625 B.R. 194

Footnotes	
1	Unless otherwise indicated, all statutory citations are to the Bankruptcy Code, Title 11 U.S.C. §§ 101–1532.
2	Debtor established the judgment lien impaired her homestead exemption.
3	This order granted chapter 13 trustee Kathleen McCallister's amended objection to claim of exemption, Dkt. No. 41, but also referenced Ms. McCallister's original objection, Dkt. No. 30.
4	Here the Court, for illustrative purposes, has substituted the italicized word "conversion" for the words "filing of the petition" that appear in the statute.
5	The Court notes the maximum homestead exemption allowed under Idaho Code § 55-1003 increased from $100,000 to $175,000 on March 23, 2020 along with other changes to the language of that subsection. Debtor has not argued that the March 23, 2020 amendment is applicable to these facts.
6	Despite Debtor's assertions that *Harris* contains language that supports Debtor's position on appreciation, *Harris* only discussed undistributed post-petition wages and did not discuss appreciation. *Harris* does not provide much support for Debtor's arguments in the present matter.
7	Though *Goins* relies on the Ninth Circuit cases of *Hyman* and *Reed* for the proposition that the post-petition appreciation belongs to the estate upon conversion, these cases did not address that issue. Neither *Hyman* nor *Reed* involved a converted case, and their reasoning addressed situations where the value of the subject property appreciated during the pendency of chapter 7 cases. *See generally Hyman*, 967 F.2d 1316; *Reed*, 940 F.2d 1317.
8	*Barrera I* also cited *Kendall v. Lynch (In re Lynch)*, 363 B.R. 101, 106-07 (9th Cir. BAP 2007), but noted that "the cases relying solely on pre-BAPCPA § 348(f)(1)(B) and the concept of implicit valuation ... are no longer persuasive on the question of what constitutes property of the estate when a debtor converts his case from chapter 13 to chapter 7." *Barrera*, 620 B.R. at 650 n.4. As Trustee points out, *Lynch*, upon which Debtor relies, addressed this issue as it arose under pre-BAPCPA § 348. *Lynch*, 363 B.R. at 103. While this Court agrees that *Lynch* is not as persuasive for discussion of post-BAPCPA § 348(f)(1)(B), its analysis is still persuasive when it addressed the chapter 7 trustee's proposed liquidation of the Debtor's home as discussed below. *In re Hodges*, 518 B.R. 445, 448 (E.D. Tenn. 2014) (concluding pre-BABCPA cases addressing § 348(f)(1)(A) remain persuasive).

9	The Court notes that the House Report preceded the enactment of BAPCPA, which amended, among other provisions, § 348(f)(1)(B). Nonetheless, BAPCPA did not amend § 348(f)(1)(A), and consequently does not override the congressional intent evident in the 1994 House Report. *Hodges*, 518 B.R. at 448 ("It should be noted that although § 348(f)(1)(B) was amended by [BAPCPA], because the issue in this case is controlled by § 348(f)(1)(A), which was not amended by BAPCPA, the Court may rely on cases construing § 348(f)(1)(A) before BAPCPA came into effect. Further, cases coming after the BAPCPA amendment have not challenged the established meaning of § 348(f)(1)(A).").

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620 B.R. 645
United States Bankruptcy Court, D. Colorado.

IN RE: Julio BARRERA, Maria Moro, Debtors.

Bankruptcy Case No. 16-13216 EEB
|
Signed January 13, 2020

Synopsis
Background: Upon conversion of Chapter 13 case to one under Chapter 7, trustee moved to compel turnover, and dispute arose as to whether postpetition increase in value of debtors' real property was included in Chapter 7 estate.

The Bankruptcy Court, Elizabeth E. Brown, J., held that postpetition increase in value of Chapter 13 debtors' residential property was not included in property of Chapter 7 estate upon conversion of their case to one under Chapter 7.

Motion denied.

Procedural Posture(s): Motion For Turnover.

Attorneys and Law Firms

***646** Erik Atzbach, Englewood, CO, for Debtor.

Lacey S. Bryan, David Wadsworth, Wadsworth Garber Warner Conrardy, P.C., Littleton, CO, for Trustee.

ORDER DENYING MOTION FOR TURNOVER OF SALES PROCEEDS

Elizabeth E. Brown, Bankruptcy Judge

THIS MATTER is before the Court on the Trustee's "Motion to Compel Debtors to Turnover and Account for Property of the Estate" (the "Turnover Motion"), which is opposed by the Debtors. At issue is whether the increase in the Debtors' equity in their home that occurred during their prior chapter 13 case became property of the chapter 7 estate following conversion.

I. BACKGROUND

The Debtors filed a chapter 13 petition on April 5, 2016. At that time, their primary residence was located at 6815 Edgewood Way, Highlands Ranch, CO 80130 (the "home"). They scheduled the home's value as $396,606 as of the petition date. They listed the balance of their first mortgage, owed to Citimortgage Inc., as $243,649.62. On Schedule D, they also listed "US Department of Housing & Urban Devel." as holding a lien on their residence in the amount of $92,560.00, but they did not indicate the nature of this lien. The two liens combined totaled $336,209.62, leaving $60,396.38 in equity. They claimed a $75,000 homestead exemption pursuant to Colo. Rev. Stat. § 38-41-201(1)(a) to fully exempt the home equity.

On June 9, 2016, the Court confirmed the Debtors' amended chapter 13 plan. The plan itself did not include any valuation of

the home. The form of plan used in this district requires a listing of the home's value only if there is non-exempt equity that must be accounted for in the section comparing what unsecured creditors could expect to receive in a chapter 7 liquidation. But the plan did provide that Citimortgage would retain its lien on the Property, the Debtors would pay the Trustee monthly cure payments for Citimortgage's benefit on a prepetition arrearage of $4,400, and Debtors would pay regular postpetition mortgage payments directly to this lender.[1] The plan also provided that "[a]ll property of the estate shall vest in the [Debtors] at the time of confirmation."

Approximately two years later, the Debtors sold the Property for $520,000. After paying off liens and closing expenses, they received $140,250.63 in sales proceeds. About two weeks later, they converted their case to a chapter 7 proceeding. At that time, they held $100,700.12 of the proceeds in a savings account.

The Trustee alleges that he contacted the Debtors shortly after conversion to request information about the sale, but the Debtors refused to provide it. Nor have they turned over the nonexempt proceeds.[2] ***647** Faced with non-compliance, the Trustee filed the instant Turnover Motion and Adversary Proceeding No. 18-1259 EEB, Rodriguez v. Barrera, to deny the Debtors a chapter 7 discharge, claiming that their inaction constitutes a postpetition act to conceal or transfer property of the estate in violation of 11 U.S.C. § 727(a)(2)(B).[3] In that adversary, the parties filed briefs on the Trustee's Motion for Partial Summary Judgment. With one other issue no longer relevant to this matter, the Trustee requested a ruling on whether the postpetition increase in equity was an asset in the converted chapter 7 case. The parties agreed to hold the Turnover Motion in abeyance pending the Court's ruling in the adversary proceeding.

The Court entered its order granting partial summary judgment in favor of the Debtors, ruling that any postpetition increase in equity belonged to them following the chapter 7 conversion. But this Order did not fully resolve the case because, at that time, the parties disputed the prepetition value of the home. If the home was actually worth $520,000 on the petition date instead of the scheduled value of $396,606, then all of the nonexempt equity would belong to the chapter 7 estate, according to the Court's ruling.

Although it was interlocutory in nature, the Trustee sought leave to appeal the adversary ruling, but the Tenth Circuit Bankruptcy Appellate Panel denied that request and dismissed it. This Court then held a status conference to determine how the parties wished to proceed. Instead of scheduling a trial on the home's prepetition value, the Trustee requested leave to dismiss the adversary action with prejudice. The Debtors did not oppose that request.

While the Trustee no longer wishes to deny the Debtors their discharge, he continues to seek appellate review as to the chapter 7 estate's entitlement to the nonexempt sales proceeds. Thus, he requested that the Court enter its ruling on this same legal issue in connection with the Turnover Motion. To remove any factual disputes, he has conceded on the record that the Court may assume that the prepetition value of the home is the same amount at which the Debtors scheduled it. Both parties agreed that they did not want to amend the Turnover Motion or Debtors' Response or to brief the matter any further. Thus, they have submitted the matter to the Court based on the filings they have already made in connection with the Turnover Motion and the adversary proceeding.

II. DISCUSSION

Congress amended § 348 to add subsection (f)(1) in 1994. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 311, 108 Stat. 4106 (1994). This change was prompted by a split in authority regarding what property constitutes property of the chapter 7 estate in a case that originates in chapter 13 but later converts to chapter 7. In relevant part, § 348(f)(1) now provides:

> Except as provided in paragraph (2), when a case under chapter 13 of this ***648** title is converted to a case under another chapter under this title—
>
> (A) property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion ....

11 U.S.C. § 348(f)(1).

A. Section 348(f)(1)(A)'s Clear Implications

The meaning of subsection (f)(1)(A) is elucidated by comparing it to subsection (f)(2). The latter provision states: "If the debtor converts a case under chapter 13 of this title to a case under another chapter of 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." The difference between these two subsections is the date of determination. With a good faith conversion, the measuring date is the petition date and, therefore, prepetition assets are included but postpetition assets are not. If the conversion reflects bad faith, then both pre- and postpetition assets will be included in the chapter 7 estate. Thus, Congress has given the debtor who attempts to repay his debts in chapter 13, albeit unsuccessfully, a sort of guarantee that he will be no worse off for having tried a repayment plan, as long as he converts in good faith. This guarantee comes in the form of allowing the debtor to retain his postpetition assets, which of course he would never have had to contribute if he had originally filed a chapter 7 case.

Subsection (f)(1)(A) also clarifies that the debtor need only turnover the prepetition property "that remains in the possession of or is under the control of the debtor on the date of conversion." This language conveys two things. If prepetition property has been consumed or transferred during the chapter 13 proceeding, the debtor has no obligation to replenish it for the benefit of the chapter 7 estate. It also addresses the fact that there will likely be no "property of the estate" on the date of conversion. With confirmation of the chapter 13 plan, unless the plan expressly states otherwise, all property of the estate vests in the debtor. 11 U.S.C. § 1327(b). Post-confirmation, it reverts to its pre-bankruptcy status as "property of the debtor." Nevertheless, if the debtor retains possession or control over it at the time of conversion, it must be surrendered to the chapter 7 trustee.

A strict reading of this subsection might suggest that the Debtors in this case have no obligation to turn over to the Trustee any of the sale proceeds regardless of the home's prepetition value. The home was a prepetition asset but on the date of conversion the Debtors no longer had possession of or control over it because they had sold it. However, this Court has not found any reported decision that has arrived at that conclusion. Instead, courts have treated the proceeds from a pre-conversion sale of property as property of the estate "as of the petition date" under § 348(f)(1)(A). Some have reached this conclusion by reasoning that § 541(a)(6) includes in the definition of property of the estate "[p]roceeds, product, offspring, rents, or profits of or from property of the estate." *See, e.g.*, *Bogdanov v. Laflamme (In re Laflamme)*, 397 B.R. 194, 202 n.7 (Bankr. D. N.H. 2008) (property of converted estate includes proceeds from commissions earned pre-bankruptcy that debtor received during chapter 13 case); *Wyss v. Fobber (In re Fobber)*, 256 B.R. 268, 273 (Bankr. E.D. Tenn. 2000) (converted estate includes proceeds of tractor debtors sold during chapter 13 case); *Pisculli v. T.S. Haulers, Inc. (In re Pisculli)*, 426 B.R. 52, 62 (E.D.N.Y. 2010) (converted estate includes proceeds from truck debtor sold ***649** during chapter 13). Some courts have assumed, with little or no analysis, that the proceeds and the property are one and the same for purposes of § 348(f)(1)(A). *See, e.g.*, *In re Niles*, 342 B.R. 72, 73 (Bankr. D. Ariz. 2006) ("*Niles*") (addressing proceeds from home debtor sold during chapter 13 case). And, in some cases, the parties have simply conceded this issue. *See, e.g.*, *Warfield v. Salazar (In re Salazar),* 465 B.R. 875, 878 (9th Cir. BAP 2012) (converted estate includes tax refunds attributable to prepetition period that debtors received during chapter 13 case).

Such is the case here. Neither party disputes that this subsection would require the Debtors to turn over any non-exempt funds attributable to the prepetition value of the home. And since both now agree that the home was only worth $396,606 on the filing date and that the greater amount realized at sale was attributable to a postpetition increase in value, the only dispute left is whether a postpetition increase in value of a prepetition asset constitutes a postpetition asset excluded from the chapter 7 estate by § 348(f)(1)(A).

B. § 348(f)(1)(A)'s Latent Ambiguity: Two Schools of Thought on Whether PostPetition Increase in Equity during a Chapter 13 Case Becomes Property of the Chapter 7 Estate upon Conversion

The Trustee argues that an increase in value that occurs postpetition is not a "postpetition asset." He advocates for an interpretation of § 348(f)(1)(A) that reads its reference to "property" existing on the petition date to be the physical thing, the bricks and mortar of a home, and not the home's value. When the Debtors sold the home, they received "proceeds" directly tied to it and those proceeds now represent the same prepetition asset under § 541(a)(6). According to the Trustee, any postpetition change in its equity is not newly acquired postpetition property but is inseparable from the home itself.

1. PostPetition Increase *is* Property of Chapter 7 Estate

The Trustee's position has support. In *In re Goins*, 539 B.R. 510, 515-16 (Bankr. E.D. Va. 2015), the court held that the post-conversion chapter 7 estate included the postpetition appreciation in value because the property itself was initially property of the estate under § 541(a)(1) and § 541(a)(6) provides that all proceeds of property of the estate are also property of the estate. It rejected the notion that § 348(f)(1)(A) controlled because "the equity attributable to the postpetition appreciation of the property is not separate, after-acquired property, [rather it] is inseparable from the real estate, which was always property of the estate under Section 541(a)." *Id.* at 516. *See also Potter v. Drewes (In re Potter)*, 228 B.R. 422, 424 (8th Cir. BAP 1999) (estate's interest in the converted case is the entire asset, including any changes in value that occur postpetition); *Vu v. Kendall (In re Vu)*, 245 B.R. 644, 647-48 (9th Cir. BAP 2000) (upon conversion from chapter 11 to chapter 7, appreciation belongs to estate); *Kakos v. Stevenson* (*In re Kakos*), 2015 WL 5212033 (E.D. Mich. Sept. 4, 2015) (equity in real estate created by large postpetition, pre-conversion payment belongs to chapter 7 estate); *In re Peter*, 309 B.R. 792 (Bankr. D. Or. 2004) (equity created by pay down of liens in chapter 13 belongs to chapter 7 trustee). Judge Romero in this district has now joined the ranks of these courts in his unpublished *In re Hayes* decision, Case No. 15-20727 (Bankr. D. Colo. March 28, 2019).

2. PostPetition Increase *is Not* Property of Chapter 7 Estate

A greater number of courts interpreting these same statutes have reached the opposite ***650** conclusion. In *Niles*, the court confronted facts identical to those in the present case. At the time the debtor filed her chapter 13 case, she owned a home with no nonexempt equity. The bankruptcy court confirmed her plan and later the debtor sold her home and received proceeds that exceeded the applicable homestead exemption. A couple of months later, while she still had possession of the proceeds, the debtor converted her case to chapter 7. The *Niles* court concluded, that "[w]hile admittedly an increase in value to real property is not the same as after-acquired property as that term is traditionally defined under bankruptcy law, it is similar in nature and justifies the same result." *Niles*, 342 B.R. at 76. Moreover, "[d]enying the debtor the increase in value upon conversion would similarly act as a disincentive to filing chapter 13 in the first instance." *Id.*

The *Niles* court's most persuasive analysis focuses on the language of § 348(f)(1)(A) and its legislative history discussed below. Relying on this, many other courts have reached the conclusion that any postpetition increase in equity in a prepetition asset, whether from appreciation or from the debtor's repayment of secured debt, is not property of the estate on conversion from chapter 13 to chapter 7. *See In re Hodges*, 518 B.R. 445, 447-49 (Bankr. E.D. Tenn. 2014); *In re Robinson*, 472 B.R. 854, 856 (Bankr. M.D. Fla. 2012); *Leo v. Burt (In re Burt)*, 2009 WL 2386102 (Bankr. N.D. Ala. July 31, 2009); *Kendall v. Lynch (In re Lynch)*, 363 B.R. 101, 106-07 (9th Cir. BAP 2007); *In re Pruneskip*, 343 B.R. 714, 717 (Bankr. M.D. Fla. 2006); *In re Woodland*, 325 B.R. 583 (Bankr. W.D. Tenn. 2005); *In re Boyum,* 2005 WL 2175879 (D. Or. Sept. 6, 2005); *In re Nichols*, 319 B.R. 854 (Bankr. S.D. Ohio 2004).[4]

3. Resort to Legislative History to Resolve Ambiguity

These two divergent views highlight an underlying ambiguity in § 348(f)(1)(A). When Congress refers to "property ... as of the date of the filing of the petition," does it mean the property *as it existed* on that date? In other words, when the term "property" is modified by qualifying language that ties it to the petition date, is that a reference to the property with the attributes it had on that date? Consider this hypothetical: assume that a debtor's prepetition home had four bedrooms, two bathrooms, an old kitchen, a value of $300,000, with a mortgage lien against it of $250,000. Two years later, the debtor, who is a builder, has renovated the home himself, adding a fifth master bedroom suite, a third bathroom, and a new kitchen, all for a total cost of $50,000. His changes to the home have increased its value by $100,000. He has also reduced the principal balance of the mortgage loan by $25,000 and realized appreciation in value due solely to market conditions of $100,000. His home is now worth $500,000 due to this combination of factors and his equity interest is $275,000 instead of the petition date amount of $50,000. When Congress stated that prepetition property becomes property of the chapter 7 estate, did it mean this home, regardless of what has changed since the petition date? Or did it mean this home with the attributes and value it had on the petition date?

In *In re Hayes*, the court concluded that the statute's reference to "property" unambiguously ***651** referred to the physical thing, the home. It said the debtor's equity interest in the home was not a separate thing. It relied on an old Supreme Court tax case, *Crane v. C.I.R.*, 331 U.S. 1, 67 S.Ct. 1047, 91 L.Ed. 1301 (1947). In that case, the taxpayer argued that she only had to pay a capital gains tax based on the difference between her basis in the property and the amount for which she later sold it. Since no equity existed at the time of her acquisition, she claimed her basis in the property was $0. The Supreme Court

rejected this reasoning, concluding that "property" does not mean the same thing as "equity." It ruled that the property referred to the physical thing, "the aggregate of the owner's rights to control and dispose of that thing." *Crane*, 331 U.S. at 6, 67 S.Ct. 1047. It further stated that "[s]trong countervailing considerations would be required to support a contention that Congress, in using the word 'property,' meant 'equity,' or that we should impute to it the intent to convey that meaning." *Id.* at 7, 67 S.Ct. 1047. Thus, the *Hayes* court concludes that the "property" is the thing as a whole, and changes to its value are not separate or newly acquired property.

But the *Hayes* court also says that the term "proceeds" in § 541(a)(6) "is sensibly read as encompassing postpetition increases in value, regardless of whether an increase is a product of a reduction in the amount of a lien, the passage of time, or some other market event." *In re Hayes*, Case No. 15-20727, slip op. at 6 (Bankr. D. Colo. March 28, 2019) (*quoting In re Celentano*, 2012 WL 3867335, at *5 (Bankr. D. N.J. Sept. 6, 2012)). Thus, in one breath, the court states that we cannot interpret equity as a thing separate from the property itself for purposes of interpreting § 348(f)(1)(A), but we can consider it to be a separate thing in interpreting what "proceeds" means under § 541(a)(6). And the reason it must interpret proceeds in this manner is because, if a postpetition increase in value is not "proceeds" of the property, what else would include it in property of the estate under § 541(a)? With limited exceptions not relevant here, § 541(a) states that the estate is comprised of the debtor's property interests "as of the commencement of the case." The *Hayes* line of cases say that the postpetition changes are included in the estate because they represent "proceeds" of the prepetition asset. They are separate enough to be proceeds but not separate enough to be excluded from the estate upon conversion under § 348(f)(1)(A).

Despite this incongruity, the Court acknowledges that it is plausible to interpret § 348(f)(1)(A)'s reference to prepetition property in this manner. On the other hand, it is also reasonable to interpret this statute as a reference to the property *as it existed* on the petition date. This latter interpretation fits well within the context of the Bankruptcy Code as a whole. Numerous statutes in the Code freeze the relative rights of the debtor, the creditors, and the estate as of the petition date. The debtor's exemption rights are determined based on the value of the asset on the petition date. Section 522 allows a debtor to exempt certain assets up to a specified dollar amount of value. It defines "value" as the fair market value "*as of the date of the filing of the petition.*" 11 U.S.C. § 522(a)(2) (emphasis added). To the extent a claim is not supported by a lien on an asset of the debtor on the petition date, it is deemed to be an unsecured claim against the estate that will no longer accrue interest. *Id.* §§ 502(a)(2), 506(a)-(b). The claim's status is not only frozen in amount, but the creditor is prevented from taking any action to acquire a new lien postpetition. *Id.* § 362(a)(4). An existing security interest that a creditor holds is ***652** cut off as of the petition date, preventing that creditor's lien from attaching to property that the estate or the debtor acquires postpetition. *Id.* § 552(a). Moreover, unless a specific statute expressly states otherwise, the bankruptcy estate is only comprised of the debtor's interests held on the date of the petition. Since these statutes and many more freeze the parties' relative rights as of the petition date, it is not illogical to assume that Congress intended to freeze the estate's rights in the debtor's prepetition assets at their prepetition values.

These two lines of analysis demonstrate that § 348(f)(1)(A) has a latent ambiguity despite its superficial clarity. "A statute is ambiguous if it is reasonably susceptible to more than one interpretation ... or capable of being understood in two or more possible senses or ways." *Nat'l Credit Union Administration Board v. Nomura Home Equity Loan, Inc.,* 764 F.3d 1199, 1226 (10th Cir. 2014) (internal citations omitted). When a statute is ambiguous, resort to extrinsic aids is permitted. A statute's legislative history, including all statements made during legislative consideration of the original bill from the time of its introduction until its final enactment, is such an extrinsic aid that courts are permitted to consider. When legislative history is without probative value, is contradictory to the language as enacted, or is itself ambiguous, then the legislative history will not control. But consulting the legislative history is never improper. The Supreme Court has noted repeatedly that, "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' " 2A Norman Singer & Shambie Singer, *Sutherland Statutory Construction* § 48:1 (7th ed. 2014) (quoting *Train v. Colo. Public Interest Research Group, Inc.* 426 U.S. 1, 96 S. Ct. 1938, 1942, 48 L.Ed.2d 434 (1976)).

With § 348(f)(1)(A), the legislative history is especially illuminating. The House Report indicates that § 348(f)(1)(A) was enacted 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 ... 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 the 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 the case, in a State with a $10,000 homestead exemption,

> would have to be counseled concerning the risk that after he or she paid off a $10,000 second mortgage in the chapter 13 case, creating [another] $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 [non-exempt] equity for the unsecured creditors and the debtor would lose the home.
>
> ***653** This amendment overrules the holding in cases such as *Matter of Lybrook*, 951 F.2d 136 (7th Cir. 1991) and adopts the reasoning of *In re Bobroff*, 766 F.2d 797 (3d Cir. 1985). However, it also gives the court discretion, in a case in which the debtor has abused the right to convert and converted in bad faith, to order that all property held at the time of conversion shall constitute property of the estate in the converted case.

H.R. Rep. No. 103-835, at 57 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 3340, 3366.

If Congress was intending its use of the term "property" in § 348(f)(1)(A) to refer to the entirety of the home itself, without regard to any postpetition changes to it, then these statements certainly do not convey that thought. According to this legislative history, one of the principal reasons for the enactment of this new provision was Congress' concern that the chapter 7 trustee was getting the postpetition increase in equity in the debtor's home. These statements reflect that a proper interpretation of "property" is the property *as it existed on the petition date*, with all its attributes, including the amount of equity that existed on that date. That interpretation gives purpose and meaning to this new statutory provision that is not conveyed by § 541(a) alone.

Despite this legislative history, one could nevertheless attempt to distinguish between increased equity that arises from the debtor's repayment of secured debt from an increase that results from a change in market conditions. But this Court cannot see any language in § 348(f)(1)(A) or elsewhere in the Bankruptcy Code to support such a distinction. Moreover, the broader concept that the legislative history points toward is Congress' intent to leave a debtor who attempts a repayment plan no worse off than he would have been had he filed a chapter 7 case at the outset. If a debtor filed a chapter 7 case, and his trustee did not sell his home, then he would enjoy the future increase in value realized by a change in market conditions in the years following his chapter 7 filing.

One of the leading sources of commentary on chapter 13 has expressed its view of § 348(f)(1)(A)'s legislative history that:

> it seems to have been congressional intent to take a snapshot of the estate at the filing of the original Chapter 13 petition and, based on that inventory, include in the Chapter 7 estate at conversion only the portion that remains in the possession or control of the debtor. The spirit of § 348(f)(1)(A) is best captured by a rule that property acquired by the Chapter 13 estate or by the debtor after the Chapter 13 petition does not become property of the Chapter 7 estate at a good-faith conversion. The method of acquisition after the Chapter 13 petition should not matter: post-petition property does not become property of the Chapter 7 estate at conversion, whether acquired with earnings by the debtor, by transfer to the debtor—for example, an inheritance after 180 days after the petition—or by appreciation in the value of a pre-petition asset.

Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy*, § 316.1, at ¶ 26 (4th ed. 2004).

C. Public Policy Implications

By this legislative history, Congress has clearly evidenced its intent to incentivize chapter 13 filings by ensuring that debtors will be no worse off than they would have been had they filed for chapter 7 at the outset. But does allowing the debtor to keep the postpetition increase in equity provide the debtor with a windfall? What about the hypothetical debtor who renovated his home, paid down his mortgage, and ***654** enjoyed an uptick in market conditions to realize $275,000 in equity while the creditors in his converted chapter 7 case were not fully repaid? Why should he realize the benefit of $200,000 in non-exempt equity? The answer lies in the difference between the fundamental bargain in a chapter 7 versus a chapter 13 proceeding.

In chapter 7, the debtor trades his non-exempt assets for his discharge. In chapter 13, he keeps his assets, but trades his

postpetition income for his discharge. David Gray Carlson, *Modified Plans of Reorganization and the Basic Chapter 13 Bargain*, 83 Am. Bankr. L.J. 585, 599-600 (2009). In a case converted from chapter 13 to chapter 7, it would violate these general principles if the chapter 7 trustee were to reap the benefit of both the debtor's non-exempt assets and his chapter 13 postpetition income. And he would do so in every case in which the debtor cured his mortgage and paid down its balance over the years he spent in a chapter 13 case before conversion.

The *Hayes* court relied on several cases that stand for the proposition that the chapter 7 estate is entitled to the benefit of any postpetition increase in equity attributable to property of the estate. *E.g. In re Celentano*, 2012 WL 3867335 (Bankr. D. N.J. 2012); *In re Prospero*, 107 B.R. 732, 736 (Bankr. C.D. Cal, 1989); *In re Croteau*, 2001 WL 1757049 at *1 (Bankr. D. N.H. July 19, 2001); *In re Shipman*, 344 B.R. 493, 494-95 (Bankr. N.D. W.V. 2006); *In re Paolella*, 85 B.R. 974 (Bankr. E.D. Penn. 1988). The Court agrees with this general proposition. If the chapter 7 estate is left open for some period of time, and the assets appreciate or the liens are reduced during this period, then the chapter 7 estate will reap the benefit of that increase in equity. Because of this, any debtor's lawyer worth his salt will file a motion to abandon the asset under § 554 early in the chapter 7 case if it looks like the estate will remain open for a significant period of time. Not doing so would be tantamount to malpractice. The debtor would be foolish to continue making payments on his home if the chapter 7 trustee still has the ability to sell it. Filing a motion to abandon serves to push the trustee to make a decision as to whether this asset has non-exempt value for the estate, but it has to be done before the postpetition equity has increased. In *Celentano*, the debtors waited more than one year to file the motion to abandon and significant postpetition equity had accrued due to the postpetition reduction of the liens by $250,000. While they argued that the court should grant abandonment based on the prepetition home value, the court ruled they were a day late and a dollar short in making this request.

But in a typical chapter 7 case, the trustee will not have the opportunity to realize significant postpetition increases in home equity due to either prompt closure of the case or the debtor's filing of a timely motion to abandon. Thus, allowing the debtor to keep the pre-conversion increase in equity does not render the chapter 7 estate worse off; it merely prevents the chapter 7 trustee from reaping a windfall. It allows the fundamental bargains of chapter 7 and 13 to remain in place.

III. CONCLUSION

For the foregoing reasons, the Court hereby ORDERS the Trustee's Motion for Turnover is DENIED.

All Citations

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Footnotes

1	The plan's only mention of HUD's lien is found in Section V, "Other Provisions," in which the Debtors indicated they would pay "$0.00" per month to this creditor over 0 months. Neither the chapter 13 trustee nor this creditor objected to this treatment. The Court surmises that this lien reflects an arrangement with HUD to be paid only on the sale of the property, without requiring any monthly payments.
2	Instead the Debtors filed a motion to reconvert their case to chapter 13. The Court denied that request. Subsequently, the Debtors have requested reconsideration. The Trustee also filed a motion in the Debtors' main case for an order compelling the Debtors to turn over the information relating to the home sale and the remaining proceeds. He also objected to the Debtors' motion for reconsideration of the Court's order denying their motion to reconvert. The Court held the turnover motion and the Debtors' motion to reconsider in abeyance pending the resolution of the cross-motions for summary judgment.

3	All references to "§" or "section" shall refer to Title 11, United States Code, unless expressly stated otherwise.
4	This Court agrees with the Court in *Hayes* that the cases relying solely on pre-BAPCPA § 348(f)(1)(B) and the concept of implicit valuation, including *Warren v. Peterson*, 298 B.R. 322 (N.D. Ill. 2003) and *In re Slack*, 290 B.R. 282 (Bankr. D.N.J. 2003), are no longer persuasive on the question of what constitutes property of the estate when a debtor converts his case from chapter 13 to chapter 7.

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NOT FOR PUBLICATION*

United States Bankruptcy Appellate Panel of the Tenth Circuit.

IN RE Julio Cesar BARRERA and Maria De La Luz Moro, Debtors.
Simon E. Rodriguez, Chapter 7 Trustee, Appellant,
v.
Julio Cesar Barrera and Maria De La Luz Moro, Appellees.

BAP No. CO-20-003
|
Bankr. No. 16-13216-EEB
|
FILED October 2, 2020

Appeal from the United States Bankruptcy Court for the District of Colorado

Attorneys and Law Firms

David V. Wadsworth, Lindsay Riley, Wadsworth Garber Warner Conrardy, P.C., Littleton, CO, for Appellant.

Erik Atzbach, Englewood, CO, for Appellees.

Before CORNISH, MICHAEL, and LOYD, Bankruptcy Judges.

OPINION

MICHAEL, Bankruptcy Judge.

***1** Home ownership lies at the center of the American dream. Chapter 13 of the Bankruptcy Code provides many Americans with a chance to keep their home when all else fails. Unfortunately, not every chapter 13 case is successful. Congress recognized this and gave debtors who can no longer meet their obligations under a chapter 13 plan the opportunity to convert the case to chapter 7, where liquidation of nonexempt assets is contemplated. The question placed before us today is a simple one, presented on a silver platter of stipulated facts: if a homestead appreciates in value while a debtor is striving under chapter 13, and the case is later converted to chapter 7, who is entitled to the increase in value: the debtors, or the chapter 7 trustee? The trial court (the "Bankruptcy Court") ruled for the debtors. The trustee appeals. We affirm.

I. Factual Background

Julio Cesar Barrera and Maria de la Luz Moro (the "Debtors") filed a chapter 13 petition on April 5, 2016. They listed real property at 6815 Edgewood Way, Highlands Ranch, Colorado (the "Residence"), in Schedule A of their petition with a fair market value of $396,606. There were two liens against the Residence. CitiMortgage Inc. held a first lien of $243,649, and the United States Department of Housing and Urban Development held a second lien of $92,560.[1] The Debtors asserted an

uncontested $75,000 homestead exemption in the Residence under Colorado Revised Statutes § 38-41-201. The combination of consensual liens and homestead exemption exceeded the value of the Residence, resulting in no nonexempt equity on the petition date.[2]

The Bankruptcy Court confirmed the Debtors' chapter 13 plan of reorganization (the "Plan") on June 9, 2016. The Plan required the Debtors to cure approximately $4,400 in mortgage arrears and to make postpetition mortgage payments directly to CitiMortgage Inc. The Plan vested all property of the bankruptcy estate in the Debtors upon confirmation.

The Debtors sold the Residence for $520,000 in April 2018. After payment of lienholders, $140,250.63 in remaining proceeds of sale (the "Net Proceeds") was received by the Debtors.[3] The Debtors voluntarily converted their case to chapter 7 shortly thereafter. At the time of conversion, approximately $100,000 of the Net Proceeds remained in a savings account.

Simon Rodriguez, chapter 7 trustee in the Debtors' case (the "Trustee"), filed a motion for turnover on July 5, 2018, seeking turnover of the Net Proceeds in excess of the $75,000 homestead exemption pursuant to 11 U.S.C. § 542[4] (the "Motion for Turnover"). The Debtors objected, arguing none of the Net Proceeds were property of the bankruptcy estate. In order to remove any issue of fact, the Trustee stipulated that the scheduled value of the Residence ($396,606) was its fair market value on the date the chapter 13 petition was filed.[5] The sole issue before the Bankruptcy Court was whether the Trustee or the Debtors were entitled to the appreciation in value of the Residence between the date of filing of the chapter 13 and the date of conversion to chapter 7.

***2** The Bankruptcy Court entered an order denying the Motion for Turnover (the "Turnover Order") on January 13, 2020.[6] The Bankruptcy Court concluded § 348(f)(1)(A)'s use of the term "property" is ambiguous. After examining the legislative history of § 348(f), the Bankruptcy Court held that

> According to this legislative history, one of the principal reasons for the enactment of this new provision was Congress' concern that the chapter 7 trustee was getting the postpetition increase in equity in the debtor's home. These statements reflect that a proper interpretation of "property" is the property *as it existed on the petition date*, with all its attributes, including the amount of equity that existed on that date.[7]

The Bankruptcy Court found its interpretation aligned with and advanced Congress's stated intent to not penalize a debtor for filing a chapter 13 case and later converting to chapter 7.[8] Accordingly, the Bankruptcy Court determined that the Debtors had no nonexempt equity in the Residence as of the petition date, and the postpetition increase in value of the Residence was not property of the chapter 7 bankruptcy estate.

II. Jurisdiction & Standard of Review

"With the consent of the parties, this Court has jurisdiction to hear timely-filed appeals from 'final judgments, orders, and decrees' of bankruptcy courts within the [United States Court of Appeals for the] Tenth Circuit."[9] No party elected to have this appeal heard by the United States District Court for the District of Colorado; thus, the parties have consented to our review.

"A decision is considered final if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' "[10] "An order denying turnover of property ... is a final, appealable order."[11] Therefore, the Turnover Order is a final order for purposes of 28 U.S.C. § 158.

Whether a bankruptcy court correctly applied § 542 to undisputed facts is a question of law reviewed *de novo*.[12] The question of whether postpetition appreciation of a debtor's homestead is property of the bankruptcy estate under § 348(f)(1)(A) also involves a legal conclusion, which we review *de novo*.[13] "*De novo* review requires an independent determination of the issues, giving no special weight to the bankruptcy court's decision."[14]

III. Discussion

***3** At the heart of this appeal is the Bankruptcy Court's interpretation of § 348(f)(1), which provides,

> [W]hen a case under chapter 13 of this title is converted to a case under another chapter under this title—
>
> (A) property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion;
> (B) valuations of property and of allowed secured claims in the chapter 13 case shall apply only in a case converted to a case under chapter 11 or 12, but not in a case converted to a case under chapter 7 ....[15]

The United States Court of Appeals for the Tenth Circuit (the "Tenth Circuit") last considered § 348 almost thirty years ago. In *In re Calder*, the Tenth Circuit applied a prior version of § 348, holding that upon conversion from chapter 13 to chapter 7, all property of the chapter 13 estate, including property acquired postpetition, becomes property of the chapter 7 estate.[16] Since *Calder*, Congress amended § 348 by adding subsection (f).[17]

The Bankruptcy Reform Act of 1994 addressed the issue of what happens to property a debtor acquires postpetition but prior to conversion through the addition of subsection (f) to § 348. Generally, subsection (f) provides that when a debtor converts a case from chapter 13, the estate in the converted case does not include property acquired after the original petition date.[18] The Supreme Court addressed the implications of § 348(f) in *Harris v. Viegelahn*, where it held wages acquired postpetition ordinarily do not become a part of the chapter 7 estate upon conversion.[19] *Harris v. Viegelahn* effectively overruled *Calder* and established that "[a]bsent 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."[20]

a. Ambiguity in Section 348(f)

The question before this Court is whether § 348(f)'s definition of the phrase "property of the estate" includes postpetition appreciation in value of an asset owned by a debtor on the petition date. The Trustee asserts the Bankruptcy Court erred when it concluded § 348(f)(1)(A)'s use of the term "property" is ambiguous, which allowed the Bankruptcy Court to consider the statute's legislative history. We disagree.

***4** The Trustee recognizes that "[t]he goal of statutory interpretation is to 'ascertain the congressional intent and give effect to the legislative will.' "[21] The Tenth Circuit has provided ample instruction in the use of legislative history to determine congressional intent as part of statutory interpretation. A court's analysis of congressional intent begins with a statute's plain language, "giv[ing] undefined terms their ordinary meanings, considering 'both the specific context in which the word is used and the broader context of the statute as a whole.' "[22] In addition, "[i]f Congress has spoken *directly* to the issue, that is the end of the matter; the court ... must give effect to Congress's unambiguously expressed intent."[23] If there is no ambiguity on the face of the statute's language, the analysis ends. However, "[i]f the statute's plain language is ambiguous as to congressional intent, 'we look to the legislative history and the underlying public policy of the statute' " to derive Congress's intent.[24] Statutory language is ambiguous "if it 'is capable of being understood by reasonably well-informed persons in two or more different senses.' "[25]

The plain language of § 348(f)(1)(A) states, "property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition."[26] The Trustee asserts "property of the estate" as used in this section includes "[a]ppreciation in the value of real property."[27] The Trustee explains that because § 541(a)(1) includes "all legal or equitable interests of the debtor in property" as property of the estate and § 541(a)(6) "expressly provid[es] that '[p]roceeds' are a form of 'property,' "[28] the Bankruptcy Code evidences Congress's intent to include appreciated equity as property of the estate.[29] However, even if we assume the Trustee's reading of the statute is correct, we are left with the question of the date the court should use to calculate a debtor's interest in the equity. In the Debtors' case, the equity interest may be calculated as of the date of the original chapter 13 petition or the date of the conversion to chapter 7. Because neither § 348(f)(1)(A) nor any other Bankruptcy Code provision resolve this question, the statute is ambiguous.[30]

The Trustee relies on *In re Hayes*,[31] an opinion from another judge of the District of Colorado Bankruptcy Court entered shortly before the Turnover Order, to argue § 348(f)(1)(A) is not ambiguous. In *Hayes*, the Bankruptcy Court addressed the issue of postpetition appreciation in value in a case converted from chapter 13 to chapter 7. The *Hayes* court concluded that

the plain language of § 348(f)(1)(A) mandated that "postpetition accrual of equity through appreciation in ... value is not itself a separate interest in property which could be excluded from post-conversion estate property."[32] The bankruptcy judge in *Hayes* reached the opposite result of the bankruptcy judge in this case.

***5** Unfortunately for the Trustee, the decision in *Hayes* illuminates, rather than eliminates, the statutory ambiguity contained in § 348(f). Ambiguity exists when reasonably well-informed individuals reach competing conclusions. We can think of no person more well-informed in the nuances of the Bankruptcy Code than a bankruptcy judge. If two bankruptcy judges do not agree whether postpetition appreciation in value of property belongs to a chapter 7 estate upon conversion, then § 348(f)(1)(A) is open to two or more interpretations.[33] A split on the issue in other jurisdictions also suggests the statute's plain language is ambiguous.[34] Accordingly, the Bankruptcy Court did not err in reviewing the legislative history of § 348(f).

b. Review of Legislative History

Although the Tenth Circuit cautions against reliance on a federal statute's legislative history in statutory interpretation,[35] it recognizes the directive of the United States Supreme Court allowing the review of legislative history as an "aid to construction of the meaning of words, ... however clear the words may appear on 'superficial examination.' "[36] There is a caveat: "the weight such history is given in construing a statute may vary according to factors such as whether the legislative history is sufficiently specific, clear and uniform to be a reliable indicator of intent."[37] Under these principles, the Bankruptcy Court did not err in its ultimate conclusion in this case, or in its decision to review the legislative history of § 348(f).

The House of Representatives' Committee on the Judiciary report on the Bankruptcy Reform Act of 1994 (the "House Report") provides insight into the legislative intent behind the amendment to § 348:

> This amendment would 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.
>
> ***6** 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 the case, in a State with a $10,000 homestead exemption, would have to be counseled concerning the risk that after he or she paid off a $10,000 second mortgage in the chapter 13 case, creating $10,000 in equity, there would be a risk that the home could be lost if the case were converted to chapter 7 (which can occur involuntarily). If all of the debtor's property at the time of conversion is property of the chapter 7 estate, the trustee would sell the home, to realize the $10,000 in equity for the unsecured creditors and the debtor would lose the home.
> This amendment overrules the holding in cases such as Matter of Lybrook, 951 F.2d 136 (7th Cir. 1991) and adopts the reasoning of In re Bobroff, 766 F.2d 797 (3d Cir. 1985). However, it also gives the court discretion, in a case in which the debtor has abused the right to convert and converted in bad faith, to order that all property held at the time of conversion shall constitute property of the estate in the converted case.[38]

Although the House Report does not address the exact issue before this Court, the cases cited therein illuminate the intent behind the reforms.

In *In re Lybrook*, the debtors initially filed a chapter 13. Ten months into the case, they inherited land worth $70,000.[39] After inheriting the land, the debtors converted their case to chapter 7. The chapter 7 trustee requested turnover of the inherited land. In affirming the bankruptcy court's order requiring the debtors to turn over the inherited land, the United States Court of Appeals for the Seventh Circuit held the land became part of the debtors' chapter 13 estate. The Seventh Circuit Court of Appeals applied § 1306(a)(1), which provides property acquired after the case's commencement but before the case is closed, dismissed, or converted belongs to the estate. The Seventh Circuit Court of Appeals held that because the land became estate property during the chapter 13 case, the land also belonged to the chapter 7 estate. The court explained, "a rule of once in, always in is necessary to discourage" debtors from filing a chapter 13 case, holding creditors at bay, and converting to chapter 7 to retain any property acquired postpetition.[40]

In re Bobroff involved a chapter 7 case converted to a chapter 13 and later reconverted to a chapter 7.[41] While still under chapter 13 but before the second conversion to chapter 7, the debtor accrued several tort causes of action. The United States Court of Appeals for the Third Circuit considered whether the causes of action were property of the chapter 7 estate after the second conversion. Although the Third Circuit Court of Appeals held the causes of action were not property of the chapter 7 estate, it did so on the basis that the debtor was not entitled to convert his case to chapter 13. The Third Circuit considered the conversion to chapter 13 void *ab initio*. As a result, the purported conversion to chapter 13 never legally occurred and the tort causes of action never became property of the estate under § 1306. The Third Circuit explained, "[i]f debtors must take the risk that property acquired during the course of an attempt at repayment will have to be liquidated for the benefit of creditors if chapter 13 proves unavailing, the incentive to give chapter 13—which must be voluntary—a try will be greatly diminished."[42]

***7** Ignoring the unique facts in *Bobroff*, the House Report adopts the Third Circuit Court of Appeals' analysis of the Bankruptcy Code's policy goals, which favored encouraging debtors to file a chapter 13 over chapter 7, or repayment over liquidation. By adopting the reasoning applied in *Bobroff* over *Lybrook*, the House Report suggests the policy goals of § 348(f) should not disincentivize filing a chapter 13 case by penalizing debtors should the case convert to chapter 7. The Bankruptcy Court's decision advances these policy goals.

c. The Bankruptcy Estate's Interest in Equity Above Secured Claims is Determined on the Petition Date, not the Conversion Date

When legislative history aids the Court in deriving congressional intent, such history "may not be used to support a construction that adds to or takes from the significance of the words employed."[43] Courts considering § 348(f)'s legislative history conclude House Report 103-835 "is highly instructive" when determining the estate's interest in equity amassed during the pendency of a chapter 13.[44] The majority of those courts hold postpetition appreciation in value of real property does not flow into a chapter 7 estate upon conversion.[45]

The House Report is a "sufficiently specific, clear and uniform ... indicator of intent"[46] to suggest Congress intended to encourage debtors to proceed with a chapter 13 filing without being punished should they later convert to chapter 7. Furthermore, interpreting § 348(f)(1)(A) in this manner does not contradict or otherwise impair other provisions of the Bankruptcy Code. Rather, such a reading complements other Code sections.

The arguments advanced by the Trustee are problematic. Were we to adopt the Trustee's interpretation of § 348(f)(1)(A), our decision would all but write § 348(f)(2) out of the Bankruptcy Code.[47] Section 348(f)(2) states, "[i]f the debtor converts a case under chapter 13 ... 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."[48] Thus, § 348(f)(2) "penalizes bad-faith debtors by making their postpetition wages [and assets] available for liquidation and distribution to creditors."[49] If Congress intended for postpetition assets to be property of the estate upon conversion from a chapter 13 case without exception, § 348(f)(2) could not punish debtors for converting a case in bad faith.[50] As such, the Trustee's interpretation is not in accord with other provisions of the Bankruptcy Code.

***8** Other cases interpreting § 348(f)(1)(A) support the Bankruptcy Court's decision. For instance, the Supreme Court interprets § 348(f)(1)(A) as removing a chapter 13 debtor's postpetition wages from the chapter 7 estate upon conversion and requiring any funds held by a chapter 13 trustee on the date of conversion be returned to the debtor instead of distributed to creditors.[51] This interpretation leads us to believe that any equity established in a home through payments made from a debtor's postpetition income, socalled "paydown" cases, would also not belong to the converted chapter 7 estate. The House Report expressly addresses the paydown case, explaining including equity resulting from the decrease in secured debt in a converted chapter 7 estate would dissuade debtors from attempting a chapter 13.[52]

The Trustee argues paydown cases are distinguishable from the case where debtors obtain equity through appreciation in value because debtors are not deprived of equity created by their own efforts. In turn, the Trustee argues including the proceeds derived from the sale of estate property does not penalize debtors for giving chapter 13 a try. The Trustee's argument ignores the primary disincentive in a case such as this: the potential that the debtor's residence is liquidated to distribute nonexempt equity. Had the Debtors not already sold their Residence before converting the case, the Trustee would likely attempt to sell the home based on the nonexempt equity. It is safe to say few debtors would appreciate the prospect of having their home sold out from under them if a chapter 13 does not pan out. Second, for many debtors, a residence is the

only investment asset in their portfolios. The prospect of losing that investment is what drives many debtors to seek bankruptcy protection and would serve as a disincentive to attempting a chapter 13.

There is a pragmatic aspect to this case that the Bankruptcy Court recognized and that should not be ignored.[53] The parties have served this case up neatly wrapped and tied in a bow: they have stipulated that the Residence was worth $396,606 on the petition date, sold for $520,000 some two years later, and that the difference in price was entirely attributable to market forces. The Trustee uses the clean nature of these facts to argue that he only seeks appreciation due to market value. The next case, and, indeed, the vast majority of cases, are unlikely to be so pristine. What is the next court to do when a debtor has remodeled a home? Or repainted? Or did any of the myriad of things real estate agents advise to make a house more attractive? In those cases, how is the bankruptcy court to determine what amount of increased value is due to the effort of the debtor, and how much is due to market forces? As a trial court judge, I do not relish the prospect of making such determinations and believe they will be largely unworkable and highly subjective.

The legislative history to § 541 is helpful in understanding the congressional intent behind the amendment to § 348. The Senate Committee on the Judiciary's report states,

> All property of the debtor becomes property of the estate, but the debtor is permitted to exempt certain property from property of the estate .... Property may be exempted even if it is subject to a lien, but only the unencumbered portion of the property is to be counted in computing the "value" of the property for the purposes of exemption.[54]

***9** The Senate's report explains the process for calculating a debtor's exemption in property unencumbered by a lien, which involves assessing equity as of the petition date. Any equity above the federal or state exemption amount is nonexempt property. As it is well established that "[e]xemption rights are determinable as of the time of the bankruptcy filing," the estate's interest in nonexempt equity may also easily be determined as of the petition date.[55]

The Trustee cites several cases for the proposition that in a case initially filed under chapter 7, postpetition appreciation in value belongs to the estate.[56] However, the Trustee cites no binding authority and this Court is unable to locate any such precedent. Although the Bankruptcy Court admits postpetition appreciation becomes property of the estate in a case initially filed under chapter 7, the Bankruptcy Court distinguished such a case. The Bankruptcy Court explained, "in a typical chapter 7 case, the trustee will not have the opportunity to realize significant postpetition increases in home equity due to either prompt closure of the case or the debtor's filing of a timely motion to abandon."[57] We agree with the Bankruptcy Court's analysis.

IV. Conclusion

The Bankruptcy Code provides that property of the estate upon converting from chapter 13 to other chapters consists of property of the estate as of the date of the original petition. However, neither § 348(f) nor § 541(a) clearly delineate a debtor's interest in the postpetition appreciation of a homestead. Interpreting congressional intent as incentivizing chapter 13 repayment and following the guidance of many other courts that have reviewed this issue, we hold any postpetition appreciation in the value of the debtor's prepetition property—including postpetition appreciation of a homestead—belongs to the debtor and does not become property of the estate upon conversion to chapter 7. Accordingly, we AFFIRM the Turnover Order.

All Citations

Slip Copy, 2020 WL 5869458

Footnotes

*	This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8026-6.

1	*Schedule D*, *in* Appellants' App. at 51 & 52.
2	*Schedule C*, *in* Appellants' App. at 48.
3	*Final Settlement Statement* at 2, *in* Appellants' App. at 90.
4	All future references to "Bankruptcy Code," "Code," or "§," refer to Title 11 of the United States Code.
5	Although the Motion for Turnover did not specify, the Bankruptcy Court made it clear that the Trustee was only seeking turnover of the Net Proceeds that exceeded the allowed $75,000 homestead exemption. Turnover Order at 3, *in* Appellant's App. at 223.
6	*Order Denying Motion for Turnover of Sales Proceeds*, Appellant's App. at 221. The Trustee also filed an adversary proceeding objecting to the Debtors' chapter 7 discharge on the basis the Debtors withheld estate property. On a motion for summary judgment, the Bankruptcy Court held the Net Proceeds were not estate property.
7	Turnover Order at 9, *in* Appellant's App. at 229.
8	Turnover Order at 10, *in* Appellant's App. at 230.
9	*Straight v. Wyo. Dep't of Trans. (In re Straight)*, 248 B.R. 403, 409 (10th Cir. BAP 2000) (first quoting 28 U.S.C. § 158(a)(1), and then citing 28 U.S.C. § 158(b)(1), (c)(1) and Fed. R. Bankr. P. 8002).
10	*In re Duncan*, 294 B.R. 339, 341 (10th Cir. BAP 2003) (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996)).
11	*In re Auld*, 561 B.R. 512, 515 (10th Cir. BAP 2017) (citing *In re Ruiz*, 455 B.R. 745, 747-48 (10th Cir. BAP 2011); *In re Graves*, 396 B.R. 70, 72 (10th Cir. BAP 2008), *aff'd as modified*, 609 F.3d 1153 (10th Cir. 2010)).
12	*In re Graves*, 396 B.R. at 72 (citing *In re Duncan*, 329 F.3d 1195, 1198 (10th Cir. 2003)).
13	*See In re Wise*, 346 F.3d 1239, 1241 (10th Cir. 2003) (citing *In re White*, 25 F.3d 931, 933 (10th Cir. 1994)) (concluding post-petition spousal support was not property of the estate under § 541(a)(5)(B)); *In re Taylor*, 899 F.3d 1126, 1129 (10th Cir. 2018) (providing bankruptcy court's conclusions on statutory interpretation reviewed *de novo*).
14	*Peters v. Clark (In re Bryan)*, 857 F.3d 1078, 1091 (10th Cir. 2017) (citing *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991)).
15	11 U.S.C. § 348(f)(1).
16	*In re Calder*, 973 F.2d 862, 866 (10th Cir. 1992) (holding attorney's fees earned after filing a chapter 13 but preconversion to chapter 7 belonged to chapter 7 estate), *overruled by Harris v. Viegelahn*, 575 U.S. 510, 135 S.Ct. 1829, 1837 (2015).
17	Bankruptcy Reform Act of 1994, Pub. L. 103-394, § 311, 108 Stat. 4106, 4138 (1994).

18	3 Collier on Bankruptcy ¶ 348.07[1] (16th ed. 2020) ("The addition of this subsection clarified that Congress had intended the result reached by cases that had not included in the postconversion chapter 7 estate the property acquired by the debtor during the preconversion chapter 13 case.").
19	*Harris*, 135 S.Ct. at 1837 ("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.").
20	*Id.*
21	*In re Taylor*, 899 F.3d 1126, 1129 (10th Cir. 2018) (quoting *Ribas v. Mukasey*, 545 F.3d 922, 929 (10th Cir. 2008)).
22	*Id.* (quoting *United States v. Theis*, 853 F.3d 1178, 1181 (10th Cir. 2017)).
23	*New Mexico v. Dep't of Interior*, 854 F.3d 1207, 1221 (10th Cir. 2017) (quoting *United Keetoowah Band of Cherokee Indians of Okla. v. U.S. Dep't of Hous. & Urban Dev.*, 567 F.3d 1235, 1240 (10th Cir. 2009)).
24	*United States v. Manning*, 526 F.3d 611, 614 (10th Cir. 2008) (quoting *United States v. LaHue*, 170 F. 3d 1026, 1028 (10th Cir. 1999)).
25	*In re Taylor*, 899 F.3d at 1129 (quoting *Allen v. Geneva Steel Co. (In re Geneva Steel Co.)*, 281 F.3d 1173, 1178 (10th Cir. 2002)).
26	11 U.S.C. § 348(f)(1)(A).
27	Appellant's Br. 7.
28	*Rajala v. Spencer Fane LLP (In re Generation Res. Co.)*, 964 F.3d 958, 968 (10th Cir. 2020) (quoting 11 U.S.C. § 541(a)(6)).
29	This is a fascinating argument, given that the actual legislative history of § 348(f)(1)(A) leads to the opposite conclusion, as discussed *infra*.
30	We recognize the courts in *In re Hayes*, No. 15-20727-MER (Bankr. D. Colo. (Mar. 28, 2019) and *In re Goins*, 539 B.R. 510 (Bankr. E.D. Va. 2015) resolve this ambiguity by concluding equity is inseparable from real estate and is thus part of the estate on the petition date. This conclusion discounts the requirement of determining a debtor's equity interest in real property in cases where a debtor claims a homestead exemption, suggesting the real property and equity interests are separable. Furthermore, our analysis does not run afoul of § 348(f)(1)(B), as that subsection allows for valuation as of the conversion date for determining the amount of allowed secured claims.
31	No. 15-20727-MER (Bankr. D. Colo. Mar. 28, 2019), *in* Appellant's App. at 186.
32	*In re Hayes*, at 14, *in* Appellant's App. at 199.
33	*See United States v. Rentz*, 777 F.3d 1105, 1107 (10th Cir. 2015) (noting circuit split on interpretation of 18 U.S.C. § 924(c)(1)(A) led to en banc review) (en banc).

34	*Compare In re Lynch*, 363 B.R. 101, 106 (9th Cir. BAP 2007) (holding in a case converted from chapter 13 to 7, the relevant date for determining the value of a debtor's residence is the chapter 13 petition date), *and Pisculli v. T.S. Haulers, Inc. (In re Pisculli)*, 426 B.R. 52, 63 (E.D.N.Y. 2010) (holding creditors not entitled to postpetition appreciation in converted chapter 7), *aff'd*, 408 F. App'x 477 (2nd Cir. 2011), *with In re Goins*, 539 B.R. 510 (Bankr. E.D. Va. 2015) (holding debtor is not entitled to appreciation in property that accrues during chapter 13 case), *and Leo v. Burt (In re Burt)*, No. 09-40016-JJR, 2009 WL 2386102 (Bankr. N.D. Ala. July 31, 2009) (unpublished) (same).
35	*Miller v. Comm'r of Internal Revenue*, 836 F.2d 1274, 1281-82 (10th Cir. 1988) (explaining (1) federal courts interpret law instead of drafting it; (2) committee reports are not in front of Congress when voting or the President when signing a bill into law; and Congress and the President rely on the plain meaning of words when enacting legislation).
36	*Id.* at 1282 (quoting *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543-44 (1940)).
37	*Id.*
38	H.R. Rep. No. 103-835, at 57 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 3340, 3366.
39	*In re Lybrook*, 951 F.2d 136, 137 (7th Cir. 1991) (explaining because the debtors inherited the property more than 180 days after the petition date § 541(a)(5)(A) did not apply).
40	*Id.* at 138-39.
41	*Bobroff v. Continental Bank (In re Bobroff)*, 766 F.2d 797, 803 (3d Cir. 1985).
42	*Id.* at 803.
43	*United States v. Missouri Pac. R.R. Co.*, 278 U.S. 269, 278 (1929) (citing multiple sources).
44	*Warren v. Peterson*, 298 B.R. 322, 326 n.1 (N.D. Ill. 2003).
45	*Bargeski v. Rose*, No. RWT 05-0962, 2006 WL 1238742 (D. Md. Mar. 31, 2006) (unpublished), *aff'd*, 242 F. App'x 945 (4th Cir. 2007); *Pisculli v. T.S. Haulers, Inc. (In re Pisculli)*, 426 B.R. 52, 63 (E.D.N.Y. 2010), *aff'd*, 408 F. App'x 477 (2d Cir. 2011); *In re Sparks*, 379 B.R. 178 (Bankr. M.D. Fla. 2006); *In re Niles*, 342 B.R. 72 (Bankr. D. Ariz. 2006); *Warren v. Peterson*, 298 B.R. at 322; *In re Doherty*, 229 B.R. 461 (Bankr. E.D. Wash. 1999).
46	*Miller v. Comm'r of Internal Revenue*, 836 F.2d 1274, 1282 (10th Cir. 1988).
47	*Renewable Fuels Assoc. v. U.S. Envtl. Prot. Agency*, 948 F.3d 1206, 1243 (10th Cir. 2020) (quoting *Rubin v. Islamic Republic of Iran*, 138 S.Ct. 816, 824 (2018) ("A statute generally should be interpreted 'so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.' ").
48	11 U.S.C. § 348(f)(2).
49	*Harris v. Viegelahn*, 575 U.S. 510, 135 S.Ct. 1829, 1838 (2015).

50	*See United States Tr. v. Standiferd (In re Standiferd)*, No. 07-1076, 2008 WL 5273690, at *6 (Bankr. D.N.M. Dec. 17, 2008), *aff'd* 641 F.3d 1209 (10th Cir. 2011) (noting that postpetition appreciation in value becomes property of the bankruptcy estate under § 348(f)(2) only when the conversion to chapter 7 is in bad faith).
51	*Harris v. Viegelahn*, 135 S.Ct. at 1835.
52	H.R. Rep. No. 103-835, at 57 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 3340, 3366 (explaining a debtor that obtained $10,000 in equity by making $10,000 in mortgage payments could potentially lose property if a chapter 7 trustee pursued the equity upon conversion).
53	Turnover Order at 10, *in* Appellant's App. at 230 (discussing who—the debtor or the trustee—rightfully benefits from equity generated through renovation and market upticks).
54	S. Rep. 95-989, at 75-76 (1978) as reprinted in 1978 U.S.C.C.A.N. 5787, 5861-62.
55	*Mansell v. Carrol*, 379 F.2d 682, 684 (10th Cir. 1967). *See also In re Robinson*, 295 B.R. 147, 153 (10th Cir. BAP 2003); *In re Lampe*, 278 B.R. 205, 210 (10th Cir. BAP 2002), *aff'd*, 331 F.3d 750 (10th Cir. 2003).
56	Appellant's Br. 11-13.
57	Turnover Order at 11, *in* Appellant's App. at 231.

Faculty

Hon. Martin R. Barash is a U.S. Bankruptcy Judge for the Central District of California in Woodland Hills and Santa Barbara, sworn in on March 26, 2015. He brings more than 20 years of legal experience to the bench. Prior to his appointment, Judge Barash had been a partner at Klee, Tuchin, Bogdanoff & Stern LLP in Los Angeles since 2001, where he counseled parties in chapter 11 cases and litigated chapter 7 and chapter 11 bankruptcy cases. He first joined the firm as an associate in 1999. Earlier in his career, Judge Barash worked as an associate of Stutman, Treister & Glatt P.C. in Los Angeles. He also has served as an adjunct professor of law at California State University, Northridge. Following law school, Judge Barash clerked for Hon. Procter R. Hug, Jr. of the U.S. Court of Appeals for the Ninth Circuit from 1992-93. He is a former ABI Board member, for which he served on its Education Committee, and he is a former member of the Board of Governors of the Financial Lawyers Conference. In addition, he is a judicial director of the Los Angeles Bankruptcy Forum and a frequent panelist and lecturer on bankruptcy law. Judge Barash received his A.B. *magna cum laude* in 1989 from Princeton University and his J.D. in 1992 from the UCLA School of Law, where he served as member, editor, business manager and symposium editor of the *UCLA Law Review*.

Hon. Trish M. Brown is a U.S. Bankruptcy Judge for the District of Oregon in Portland, appointed by the Ninth Circuit Court of Appeals on Dec. 3, 1999, and reappointed on Dec. 3, 2014. She previously was a shareholder with Farleigh, Wada & Witt, P.C. and a partner with Lane, Powell, Spears, Lubersky LLP. While in private practice, Judge Brown focused on bankruptcy and corporate reorganization, representing primarily creditors in all types of bankruptcies, defending preference and other avoidance actions and pursuing nondischargeable debts for creditors; loan workouts and foreclosures; and real estate transactions, and she also acted as a mediator and arbitrator in all aspects of debtor/creditor, real estate and contract disputes. She is licensed to practice in Oregon, Washington and Virginia, and is Board Certified in Business Bankruptcy Law by the American Board of Certification. Judge Brown served as treasurer of the National Conference of Bankruptcy Judges from 2017-19 and is a member of the Oregon State Bar. She also has served as a Pro Bono Clinic speaker since 1997 and has given CARE (Credit Abuse Resistance Education) presentations. In addition, she has been an editor and author of *Oregon State Bar CLE on Bankruptcy* (1989) and Supplements (1992 and 1995). Judge Brown received her B.S. in 1978 from the University of Pennsylvania Wharton School of Business and her J.D. *cum laude* in 1981 from Washington and Lee University School of Law.

Hon. Scott C. Clarkson is a U.S. Bankruptcy Judge for the Central District of California in Santa Ana and Riverside, appointed on Jan. 20, 2011, and has also sat on the Ninth Circuit Bankruptcy Appellate Panel. Prior to his appointment, Judge Clarkson practiced bankruptcy law and bankruptcy litigation for more than 20 years in Los Angeles, and he served as chair of the Los Angeles County Bar Association's Commercial Law and Bankruptcy Section from 2008-09. He is a board member of the Orange County Federal Bar Association, and has lectured on ethics and civility for the annual Los Angeles Federal Bar Association Ethics Program. He was a member of the Virginia, District of Columbia and California bars. From 1977-82, Judge Clarkson was a legislative assistant to U.S. Congressman Harold L. Volkmer in Washington, D.C., and was assigned to the U.S. House of Representatives Judiciary Committee, where he was a direct observer of and participant in the creation of

the 1978 Bankruptcy Code in the House. He later clerked for Hon. William L. Hungate, U.S. District Judge for the Eastern District of Missouri. Judge Clarkson has also been an established documentary photographer in the U.S., Southeast and Central Asia, and South America for more than 20 years. He also traveled to Afghanistan, Pakistan and Kashmir in 2008-09, and Jordan and Israel in 2014, covering recent events in these regions of the world. Judge Clarkson received his undergraduate degree from Indiana University in Bloomington in 1979 and his J.D. from George Mason University School of Law in 1982.

Hon. Daniel P. Collins is a U.S. Bankruptcy Judge for the District of Arizona in Phoenix, appointed on Jan. 18, 2013. He served as chief judge from 2014-18. Previously, he was a shareholder with the law firm of Collins, May, Potenza, Baran & Gillespie, P.C. in downtown Phoenix, practicing primarily in the areas of bankruptcy, commercial litigation and commercial transactions. Judge Collins serves on the Ninth Circuit's Bankruptcy Education Committee, is the education chair for the National Conference of Bankruptcy Judges, will be NCBJ's President in 2022-23, is a member of ABI's Board of Directors, sits on ABI's Education Committee and Diversity Committee, is on the Board of the Phoenix Chapter of the Federal Bar Association, is a Fellow of the American College of Bankruptcy and is a member of the University of Arizona Law School's Board of Visitors. He also is a founding member of the Arizona Bankruptcy American Inn of Court. Judge Collins received both his B.S. in finance and accounting in 1980 and his J.D. in 1983 from the University of Arizona.

Hon. Natalie M. Cox is a U.S. Bankruptcy Judge for the District of Nevada in Las Vegas, sworn in on Jan. 27, 2020. She previously had served as an Assistant U.S. Trustee in the Office of the U.S. Trustee in Nashville, Tenn., since April 2019, overseeing chapter 7 and 11 cases and supervising chapter 7 trustees. Judge Cox also gained vital insight as a trial attorney in the Office of the U.S. Trustee's field office in Wilmington, Del., where she managed and litigated chapter 11 cases. It was while Judge Cox engaged in private practice in Las Vegas as an associate, then partner, at Kolesar & Leathan, Chtd., and as an associate at Jolley, Urga, Wirth, Woodbury & Standish, that she developed an intense interest in bankruptcy practice. Judge Cox reeived her Bachelor's degree *summa cum laude* from Austin Peay State University in Clarksville, Tenn., and her J.D. *cum laude* from the University of Nevada William S. Boyd School of Law.

Hon. Harlin DeWayne Hale is Chief U.S. Bankruptcy Judge for the Northern District of Texas in Dallas, appointed in November 2002. He previously worked at Strasburger & Price before opening a boutique firm, where he became well versed in bankruptcy law. Two years before his judicial appointment, Judge Hale was a regional partner in charge of the bankruptcy practice at Baker & McKenzie in Dallas. He is a member of the Texas, Louisiana, American and Dallas Bar Associations, the Dallas Bankruptcy Bar Association, and the National Conference of Bankruptcy Judges. Judge Hale received his undergraduate degree and J.D. from Louisiana State University, where he was a member of the Order of the Coif and an editor of its law review.

Hon. Mary Jo Heston is a U.S. Bankruptcy Judge for the Western District of Washington in Tacoma, appointed on Jan. 31, 2017. Previously, she was a shareholder at the Seattle law firm of Lane Powell PC, where her practice involved commercial litigation and transactional matters with an emphasis on business reorganizations, international insolvency and the acquisition of troubled businesses and assets. Between 1988 and 1993, Judge Heston served as the first Region 18 U.S. Trustee, overseeing

bankruptcy cases and fiduciaries in Washington, Oregon, Idaho, Alaska and Montana. She also is a former law clerk to a federal district court judge and a bankruptcy judge and a former estate administrator of the federal bankruptcy court. Judge Heston taught bankruptcy courses for more than 20 years at both Seattle University School of Law and University of Washington Law School. She is a 2001 Fellow of the American College of Bankruptcy and an active participant in both professional organizations and community service organizations, and she currently serves or has served in leadership positions for the National Conference of Bankruptcy Judges, ABI, INSOL International, the Washington State Bar Association's Debtor Creditor Section, the Turnaround Management Association, CARE and CENTS. Judge Heston is a frequent international, national and regional speaker and author on topics including international insolvency issues, creditors' rights issues, and commercial and consumer insolvency issues. Her recent community service efforts have focused on military and veterans' financial and bankruptcy-related issues through her service on the *Pro Bono* Committee of ABI's Veterans and Servicemembers Task Force. Judge Heston received her undergraduate degree *cum laude* from the University of Washington in 1975 and her J.D. *cum laude* from the Seattle University School of Law in 1980.

Hon. Christopher M. Klein is a U.S. Bankruptcy Judge for the Eastern District of California in Sacramento, where he has been a judge since 1988, and he was a member of the Bankruptcy Appellate Panel of the Ninth Circuit from 1998 until August 2008, serving as Chief Judge from 2007-08. He is admitted to the California, District of Columbia, Illinois and Massachusetts Bar Associations. After completing service in the U.S. Marine Corps as an artillery officer in Vietnam and judge advocate, Judge Klein was a trial attorney in the U.S. Department of Justice, in private practice with Cleary, Gottlieb, Steen & Hamilton, and deputy general counsel-litigation of the National Railroad Passenger Corporation. In 1988, he was appointed a U.S. Bankruptcy Judge for the Eastern District of California. He was appointed to the Bankruptcy Appellate Panel in 1998 and served for 10 years. From 2000-07, Judge Klein was a member of Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States and the Advisory Committee on the Federal Rules of Evidence. His bankruptcy-related publications include "Principles of Preclusion and Estoppel in Bankruptcy Cases," 79 *Am. Bankr. L.J.* 839 (2005); and "Bankruptcy Rules Made Easy (2001): A Guide to the Federal Rules of Civil Procedure that Apply in Bankruptcy," 75 *Am. Bankr. L.J.* 35 (2001). Judge Klein received his B.A. and M.A. from Brown and his M.B.A. and J.D. from the University of Chicago, where he was executive editor of its law review.

Hon. Paul Sala is a U.S. Bankruptcy Judge for the District of Arizona in Phoenix, appointed on July 1, 2014. Previously, he practiced bankruptcy law in Phoenix for 26 years, the last 15 of which with Allen, Sala & Bayne, PLC, which he co-founded in 1999. Judge Sala's legal practice focused on representing individuals and companies in nonbankruptcy workouts and bankruptcy reorganizations. He also represented unsecured creditors' committees in many high-profile Arizona cases, including Dewey Ranch Hockey (Phoenix Coyotes), the Baptist Foundation of Arizona, Popular Stores and Sun Valley Waterbeds. In addition, he represented trustees in chapter 7 and 11 cases and was appointed in numerous cases to serve as a chapter 11 trustee and as a post-confirmation plan administrator. Judge Sala is a member of the State Bar of Arizona and was active in bar association activities. He was also a member of the President's Circle of the National Association of Bankruptcy Trustees, was selected as a master in the Arizona Bankruptcy American Inn of Court, and was listed in *The Best Lawyers in America*, *Southwest Super Lawyers* and *Arizona's Finest Lawyers*. Judge Sala received his B.S. in 1984 and his J.D. in 1987 from the University of Utah.

Hon. David T. Thuma is a U.S. Bankruptcy Judge for the District of New Mexico in Albuquerque, sworn in on Aug. 14, 2012. He previously practiced law in a large Indianapolis firm for five years before moving to New Mexico, where he focused on bankruptcy law and commercial litigation between 1989 and 2012. Judge Thuma received his undergraduate degree from the University of Chicago in 1980 and his J.D. from Duke University in 1984; between college and law school, he worked briefly as a cowboy on a ranch near Mayer, Ariz.

Lindsi M. Weber is an attorney with The Burgess Law Group in Phoenix, where she helps resolve bankruptcy and financial restructuring issues on behalf of chapter 11 debtors, committees, secured creditors or parties to bankruptcy litigation. Active in the bankruptcy community, she is a past board member of the Maricopa County Bar Association Bankruptcy Section and past president of the NextGen Emerging Leaders Board of the Turnaround Management Association's Arizona Chapter. She also participated as a member of the National Conference of Bankruptcy Judges' Next Generation program in 2017 and was a member of the 2019 class of ABI's "40 Under 40" In addition to her time in the bankruptcy courts, Ms. Weber also assists clients with complex, commercial, probate and business litigation matters in both state and federal courts. She has been a Fellow of the American Bar Foundation since 2020, is rated AV-Preeminent by Martindale-Hubbell, and is listed in *The Best Lawyers in America* for Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law (2019-21) and in *Southwest Super Lawyers* for 2020. In addition, she received the "Turnaround of the Year Award" by the Turnaround Management Association's Arizona Chapter in 2012 and the Matheson Service Award in 2007, and she is on the *Pro Bono* Honor Roll with the U.S. Bankruptcy Court for the District of Arizona. Mr. Weber received her B.A. in business management with honors in 2001 from the University of Puget Sound and her J.D. *magna cum laude* from Arizona State University's Sandra Day O'Connor College of Law in 2007, where she was admitted to the Order of the Barristers and Order of the Coif, was a Pedrick Scholar, was a National Environmental Moot Court member and received the Editor's Award in 2007 for her work on the *Arizona State University Law Journal*.