Educational Materials

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CHAPTER 13 EXIT STRATEGIES

National Conference of Bankruptcy Judges

Chapter 13 Exit Strategies

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Options and Alternatives When the Chapter 13 Debtor Cannot Defeat a Motion to Dismiss

Chief Judge Rebecca Connelly

When the chapter 13 debtor cannot defend a motion to dismiss, he may have alternatives to simply consenting to dismissal. If he cannot cure a default in plan payments, cannot complete his plan, and cannot modify his plan to successfully complete a chapter 13 plan, he may want to consider the following.

CONVERSION TO CHAPTER 7

BENEFITS TO A DEBTOR

Discharge. The debtor may be able to obtain a discharge even if he is not current on domestic support obligations (DSOs), or his mortgage, or did not complete his chapter 13 plan payments. Although these facts may affect his ability to receive a chapter 13 discharge, they do not affect his eligibility for a chapter 7 discharge. *See* 11 U.S.C. §§ 727; 1328.

Automatic Stay. If the case is dismissed, the automatic stay of section 362 will no longer provide protection for the debtor. 11 U.S.C. § 362(c)(2)(B). By contrast, if the case is converted, the stay remains in effect until relieved, or until the debtor is discharged and the property is no longer property of the estate. 11 U.S.C. § 362(c).

Post-petition debts may be discharged. Unless the conversion is in bad faith (see below), claims against the debtor that arose after the order for relief in the chapter 13 case but before conversion [other than claims under section 503(b)] are treated as if the claim had arisen immediately before the date of filing the petition. 11 U.S.C. § 348(d); *see also Rosenberg v. Corio (In re Corio)*, 371 Fed. Appx. 352, 356 (3d Cir. 2010) (affirming decision avoiding a judicial lien which arose from a post-petition claim because once the debtor converted from chapter 13 to chapter 7 the post-petition claim was treated as a pre-petition claim). In this

manner, the debtor may discharge in the converted chapter 7 case most debts that he incurred post-petition while he was in chapter 13.

Automatic stay available if new bankruptcy case filed within a year of the discharged chapter 7. If the debtor files a new case within a year of the dismissal of one or more prior cases, the automatic stay is limited or may not be available. 11 U.S.C. §§ 362(c)(3), (4). By contrast, these limitations do not apply if the debtor converts and obtains a discharge. Put differently, the Code does not restrict the automatic stay if the debtor files a new case within a year of a discharge in a previous case (albeit the Code *does* limit the availability of a discharge in the new case filed within a year of a prior discharge).

Chapter 20 available. The debtor is eligible to file a new chapter 13 following discharge in the chapter 7 (colloquially called "chapter 20"). If the debtor converts to chapter 7, he may be able to discharge all of his personal liability and subsequently file a new chapter 13 case for the purpose of restructuring his secured debt. *Johnson v. Home State Bank*, 501 U.S. 78 (1991); *Branigan v. Bateman (In re Bateman)*, 515 F.3d 272 (4th Cir. 2008) (finding that chapter 13 debtors could propose a plan in good faith even if ineligible for a discharge based on a prior discharge). The terms of the new chapter 13 case may be more feasible for a debtor who was unable to complete a previous chapter 13 plan dealing with considerably more debt. On the other hand, these cases may be subject to greater scrutiny. *See, e.g.*, *T.D. Bank v. Davis (In re Davis)*, 716 F.3d 331, 338 (4th Cir. 2013) ("[B]ankruptcy courts are bound to carefully scrutinize filings for good faith and dismiss cases where the debtor attempts to use a Chapter 20 procedure solely to strip off a lien."). The chapter 20 debtor may not be eligible for a chapter 13 discharge. *See* 11 U.S.C. § 1328(f).

Post-petition earnings not property of the estate; *and if more than 180 days has passed after petition date, inheritance and other receipts may not be property of the estate*. If the debtor converts to chapter 7, the property of his chapter 7 estate is limited to his assets as of his petition date or within 180 days of the petition date. 11 U.S.C. § 541. The petition date does not change upon conversion. 11 U.S.C. § 348. On the one hand, if the debtor has considerable equity or non-exempt assets as of the petition date, the conversion will subject the debtor to liquidation of these non-exempt assets. On the other hand, if his assets as of the petition date are of inconsequential value, he may avoid liquidation of such assets. If the debtor already paid an amount equal or greater to the equity in the non-exempt assets to his unsecured creditors while in chapter 13, he may defeat a turnover action by a chapter 7 trustee. *In re Sparks*, 379 B.R. 178 (Bankr. M.D. Fla. 2006). More important to the debtor may be that his post-petition earnings and receipts, along with inheritances more than 180 days from the petition date, are excluded from liquidation in the chapter 7 case (unless the conversion was in bad faith). 11 U.S.C. 348(f); *see, e.g.*, *In re Lien*, 527 B.R. 1 (Bankr. D. Minn. 2015) (holding that because the debtors acted in bad faith in converting their case from chapter 13 to chapter 7, the debtors had to turn over their non-exempt property to the chapter 7 trustee, including post-petition funds from the male debtor's post-petition inheritance). Rule 1019 permits a new deadline for objecting to exemptions in a case converted to chapter 7, unless the case is converted more than one year after the entry of the first order confirming a plan, or the case was previously pending in chapter 7 and the time to object to a claimed exemption had expired in the original chapter 7. Rule 1019 refers to Rule 4003(b) for the objection time period. Rule 4003(b) provides that a party in interest may file an objection to the debtor's claim of exemption within 30 days after "the"

meeting of creditors held under section 341(a) is concluded, or within 30 days after any amendment to the list or supplemental schedule is filed, *whichever is later*.

If over-median, the debtor may be able to successfully defend a section 707 action. According to most courts, conversion does not insulate a debtor from section 707 litigation. *See discussion in In re Layton*, 480 B.R. 392, 394–97 (Bankr. M.D. Fla. 2012); *In re Reece*, 498 B.R. 72 (Bankr. W.D. Va. 2013). As a practical matter, the debtor's inability to perform in chapter 13 may be indicative of circumstances that may rebut or respond to the section 707 action.

Expedited process to case closure. If the debtor converts to chapter 7, he may be able to achieve discharge and the case may be closed within months of conversion. The debtor may be able to obtain new credit if needed once the case is closed.

BENEFITS FOR CREDITORS

Opportunity to object to dischargebility or object to general discharge. After conversion, the Clerk will provide notice of a section 341 meeting in the chapter 7 case. Creditors will be provided a new deadline to object to the dischargeability of a particular debt or object to the general discharge based on the 341 meeting date in the chapter 7 case. Fed. R. Bankr. P. 2002, 4004, 4007.

Note: The time for "the" meeting of creditors is established in Rule 2003(a) as within a certain range of days following the order for relief. According to section 348, the order of conversion is an order for relief in the chapter 7 case, "but . . . does not affect a change in the date of . . . the order for relief." Query: is a new meeting of creditors in the converted case required by statute? The requirement may be implicit because holding the meeting may be necessary in order for the chapter 7 trustee to carry out his duties under section 704, and correspondingly the debtor to carry out his duties set forth in Rule 4002.

Liquidation and opportunity for dividend. If the case converts to chapter 7, the debtor's non-exempt assets are subject to liquidation by a trustee. The chapter 7 case administration may occur quickly. Only creditors holding allowed unsecured claims may participate in the liquidation proceeds. On the other hand, if the case is dismissed, the creditor may have to pursue state law remedies and may have to compete with all other creditors in the "race to the courthouse."

New time period to file claim. A proof of claim filed in the chapter 13 case is deemed filed in the chapter 7 case. Fed. R. Bankr. P. 1019(3). Yet, if the chapter 7 trustee notices the case as an asset case, the creditor will have a new time period to file a claim in the converted case. Even creditors who did not file claims in the original chapter 13 case may file claims in the converted case. Note: If the debtor has equity in property owned as tenants by the entirety and has some joint creditors, the chapter 7 trustee may encourage these joint creditors to file claims, even if they had not filed claims in the chapter 13 case.

Values of property and allowed secured claims in the converted chapter 7 not subject to cramdown. Once the case is converted to chapter 7 from chapter 13, the valuations of property and of allowed secured claims in the chapter 13 case shall *not* apply in the chapter 7 case. 11 U.S.C. § 348(f)(1)(B). If the debtor seeks to redeem property in the chapter 7, he may not be able to credit payments made during the chapter 13 case or rely on the values from the chapter 13 case.

Longer time frame between discharges. If the debtor's case is dismissed, he will be eligible to obtain a discharge in a new case. If the debtor remains in chapter 13 and obtains a discharge, he will be ineligible for another chapter 13 discharge in a case filed within two years of the filing of his prior case, and will be ineligible for a chapter 7 discharge in a case filed

within six years of the filing of his prior case unless he repaid 100% to allowed unsecured claims or 70% to such claims, filed the plan in good faith and represented his best efforts. By contrast, if he converts to chapter 7 and obtains a discharge, he will be ineligible for another chapter 7 discharge for a period of 8 years and for a chapter 13 discharge for a period of 4 years from filing of the previous case.

POTENTIAL TRAPS AND CHALLENGES FOR DEBTORS

Eligibility for chapter 7 discharge. Before conversion, counsel should verify that the debtor has not received a prior chapter 7 discharge within previous 8 years. 11 U.S.C. § 727(a)(8).

Complete debtor education. Counsel for the debtor should verify whether the debtor completed a personal financial management course while in chapter 13 and if so must file the certificate of completion with the court. If the debtor has not completed the financial management education requirement, the debtor must do so promptly to ensure eligibility for discharge. 11 U.S.C. § 727(a)(11); Fed. R. Bankr. P. 1007(c) (the debtor must file the statement of completion within 60 days after the first date set for the meeting of creditors under § 341).

File any reaffirmation agreements needed. In the converted chapter 7 case, the debtor must file a statement of intention with respect to all secured debts and must perform the intention. 11 U.S.C. §§ 362(h), 521. If the debtor intends to reaffirm, the reaffirmation agreements must be timely filed. 11 U.S.C. § 524.

Debtor will need to file new schedules and certain statements. Upon conversion to chapter 7, an order for relief in the chapter 7 is entered. Unless ordered otherwise:

- Within 14 days of the order for relief in the chapter 7, the debtor will need to file any statements, schedules or other documents required by 11 U.S.C. § 521

that had not been filed in his case prior to conversion. Fed. R. Bankr. P. 1019(1)(A).

- Within 30 days of the order for conversion, the debtor must file his statement of intention. Fed. R. Bankr. P. 1019(1)(B).

- Not later than 14 days after conversion of the case, the debtor shall file a schedule of unpaid debts incurred after the filing of the petition and before conversion of the case, including the name and address of each holder of a claim, and if the case is converted post confirmation, a schedule of executory contracts and unexpired leases entered into or assumed after the filing of the petition but before conversion. Fed. R. Bankr. P. 1019(5)(B), (C).

Debtor may be subject to discharge litigation. If the debtor has engaged in any of the conduct described in subsections 727(a)(2)–(7), he may be subject to a complaint seeking to deny his general discharge. There is no corresponding or parallel remedy in chapter 13 for such conduct.

Relief from stay. The debtor may be subject to relief from stay litigation based on the default in payments during the chapter 13 case. Yet, the debtor may be without standing to defend the estate's interest in the stay litigation because it is the chapter 7 trustee who represents the estate's interest. 11 U.S.C. §§ 541, 704.

Filing fee for conversion. The party requesting conversion must pay a filing fee for the conversion. In some circumstances when the trustee moves for conversion, and if the trustee has no funds on hand for the fee, the filing fee may be waived.

Debtor may need to appear at a new 341 meeting. After conversion, a chapter 7 trustee will be appointed to the case and must conduct an examination under 11 U.S.C. § 341 ("[W]ithin a reasonable period of time after the order for relief in a case under this title, the United States Trustee shall convene a . . . meeting of creditors."). The debtor must appear and must comply with document requests and identification requests of the trustee. 11 U.S.C. §§ 341, 521. Query: if the debtor appeared at the original meeting of creditors following the original order for relief,

may he be excused from appearance at the meeting of creditors following the order for relief in the converted case?

Debtor may be subject to avoidance actions by trustee, turn over actions by trustee, and document demands by trustee. In the converted case, the chapter 7 trustee may seek to avoid transfers that occurred prior to or during the bankruptcy. The trustee will request information and documents, and may initiate turn over actions if appropriate to liquidate non-exempt assets. Failure to comply may subject the debtor to discharge litigation or other consequences. 11 U.S.C. §§ 727(a)(4)(D), (5).

Trustee will liquidate non-exempt assets. 11 U.S.C. § 704. In *In re Goins*, 539 B.R. 510 (Bankr. E.D. Va. 2015), Judge Kenney held that the debtor, who converted from chapter 13 to chapter 7, was not entitled to the appreciation in his property that accrued during the course of his chapter 13 and that the trustee was entitled to sell the property.

Tax debt may be subject to interest and penalties for the period that debtor had been in chapter 13 plus time in chapter 7. Unlike chapter 13, the debtor may be liable for post-petition statutory interest and penalties for some pre-petition tax debts. 11 U.S.C. § 523(a)(1).

Debtor may not be able to re-convert or voluntarily dismiss. After conversion from chapter 13, the debtor has no statutory right to voluntarily dismiss or re-convert to chapter 13. 11 U.S.C. § 1307(b). The debtor may request such relief after notice and hearing. 11 U.S.C. § 1307(b); Fed. R. Bankr. P. 1017(f)(2). The court may consider the debtor's conduct in the case along with the best interests of creditors and the estate in deciding the request. *Harris v. Boston Private Bank & Trust Co. (In re Harris)*, 497 B.R. 652 (Bankr. D. Mass. 2013) (holding that the debtor was not entitled to reconversion because her proposed chapter 13 plan was unlikely to succeed); *Advanced Control Sols., Inc. v. Justice*, 639 F.3d 838 (8th Cir. 2011) (holding

reconversion to chapter 13 was not an abuse of discretion with debtor's consent and in case which debtor did not rebut presumption of abuse of chapter 7); *In re White*, 542 B.R. 762 (Bankr. E.D. Va. 2015) (holding that conversion to chapter 7, as opposed to dismissal of the case, was in the best interest of the creditors); *Brown v. Billingslea (In re Brown)*, BAP No. SC-14-1388, 2015 WL 6470940 (B.A.P. 9th Cir. Oct. 26, 2015) (same).

Chapter 7 trustee's failure to assume leases may affect debtor's interest in the lease or ability to assume or assign. If the debtor was a party to an unexpired lease or executory contract, even if he assumed such lease or contract under his chapter 13 plan, upon conversion, the unexpired lease or executory contract is deemed rejected unless the chapter 7 trustee (not the debtor) assumes the lease or contract within 60 days from the order for relief. 11 U.S.C. § 365(d)(1). Once the lease is deemed rejected, the bankruptcy court may not be able to revive it, even if the chapter 7 debtor had performed all of the obligations under the lease, including rent, and even if the performance was accepted by the lessor. *In re Bane*, 228 B.R. 835 (Bankr. W.D. Va. 1998). The chapter 7 trustee has standing to assume or reject and absent compelling reason to disapprove trustee's business decision to reject unexpired lease, rejection will be approved. *In re Slatwer*, No. 14-34024, 2015 WL 300520 (Bankr. N.D. Ohio Jan. 22, 2015) (debtor lacked standing to assume lease in chapter 7 case, after time period expired for trustee to assume, and court granted relief from stay to landlord); *In re Gatea*, 227 B.R. 695 (Bankr. S.D. Ind. 1997) (trustee's rejection of unexpired lease for debtor's hair salon operation approved and debtor had no standing to assume such lease); *but see Williams v. Ford Motor Credit Co*., No. 15-cv-14201, 2016 WL 2731191 (E.D. Mich. May 11, 2016) (debtor could assume personal property lease and was not required to also reaffirm; assumption enforceable post-bankruptcy even in absence of reaffirmation agreement). Failure to assume the lease may terminate the same

and eliminate the debtor's ability to assume or assign. 11 U.S.C. § 365(d)(1). Failure to assume an executory contract constitutes a breach. Section 365(g)(1) provides that rejection of an executory contract, other than as provided for in 365(h)(2) and (i)(2), constitutes breach of contract and not necessarily termination; therefore, the debtor may become liable for breach of contracts not assumed. *See Square Ring, Inc. v. Soszynski (In re Soszynski)*, 508 B.R. 693 (Bankr. N.D. Ill. 2014) ("[T]he effect of § 365(d)(1) is to breach but not terminate the agreement, leaving for determination in a state court under the applicable state law whether or not any remedy may be sought by [the non-debtor party] for breach . . . ." (citing *Top Rank, Inc. v. Ortiz (In re Ortiz)*, 400 B.R. 755 (C.D. Cal. 2009))). On the other hand, if the trustee abandons his interest the debtor may be able to assume. *See* 11 U.S.C. § 365(p)(2).

Liability on property abandoned by the chapter 7 trustee. A debtor may not force a creditor to foreclose, or accept deed in lieu, on abandoned real property, which means that a debtor may remain subject to taxes and ownership responsibilities. Some courts, however, may fashion equitable relief to free a debtor from certain responsibilities. *See In re Pigg*, 453 B.R. 728, 735 (Bankr. M.D. Tenn. 2011) (finding that "[e]quity require[d] that the court prevent the debtor's fresh start from being completely eradicated" and permitting sale to proceed to pay off junior liens in reopened case to relieve debtor of nondischargeable HOA fees).

Bad faith conversions. If the court determines the debtor converted to chapter 7 in bad faith, then the property of the estate may be determined as of conversion date. 11 U.S.C. § 348(f)(2); *see Sherman v. Wal-Mart Assocs., Inc.*, Civ. No. 3:14-CV-04201, 2016 WL 1669019 (N.D. Tex. Apr. 25, 2016) ("The only circumstance that would require the inclusion of [the debtor's] post-petition claim in the bankruptcy estate is if [the debtor] converted the case in bad faith.").

POTENTIAL TRAPS AND CHALLENGES FOR CREDITORS:

Stay litigation may be affected by chapter 7 trustee. If a creditor has not obtained relief from stay before the case converted to chapter 7, the creditor must make the chapter 7 trustee a party to any relief from stay litigation. The chapter 7 trustee may oppose stay relief and may be able to successfully defend the stay litigation notwithstanding any default, if the trustee can show equity in the collateral.

May be subject to avoidance and recovery actions by a chapter 7 trustee. Creditors may be subject to avoidance actions based on the trustee's powers. 11 U.S.C. §§ 544, 545, 547, 548, and 550.

May need to file a new proof of claim (know local practice). In some jurisdictions, creditors are expected to file a new proof of claim if the chapter 7 trustee serves an asset notice.

Administrative and priority claims may be higher in chapter 7 than chapter 13, or than outside of bankruptcy.

INVOLUNTARY CONVERSION

May a court *sua sponte* convert a chapter 13 case to chapter 7?

A "party in interest" or the United States Trustee may move to convert a chapter 13 case to a case under chapter 7 "for cause." 11 U.S.C. § 1307(c). The court may only convert on motion of a party in interest or the United States Trustee "after notice and hearing." *Id.* The movant must show "cause." *In re White*, 542 B.R. 762, 771 (Bankr. E.D. Va. 2015). Generally, cause is based on a totality of circumstances. *See, e.g.*, *id.*; *In re Myers*, 491 F.3d 120, 125 (3d Cir. 2007); *Alt v. United States (In re Alt)*, 305 F.3d 413, 419–20 (6th Cir. 2002); *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219, 1224 (9th Cir. 1999); *Gier v. Farmers State Bank of Lucas (In re Gier)*, 986 F. 2d 1326, 1329 (10th Cir. 1993); *In re Love*, 957 F.2d 1350, 1355 (7th Cir. 1992),

Once a court has determined cause, the court may either dismiss or convert "whichever is in the best interests of creditors." 11 U.S.C. § 1307(c). As the court in *In re White* explains, "[t]he court is not required by § 1307(c) to weigh the interests of creditors in its cause determination analysis. The best interest of creditors is considered by the Court only after cause has been established. The Court must weigh what is in the best interest of creditors in deciding between conversion and dismissal of the case." 542 B.R. at 772; *see In re Nelson*, 343 B.R. 671 (B.A.P. 9th Cir. 2006) (using a two-step analysis: first determine "cause" and then weigh the alternatives of conversion or dismissal based on the interests of creditors and the estate).

When is conversion in the best interest of creditors and the estate?

In *Brown v. Billingslea (In re Brown)*, BAP No. SC-14-1388, 2015 WL 6470940 (B.A.P. 9th Cir. Oct. 26, 2015), the court determined that conversion to chapter 7 was appropriate after the debtor concealed and then gave away property of the estate because conversion would result in the appointment of a chapter 7 trustee who would have standing to assert avoiding powers against the debtor and transferees.

In *In re Chabot*, 411 B.R. 685 (Bankr. D. Montana 2009), "the Trustee and U.S. Trustee [sought] conversion to Chapter 7 and not dismissal, contending that it is in the best interests of creditors for a trustee in Chapter 7 to be able to investigate the Debtor's financial affairs and possibly pay creditors." The court found that it was "in the best interests of creditors to convert the case to Chapter 7 in order to prevent abuse of the bankruptcy process by this Debtor, by retaining jurisdiction in order to compel the Debtor's compliance, and to prevent the Debtor from filing another bankruptcy petition and invoking another automatic stay to frustrate a legitimate secured creditor's efforts to enforce its rights under a deed of trust."

May a debtor voluntarily dismiss in the face of a motion to convert for cause?

In *In re Fisher*, Case No. 14-61076, 2015 WL 1263354 (Bankr. W.D Va. Mar. 2015), the debtor voluntarily moved to dismiss his case, which was not previously converted, pursuant to § 1307(b). Immediately after the debtor's motion, a creditor filed a motion to convert the case to a case under chapter 7 based on alleged bad faith conduct. The court held that the debtor was entitled to dismiss his case despite the motion to convert. The court, however, barred the debtor from refiling bankruptcy for 180 days. *See also In re Mills*, 539 B.R. 879 (Bankr. D. Kan. 2015) (concurring with *Fisher* and holding that the debtor's right to dismiss was absolute even though a motion to convert was pending).

In *In re Brown*, 547 B.R. 846 (Bankr. S.D. Cal. 2016), however, the court held that the right to dismiss a chapter 13 case, which had not been previously converted, pursuant to § 1307(b) was not absolute when a motion to convert was pending. The court determined that the absolute right only extends to good faith debtors. If a debtor acts in bad faith, the right to dismiss is not absolute and the court will determine "how the case is to proceed, if at all, in the interests of the creditors rather than of the debtor."

HARDSHIP DISCHARGE

After confirmation of the plan and after notice and a hearing, the court may grant a hardship discharge pursuant to section 1328(b) to a debtor, who has not completed payments under the plan, *only* if:

- The debtor failed to complete plan payments because of "circumstances for which the debtor should not justly be held accountable." 11 U.S.C. § 1328(b)(1).
- The value of property actually distributed under the plan to on account of allowed unsecured claims is not less than the amount that would be paid on such claims if the estate would have been liquidated under chapter 7. 11 U.S.C. § 1328(b)(2); *see also In re Harrison*, Case No. 96-36511-T, 1999 Bankr.

LEXIS 1830 (Bankr. E.D. Va. July 30, 1999) (denying hardship discharge for failure to comply with 11 U.S.C. § 1328(b)(2)).

- Modification of the plan under section 1329 is not practicable. 11 U.S.C. § 1328(b)(3).
- The debtor has not received either (i) a discharge in a case filed under chapter 13 during the 2-year period preceding the date of the order for relief in the later case or (ii) a discharge in a case filed under chapter 7, 11, or 12 during the 4-year period preceding the date of the order for relief in the later case. 11 U.S.C. § 1328(f).
- The debtor has completed the post-petition financial management education course. 11 U.S.C. § 1328(g).

The burden is on the debtor to prove the elements to qualify for hardship discharge. This will require an evidentiary hearing. *In re Stockton*, No. 04-00792 (Bankr. W.D. Va. Mar. 8, 2007) (Krumm, J.) (denying a hardship discharge when the debtor could not show modification of the plan had been attempted).

Benefits over conversion to chapter 7. The debtor's modification of a secured debt under the plan will survive with the hardship discharge but would not be effective upon conversion to chapter 7. 11 U.S.C. § 1325(a)(5)(B)(i)(I). After obtaining a hardship discharge, the debtor will be eligible for another chapter 13 discharge in a case filed within two years of the first case or for a chapter 7 discharge within six years of the first case, as opposed to the four or eight year period, respectively, if the discharge was obtained in chapter 7. Further, the debtor's nonexempt assets are not subject to liquidation in seeking a hardship discharge in contrast to the potential turnover actions by a chapter 7 trustee upon conversion.

When conversion may be preferable. The hardship discharge is more limited than a general discharge under chapter 13. *See, e.g.*, *Anderson v. IRS (In re Anderson)*, 228 B.R. 844 (Bankr. W.D. Va. 1998) (hardship discharge does not discharge debtor from unpaid withholding taxes, regardless of whether the IRS filed timely proof of claim). A chapter 13 discharge (general or hardship) does not discharge the debtor of post-petition debt. Even if the holder of a

post-petition claim files a claim pursuant to § 1305(a)(2), the chapter 13 discharge does not discharge the debtor of such consumer debt filed under § 1305(a)(2) if prior approval by the trustee of the debtor incurring such debt was practicable and not obtained. 11 U.S.C. § 1328(d). Conversion to chapter 7 may allow the debtor to discharge more post-petition debt than he would be able to discharge through a chapter 13 discharge. Therefore, if the debtor has incurred substantial post-petition debt, conversion may be more appropriate for the debtor.

CLOSING WITHOUT DISCHARGE

Debtors who are not eligible for chapter 13 discharge are eligible to *file* chapter 13. *Branigan v. Bateman (In re Bateman)*, 515 F.3d 272, 281 (4th Cir. 2008). Ineligibility for discharge is not by itself grounds to deny confirmation of a chapter 13 plan. *Id.* at 283 ("The availability of a discharge is only one factor relevant in considering whether a plan was proposed in bad faith, and that factor standing alone is insufficient to support a finding of bad faith."). Thus a debtor may proceed through chapter 13 but not obtain a discharge.

A debtor may not be eligible for chapter 13 discharge if:

- The debtor failed to complete "all payments under the plan." 11 U.S.C. § 1328(a); *see also In re Evans*, 543 B.R. 213 (Bankr. E.D. Va. 2016).
- The debtor failed to make all domestic support obligation payments which the debtor was required to pay by judicial or administrative order or by statute. 11 U.S.C. § 1328(a).
- The debtor received a discharge in a case filed under chapter 13 during the 2-year period preceding the date of the order for relief in the later case or received a discharge in a case filed under chapter 7, 11, or 12 during the 4-year period preceding the date of the order for relief in the later case. 11 U.S.C. § 1328(f).
- The debtor failed to complete post-petition financial management education. 11 U.S.C. § 1328(g).

The discharge may be delayed if the court finds that § 522(q)(1) is applicable to the debtor and there is pending any proceeding in which the debtor may be found guilty of a felony

of the kind described in § 522(q)(1)(A) or liable for a debt of the kind described in § 522(q)(1)(B). 11 U.S.C. § 1328(h).

If the debtor fails to complete plan payments, he is not eligible for a chapter 13 discharge. If the debtor is not eligible for discharge due to failure to complete plan payments, may the case be "closed without discharge"?

Section 350 permits closing a bankruptcy case after "an estate is fully administered." For this reason, one court recently determined that a case cannot be "closed without discharge" under section 350 if the estate was not "fully administered." *In re Evans*, 543 B.R. 213, 235 n.19 (Bankr. E.D. Va. 2016) ("[W]here all of the required payments under the plan were not made, the condition of case closure, established by 11 U.S.C. § 350, that this case has been 'fully administered,' is unmet."). Thus if the debtor failed to complete plan payments, it follows that the estate has not been fully administered and the appropriate remedy is dismissal or conversion rather than closing the case without discharge.

On the other hand, if the trustee has received all the payments to be made to the trustee but the debtor is ineligible for a chapter 13 discharge, either because of his failure to make his direct payments to secured creditors or because he otherwise is not eligible pursuant to § 1328, nonetheless it may be permissible for a court to permit the entry of an order, or authorize a procedure, that denies entry of a chapter 13 discharge and closes the chapter 13 case and releases the chapter 13 trustee. *See, e.g.*, *In re Okosisi*, 451 B.R. 90, 99 (Bankr. D. Nev. 2011) ("At the successful completion of all payments in a no-discharge chapter 13 case, no order discharging the debtor will be entered because the debtor is not eligible for a discharge. 11 U.S.C. § 1328(f). The court finds that in this situation the proper result is for the court to close the case without discharge. 11 U.S.C. § 350(a) . . . .").

If, however, the debtor failed to make all of his payments to the chapter 13 trustee, it is not clear that the chapter 13 trustee would be permitted to request closure of the case under section 350, or that the debtor may request "closure without discharge," without the support of the trustee. At this time, no authority exists to compel a trustee to simply close the case based on an "uncompleted plan" by reporting the case as "plan uncompleted; case to be closed without discharge." Unless the debtor has made all plan payments *to the trustee*, the debtor instead may be left with the options to pursue dismissal, conversion or hardship discharge.

Conversion	Dismissal	Hardship discharge
Filing fee	No fee	No fee
Subject to discharge litigation	No discharge litigation; dismissal may be subject to restrictions	Not subject to conditions or restrictions due to conduct
Automatic stay in place but may face stay litigation	No automatic stay	Automatic stay in place through discharge with possible stay litigation
Longer time period before eligible for discharge under chapter 7 in future case (8 years)	Does not affect eligibility for discharge	Eligible for chapter 7 discharge after 6 years
Need to complete post-petition financial management course	Post-petition financial management course if completed is not valid in future case	Must complete financial management course
Automatic stay in place in future case filed within one year	Automatic stay may be temporary or not in place at all in future case if filed within one year of dismissal	Automatic stay in place in future case filed within one year
Assets subject to liquidation – except most post-petition assets [*see* 11 U.S.C. § 541]	No liquidation by trustee	No liquidation by trustee
Post-petition debts may be discharged	Post-petition debts not discharged	Post-petition debts not discharged
SOL tolled	SOL not tolled (tolling ceases)	SOL tolled
No co-debtor stay	No stay at all	Co-debtor stay available
No opportunity to cure lease arrearages or mortgage arrearages absent consent of creditor	No opportunity to cure lease arrearages or mortgage arrearages absent consent of creditor	Cure and reinstatement available
Leases may terminate	Leases may terminate	Leases may be assumed
No opportunity for separate classification of unsecured claims	No opportunity for separate classification of unsecured claims	Unsecured claims may be separately classified
May adversely affect ability to accomplish mortgage modification	Ability to obtain Mortgage modification should be unaffected	Ability to obtain Mortgage modification should be unaffected

May not be able to modify secured debts (limited to reaffirmation, redemption or surrender option)	Not able to modify secured debts absent consent of secured creditor	May be able to modify secured debts
Subject to further examination under oath (new meeting of creditors under section 341) and must turn over tax returns and pay stubs	No 341 meeting requirement	No new 341 meeting occurs for hardship discharge
Cannot transfer property; ownership passes to trustee unless exempted or abandoned	Transfers may occur	Generally cannot transfer property outside ordinary course of business absent court permission (check local requirements); section 363
Few if any bankruptcy court appearances	No bankruptcy court appearances	Hardship discharge will require appearance at evidentiary hearing
Personal Discharge	No Personal Discharge	Personal Discharge

Chapter 13 Exit Strategies: Voluntary Dismissal and Refiling Options

Edward Boltz

1. Voluntary Dismissal - Absolute or Not?

11 U.S.C. § 1307(a) allows that "[t]he debtor may convert a case under this chapter to a case under chapter 7 of this title at any time. Any waiver of the right to convert under this subsection is unenforceable." This had long been held to provide debtors with an absolute right to dismiss a chapter 13 case.

This absolute right began to erode following *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 127 S. Ct. 1105, 166 L. Ed. 2d 956 (2007), where the Supreme Court held that a chapter 7 debtor's right to convert to chapter 13 was not absolute, as 11 U.S.C. § 1307(c) allowed dismissal of a case filed in bad faith and 11 U.S.C. § 706(d) only allowed conversion if a debtor was eligible for such chapter. Coupled with the equitable powers of the bankruptcy court under 11 U.S.C. § 105(a), denial of a bad faith conversion was permissible to avoid the "procedural anomaly" of converting a Chapter 7 case to a Chapter 13 case even though it "will thereafter be dismissed or immediately returned to Chapter 7." *Id.* at 368.

In the wake of *Marrama*, a line of cases, led by *Rosson v. Fitzgerald (In re Rosson)*, 545 F.3d 764 (9th Cir. 2008) and *Jacobsen v. Moser (In re Jacobsen)*, 609 F.3d 647 (5th Cir. 2010), have held "that even otherwise unqualified rights in the debtor are subject to limitation by the bankruptcy court's power under § 105(a) to police bad faith and abuse of process." *Rosson*, at 773 n.12. Applying an expansive interpretation of *Marrama* and § 105(a), this line of case has found a "broad authority to take any action that is necessary or appropriate to prevent an abuse of process under § 105(a) of the Code and that they would have such power even in the absence

of § 105(a) due to the inherent power of every federal court to sanction abusive litigation practices." *Jacobson,* at 661 (quotations omitted).

Other courts, however, have determined that *Marrama* has no effect on the analysis of the statutory language of § 1307(b) as it is unambiguous. *See, e.g., In re Procel*, 467 B.R. 297, 308 (S.D.N.Y. 2012) ("the right of voluntary dismissal under § 1307(b) is absolute."); *In re Darden*, 474 B.R. 1, 7 (Bankr. D. Mass. 2012) ("§ 1307(b) gives a debtor an absolute right of dismissal."); *In re Williams*, 435 B.R. 552, 560 (Bankr. N.D. Ill. 2010) ("[T]he language of § 1307(b) accords debtors an unlimited right to dismissal of unconverted Chapter 13 cases, and . . . that right is not limited by judicial discretion or other provisions of the Bankruptcy Code . . . ."); *In re Campbell*, No. 07-457, 2007 Bankr. LEXIS 4159, 2007 WL 4553596, at *1 (Bankr. N.D. W. Va. Dec. 18, 2007) ("[T]he Debtor has an absolute right to dismiss his Chapter 13 case . . . ."). Unless a case was previously converted under §§ 706, 1112, or 1208 of the Bankruptcy Code, 11 U.S.C. § 1307 states that if the debtor requests dismissal, the court "**shall** dismiss [the] case." (Emphasis added.) The term "shall" "creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35, 118 S. Ct. 956, 140 L. Ed. 2d 62 (1998); *see also Shenango Inc. v. Apfel*, 307 F.3d 174, 193 (3d Cir. 2002) ("'[S]hall' is generally mandatory when used in a statute."). It "is clear: when a Chapter 13 debtor moves to dismiss a case, the court must grant the motion, subject only to the limitations explicitly stated in § 1307(b)." *Ross v. AmeriChoice Fed. Credit Union*, 530 B.R. 277 (E.D. Pa. 2015). Further, a debtor's absolute right to dismiss under § 1307(b) is consistent with the purely voluntary nature of Chapter 13 proceedings where the debtor, pursuant to 11 U.S.C. § 1321, is in control of any proposed Chapter 13 payment plan. *Id.* Without being over-dramatic, as a debtor's wages are, under 11 U.S.C. § 1306(a)(2), an asset of the chapter 13 bankruptcy estate

(contrasted with the chapter 7 estate), the prohibition on involuntary servitude under the Thirteenth Amendment is also implicated.

Lastly, in contrast to the expansive view of *Rosson* and *Jacobsen* of the § 105(a) powers of bankruptcy court, in the more recent case of *Law v. Siegel*, 134 S. Ct. 1188 (U.S. 2014), the Supreme Court reinforced that "[i]t is hornbook law that §105(a) 'does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code.'" *Id.* at 1194, *citing 2 Collier on Bankruptcy* ¶105.01[2], p. 105-6 (16th ed. 2013). This limitation of § 105(a) aligns with the cases supporting the absolute right to voluntarily dismiss a case. Also worth noting is that in *Harris v. Viegelahn*, 135 S. Ct. 1829 (U.S. 2015), the Supreme Court considered "Chapter 13, **a wholly voluntary** alternative to Chapter 7" in which "Congress accorded debtors a **nonwaivable right** to convert a Chapter 13 case to one under Chapter 7 'at any time.'" *Id.* at 1833 (emphasis added). That conversion (with its permissive "may") was so strongly recognized buttresses that voluntary dismissal (with its mandatory "the court shall") is absolute.

2. After Dismissal

a. Structured Dismissal - *Jevic* and Chapter 13

The Supreme Court recently granted *certiorari* in *Czyzewski v. Jevic Holding Corp. (In re Jevic Holding Corp.)*, 2016 U.S. LEXIS 4293 (June 28, 2016) on the question of whether a "structured dismissal" of a chapter 11 bankruptcy may provide for payments to creditors that deviates from the priority system of the Bankruptcy Code. In *Official Comm. of Unsecured Creditors v. CIT Grp./Bus. Credit Inc. (In re Jevic Holding Corp.)*, 787 F.3d 173 (3d Cir. 2015), the court held that a structured dismissal is permissible "when a bankruptcy judge makes sound findings of fact that the traditional routes out of Chapter 11 are unavailable and the settlement is the best feasible way of serving the interests of the estate and its creditors." *Id.* at 186.

While the differences between chapter 11 and chapter 13 case are legion, including the bases and standards for dismissal, the primary reason that the question of structured dismissals is virtually absent in the chapter 13 arena is the practical matter that the sheer number of chapter 13 cases unfortunately often requires processing such case, particularly at the time of dismissal, in a mechanical and rote fashion. As the drive for a National Chapter 13 Form Plan shows, individualized treatment of chapter 13 cases (and debtors) is rather disfavored. There is, however no substantial statutory difference between the dismissal provisions in 11 U.S.C. § 1112(b)(1) and § 1307(c). This leads to options that a debtor could seek to have a dismissal provide for rights and obligations of the debtor and creditors. These could include formalization of a mortgage loss mitigation, a student loan waiver of default and enrollment into an income driven repayment plan, etc.

Obviously, this will depend on the resolution by the Supreme Court in *Jevic.*

b. Other Orders of the Bankruptcy Court Following Dismissal

Following dismissal the various previous orders of the bankruptcy court entered during the case may have varying degrees of vitality. The confirmation order generally becomes a nullity and the parties are returned to the *status quo ante*. *See In re Nash*, 765 F.2d 1410 (9th Cir. 1985). The legislative history of § 349(b) states that "the basic purpose of the subsection is to undo the bankruptcy case, as far as practicable, and to restore all property rights to the position in which they were found at the time of the commencement of the case." S. Rep. No. 989, 95th Cong., 2d Sess. 49, reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5835.

Again, there are important differences with chapter 11, where the debtor is discharged upon confirmation and is thus bound by the terms of the confirmed plan. A dismissal in Chapter

13, by contrast, occurs prior to discharge, and the confirmed plan in a dismissed case does not bind the debtor or his creditors. *See, e.g., United States v. Ramirez*, 2001 U.S. Dist. LEXIS 19891 (N.D. Tex. Dec. 3, 2001) and *In re Irons*, 173 B.R. 910 (Bankr. E.D. Ark. 1994).

But other orders by a bankruptcy court, particularly those based on nonbankruptcy law, may be binding regardless of dismissal under theories of *res judicata* and claim and/or issue preclusion. As there are specific exceptions under 11 U.S.C. § 349(b), generally reinstating liens to their pre-petition status, the principle of statutory construction that *expressio unius est exclusio alterius* ("the expression of one thing is the exclusion of the other") would indicate that orders of the bankruptcy court other than those enumerated survive. For example, consider a disallowance of a Proof of Claim under 11 U.S.C. § 502, based on non-bankruptcy law based on the applicable Statute of Limitations or a calculation of the amount actually due. Following such a disallowance or determination *res judicata* would apply "because of the identity of the causes of action despite the creditor's contention that there was a distinction between claim allowance and claim discharge." *Hann v. Educ. Credit Mgmt. Corp. (In re Hann)*, 476 B.R. 344 (B.A.P. 1st Cir. 2012).

3. Closure without Discharge

Not all chapter 13 plans that complete may result in a discharge. For example, 11 U.S.C. § 1328(f) provides that:

> Notwithstanding subsections (a) and (b), the court shall not grant a discharge of all debts provided for in the plan or disallowed under section 502, if the debtor has received a discharge--
>
> (1) in a case filed under chapter 7, 11, or 12 of this title during the 4-year period

preceding the date of the order for relief under this chapter, or

(2) in a case filed under chapter 13 of this title during the 2-year period preceding the date of such order.

Despite being ineligible for a discharge a debtor may nonetheless "file a Chapter 13 case and utilize the tools in chapter 13 to cure a mortgage, deal with other secured debts, or simply pay debts under a plan with the protection of the automatic stay." *Branigan v. Bateman (In re Bateman)*, 515 F.3d 272 (4th Cir. Md. 2008) (citing 8 Collier P 1328.06[2] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2007.)) As such, following performance under the plan, the debtor's case would be closed without discharge as 11 U.S.C. § 350(a) allows closure of a case "after an estate is fully administered."

The Notice of Final Cure Payment and Response under Rule 3002.1(f) and (g) have brought to light in many cases that chapter 13 debtors did not make all of their direct payments (or in some stringent cases timely payments) on mortgages. *See, e.g. In re Dennett*, 548 B.R. 733 (Bankr. N.D. Tex. 2016). The failure to certify such payments can result in dismissal or closure of the case. The Comments to Rule 3002.1(h), however, make clear that a bankruptcy court may determine "whether any other non-current amounts remain outstanding" and potential provide for treatment of such. *See In re Payer*, 2016 Bankr. LEXIS 1941 (Bankr. D. Colo. May 5, 2016).

Where the creditor is silent as to the status of direct payments, many bankruptcy courts have required chapter 13 debtors to file an affirmative certification he or she complied with the plan, including all such direct payments. See, e.g. http://www.txs.uscourts.gov/sites/txs/files/certification.pdf . While 11 U.S.C. § 1328(b) allows a

"hardship discharge" for debtors that have not completed payments under a plan, there is no obligation that a debtor disclose such. This again contrasts with chapter 11, where 11 U.S.C. § 1141(d)(5) provides for " a discharge on completion of **all payments** under the plan" (Emphasis added) or, upon certain conditions, for " debtor who has not completed payments under the plan", in chapter 13 the debtor is not required to affirmatively state that he has complied with all the terms of the confirmed plan. 11 U.S.C. § 1328(a) requires a specific certification only "that all amounts payable under [a domestic support obligation] order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid." Further, as a chapter 13 debtor is not a "debtor in possession", he or she does not any fiduciary duty to the creditors, requiring such disclosure.

4. Refiling

a. With Respect to Any Action Taken and the Debtor

The refiling of a bankruptcy after the dismissal of another presents multiple issues, including questions of feasibility and good faith. In an attempt to prevent repeat filing, BAPCPA limited the automatic stay in cases where a "case of the debtor was pending within the preceding 1-year period but was dismissed ... **with respect to any action taken** with respect to a debt or property securing such debt or with respect to any lease shall terminate **with respect to the debtor** on the 30th day after the filing of the later case". (Emphasis added.) Several courts have interpreted this provision "warily, and with pruning shears in hand." *In re Jones*, 339 B.R. 360 (Bankr. E.D.N.C. 2006). First, finding that the limitation "with respect to any action taken" should be narrowly construed to only terminate the stay if "a formal action, such as a judicial, administrative, governmental, quasi-judicial, or other essentially formal activity or proceeding"

was taken prior to the filing of the second case. *In re Paschal*, 337 B.R. 274 (Bankr. E.D.N.C. 2006), *but see In re James*, 358 B.R. 816 (Bankr. S.D. Ga. 2007).

Further, as to the phrase "with respect to the debtor," this has been frequently held to only terminate the stay as to the debtor and not the bankruptcy estate. *See In re Jones*, 339 B.R. 360 (Bankr. E.D.N.C. 2006); *Jumpp v. Chase Home Fin., LLC (In re Jumpp)*, 356 B.R. 789 (B.A.P. 1st Cir. 2006); *but see In re Jupiter*, 344 B.R. 754 (Bankr. D.S.C. 2006).

The effect of these can eliminate much of the need to file a motion to extend stay, with certain other limitations. If the property of the estate vests, pursuant to 11 U.S.C. § 1306, in the debtor at confirmation, the automatic stay evaporates at that point. This is another reason why property should remain an asset of the estate. Further, if a lienholder later brings a Motion for Relief, the debtor may not have standing to resist that motion as the stay only remains as to the "property of the estate", over which the Trustee has dominion. A friendly and sympathetic Trustee may be likely to agree that the estate needs a car or house to have a viable plan, but nothing would prevent a Trustee from agreeing to the release of the property giving the debtor additional disposable income for unsecured claims.

An interesting effect of the termination of the stay "with respect to the debtor" could also be that a state law Statute of Limitations may begin to run again. While 11 U.S.C. § 108(c) extends the time under nonbankruptcy law to commence a civil action against the debtor, Statutes of Limitation are not always tolled by bankruptcy. For example, in Kentucky the Statute of Limitations is tolled whenever an injunction, such as the automatic stay, prevents either "the collection of a judgment or the commencement of an action." Ky. Rev. Stat. Ann. §413.260 (2). In contrast, the Statute of Limitations in North Carolina is only tolled by a bankruptcy "when the

commencement of an action is stayed by injunction or statutory prohibition," N.C.G.S. § 1-23, and does not include a corresponding tolling when only collection of a judgment is stayed. If the stay terminates "with respect to the debtor" a creditor could commence suit against that debtor, even if collection against assets of the estate is prohibited. This could mean that in a second filing following dismissal, the Statute of Limitations would continue to run and may in fact expire. This could make a "Chapter 26" a useful tool in dealing with non-dischargeable private student loans, which, unlike government student loans, are subject to applicable Statutes of Limitations.

b. **Upon Creation of Debt Repayment Plan.**

11 U.S.C. § 362(i) provides that "[i]f a case commenced under chapter 7, 11, or 13 is dismissed due to the creation of a debt repayment plan, for purposes of subsection (c)(3), any subsequent case commenced by the debtor under any such chapter shall not be presumed to be filed not in good faith." Once the double negatives are parsed and cancelled out, this provision would mean that there is no presumption that the case was not filed in good faith if there was a "debt repayment plan" created. Neither the term "debt repayment plan" nor any variant is defined in the Code and there is a dearth of case law on this section. One Court has held, however, that "if a debtor's case is dismissed after undergoing credit counseling, there is no presumption that it was 'filed not in good faith.'" *In re Wilson*, 336 B.R. 338 (Bankr. E.D. Tenn. 2005). As all debtors are generally required by 11 U.S.C. § 521(b) to obtain credit counseling prior to filing bankruptcy, this would mean that any debtor that complied with such requirement and refiled should not face a presumption that the case was not filed in good faith.

Case Summaries on Impact of *Harris v. Viegelahn*

Kathy A. Dockery

ATTORNEY FEES UPON DISMISSAL			
NO.	**CASE**	**SUMMARY**	**HOLDING**
1	***In re: Brandon*** 537 B.R. 231 (Bankr. Northern Division of the District of Maryland 2015)	Following entry of orders dismissing or converting multiple Chapter 13 cases prior to confirmation of plan, debtors' counsel moved for allowance and payment of their fees.	The Bankruptcy Court held that: [1] undistributed funds in Chapter 13 trustee's possession, upon dismissal of Chapter 13 case prior to confirmation of plan, had to be returned to debtor, but only after deduction for payment of allowed administrative expenses, including unpaid fees of debtor's attorney; [2] former Chapter 13 trustee continues to have some ongoing responsibilities, even when case is converted prior to confirmation of plan, which include the payment of administrative expenses, such as remaining allowed fee of debtor's counsel; and [3] debtors' assignment to their bankruptcy attorneys of their interest in any undistributed funds in trustee's possession, in event that case was converted, in payment of any unpaid balance of attorneys' fees, was valid and enforceable and provided independent basis for trustee, when cases were converted prior to confirmation of plan, to use undistributed funds to make payment to attorneys.
2	***In re Hightower***, 2015 WL 5766676 (Bankr. Southern District of Georgia, Dublin Division 2015)	Pro se debtor filed Objection and Motion for Turnover of funds seeking the entire balance held by the Trustee.	Pursuant to its express terms, § 1326(a)(2) governs the disbursement of undistributed plan payments upon dismissal of a Chapter 13 plan that has not been confirmed. Trustee must first pay administrative expenses allowed pursuant to § 503(b) and "any payments not yet due and owing to creditors pursuant to § 1326(a)(3)."

3	***In re Ikegwu***, 2015 WL 5608357 (Bankr. District of Maryland, Northern Division 2015)	Debtor's counsel applied for fees after plan was not confirmed.	This court recently decided that *Harris* does not preclude payment by a Chapter 13 trustee of the allowed compensation of debtor's counsel in cases that are dismissed (like this one) prior to confirmation of a Chapter 13 plan.
4	***In re Kirk*,** 537 B.R. 856 (Bankr. Northern Distirct of Ohio 2015)	After Chapter 13 case was dismissed prior to confirmation of plan, on trustee's motion, for debtors' failure to make required plan payments, trustee and debtors' counsel filed motions concerning how funds held by trustee should be disbursed.	The Bankruptcy Court held that: [1] disbursement of funds held by a Chapter 13 trustee upon dismissal prior to confirmation is governed by the specific directives in the section of the Bankruptcy Code dictating the manner in which a Chapter 13 trustee should distribute plan payments in that situation, not the general directive in the section of the Code generally requiring that property of the estate be returned to the debtor upon dismissal; [2] debtors' counsel was entitled to payment of attorney's fees in the amount of $1,000 as an administrative expense claim; and [3] adequate protection payments held by trustee should be returned to debtors. [4] *Harris v. Viegelahn* only controls upon conversion of the case.
5	***In re Merovich***, 547 B.R. 643 (Bankr. Middle District of Pennsylvania 2016)	The debtor deceased prior to confirmation of the plan. The bankruptcy court held a hearing on the fee application on the same date and time as the confirmation hearing. The trustee moved to dismiss the case which the court granted but reserved jurisdiction to rule on debtor counsel's fee application.	[D]isbursement of funds held by a Chapter 13 trustee upon dismissal prior to confirmation is governed by the specific directives in the section of the Bankruptcy Code dictating the manner in which a Chapter 13 trustee should distribute plan payments in that situation, and . . . debtor's counsel was entitled to payment of attorney's fees in the amount of $1,589.50 as an administrative expense claim.

6	***In re Ulmer***, 2015 WL 3955258 (Bankr. W.D. Louisiana, Monroe Division 2015)	Debtor's attorney filed an application to be paid his fees prior to dismissal or conversion of the case.	The Court denied the motion as moot holding that Section 1326(a)(2) authorizes the Trustee to pay fees in a dismissed case and *Harris v. Viegelahn* only applies in converted cases.
7	***In re Wheaton***, 547 B.R. 490 (1st Circuit BAP 2016)	Debtor's counsel appealed the bankruptcy court's order overruling counsel's objection to the Trustee's Final Report which did not include all fees awarded by the bankruptcy court.	Pursuant to § 1326(a)(2), a debtor's attorney is entitled to payment of attorney's fees prior to disbursement of the undistributed plan payments to the debtor, if the fees constitute a § 503(b) administrative expense claim.

NO ATTORNEY FEES UPON CONVERSION

NO.	CASE	SUMMARY	HOLDING
1	***In re Beckman*****,** 536 B.R. 446 (Bankr. S.D. California 2015)	Following conversion of Chapter 13 case to one under Chapter 7, trustee filed motion for determination of what he should do with accumulated funds in his possession, given that conversion had occurred prior to confirmation of plan.	The Bankruptcy Court held that trustee, absent showing that conversion of case was in bad faith, had to return any accumulated funds in his possession to debtor without first making adequate protection payments to creditors and without deducting from the funds the fees awarded to debtor's counsel.
2	***In re Drago***, 2016 WL 1576470 (Bankr. District of New Jersey 2016)	After failure to confirm the plan, the Debtor converted the case to chapter 7.	For the foregoing reasons, G & K's request for turnover of funds held by the Chapter 13 Trustee as partial payment of its allowed fees is denied. Upon conversion of a Chapter 13 case to Chapter 7, the Chapter 13 Trustee is obligated to return funds on hand to the Debtor. The Chapter 13 Trustee is hereby ordered to return the Funds to the Debtor.

3	***In re Hoggarth,*** 546 B.R. 875 (Bankr. District of Colorado 2016)	Attorney who had represented debtor prior to conversion of debtor's Chapter 13 case to one under Chapter 7 filed application for payment of remaining portion of her fee out of undistributed funds in former Chapter 13 trustee's possession.	Undistributed funds had to be returned to debtor, with no deduction for administrative expenses, such as fee claim of debtor's counsel.
4	***In re Marshall***, 2016 WL 402386 (Bankr. Western District of Lousiana, Shreveport Division 2016)	Debtor's counsel attempt to vacate a prior order denying a fee application based on the fact that the case had not been converted to chapter 7 yet although all parties were aware that this was the debtor's intention.	Motion to vacate denied due to *Harris* and even if court granted the motion and the fees are approved, *Harris* would require the trustee to return the funds to the Debtor.
5	***In re: Sowell,*** 535 B.R. 824 (Bankr. District of Minnesota 2015)	Chapter 13 trustee objected to request by attorney who had represented debtor while case was proceeding under Chapter 13 for payment of his agreed "no look" fee out of undistributed plan payments in trustee's possession when case was converted.	The Bankruptcy Court held that: [1] trustee had standing to object, and [2] undistributed plan payments made by debtor and in hands of Chapter 13 trustee at time case was converted had to be returned to debtor, such that it was inappropriate, in order approving agreed "no look" fee of debtor's counsel, to include language directing that fee be paid out of undistributed funds in trustee's possession.

6	***In re Spraggins, Jr***., 2015 WL 5227836 (Bankr. District of New Jersey 2015)	The Chapter 13 trustee sent notices for three chapter 13 cases to debtors' counsel notifying counsel that she would refund all funds she is holding due to conversion of the three cases to chapter 7. Debtor's counsel objected to the refund of the funds and set the matter for hearing.	The court overruled the objections and held that *Harris v. Viegelahn* controls when a case is converted to chapter 7 and that the debtor is entitled to return of any and all post-petition wages not yet distributed by the Standing Trustee.
7	***In re: Vonkreuter*****,** 545 B.R. 297 (Bankr. District of Colorado 2016)	In case converted from Chapter 13 to Chapter 7 pre-confirmation, counsel for debtor filed application for payment of administrative claim for attorney fees incurred during the pendency of the Chapter 13 case and for order directing trustee to pay to counsel the $665 in undisbursed postpetition wages then held by trustee. Trustee objected.	[A]bsent bad faith conversion, allowed administrative expense claims may not be paid from undistributed postpetition earnings in a case converted from Chapter 13 to Chapter 7, regardless of whether a plan has been confirmed.
NO ATTORNEY FEES UPON CONVERSION OR DISMISSAL			
1	***In re: Edwards,*** 538 B.R. 536 (Bankr. S.D. Illinois 2015)	In separate Chapter 13 cases, each of which was dismissed subsequent to confirmation of plan, trustees sought clarification as to what they should do with undistributed debtor funds in their possession.	Post-petition property and wages held by the trustee at the time of dismissal of the debtor's confirmed Chapter 13 case must be distributed to the debtor. This decision is based not on the Supreme Court's decision in *Harris v. Viegelahn*, but on § 349(b)(3) and the effect of dismissal on a Chapter 13 case.

Central District of California
Local Rule on Distributions to Attorneys in Dismissed/Converted Cases

(ii) the date scheduled for each hearing to consider confirmation of a chapter 13 plan in the case.

(C) Bring Declaration to All § 341(a) Meetings of Creditors and Hearings on Plan Confirmation. The debtor must bring a copy of an executed form F 3015-1.4.DEC.PRECONF.PYMTS, together with a proof of service reflecting service in accordance with this subsection, to all dates set forth above in subparagraph (m)(6)(B).

(7) Failure to Make Postpetition Payments. Failure to make all of the payments required by subsection (m)(2) or (3) of this rule in a timely manner will generally result in dismissal of the case. In determining whether a debtor has complied with this subsection at a confirmation hearing, the court will disregard payments as to which a late penalty has not yet accrued or which are due on the date of the confirmation hearing. The failure to submit form F 3015-1.4.DEC.PRECONF.PYMTS at each § 341(a) meeting of creditors and each confirmation hearing, with all required attachments, may result in dismissal of the case, and the court may impose a 180-day bar against refiling pursuant to 11 U.S.C. § 109(g).

(n) Modification of Confirmed Plan or Suspension of Plan Payments. After a chapter 13 plan has been confirmed, its terms can be modified only by court order. A motion to modify a confirmed plan or to suspend plan payments must be made in accordance with subsections (w) and (x) of this rule and must be filed using court-mandated forms.

(o) Tax Returns. For each year a case is pending after the confirmation of a plan, the debtor must provide to the chapter 13 trustee within 14 days after the return is filed with the appropriate tax agencies a copy of: (1) the debtor's federal and state tax returns; (2) any request for extension of the deadline for filing a return; and (3) the debtor's forms W-2 and 1099.

(p) Sale or Refinance of Real Property. A sale or refinancing of the debtor's principal residence or other real property must be approved by the court. A motion to approve a sale or refinance of real property may be made by noticed motion in accordance with subsections (w) and (x) of this rule.

(q) Dismissal or Conversion of Case.

(1) Debtor Seeks Dismissal.

(A) Case Has Not Been Previously Converted. If the case has not been converted from another chapter, a debtor may seek dismissal of the case by filing with the clerk of the bankruptcy court a request for voluntary dismissal pursuant to 11 U.S.C. § 1307(b) and may be ruled on without a hearing pursuant to LBR 9013-1(q). The proof of service must evidence that the request for dismissal was served upon the chapter 13 trustee and the United States trustee.

(B) Case Has Been Previously Converted. If the case has been converted from another chapter, a debtor must file and serve a motion in accordance with

LBR 9013-1 (d) or (o) and LBR 1017-2(e). Notice must be given to the chapter 13 trustee, any former trustee, all creditors, and any other party in interest entitled to notice under FRBP 2002.

(C) Mandatory Disclosure. Whether dismissal is sought by request or motion, a debtor must disclose under penalty of perjury whether the present case has been converted from another chapter of the Bankruptcy Code, and whether any motion for relief from, annulment of, or conditioning of the automatic stay has been filed against the debtor in the present case.

(2) Debtor Seeks Conversion.

(A) Debtor Seeks First Time Conversion of Chapter 13 to Chapter 7. Pursuant to 11 U.S.C. § 1307(a), FRBP 1017 and LBR 1017-1(a)(1), the conversion of a chapter 13 case to a case under chapter 7 (for the first time) will be effective upon:

(i) The filing by the debtor with the clerk of the bankruptcy court of a notice of conversion using court-mandated form F 3015-1.21.NOTICE.CONVERT.CH13 and a proof of service evidencing that the notice of conversion was served upon the chapter 13 trustee and the United States trustee; and

(ii) Payment of any fee required by 28 U.S.C. § 1930(b).

(B) Debtor Seeks Subsequent Conversion of Chapter 13 to Chapter 7. If the case has previously been converted from another chapter, a debtor must file and serve a motion in accordance with LBR 9013-1(d) or (o). Notice must be given to the chapter 13 trustee, any former trustee, and all creditors.

(C) Debtor Seeks Conversion of Chapter 13 to Chapter 11. A motion by the debtor to convert a chapter 13 case to a case under chapter 11 must be filed, served and set for hearing in accordance with LBR 9013-1(d). Notice must be provided to the chapter 13 trustee and all creditors.

(3) Interested Party Seeks Dismissal or Conversion of Chapter 13 to Chapter 7, 11, or 12. A motion by any other party in interest to either dismiss a chapter 13 case, or alternatively, to convert a chapter 13 case to a case under chapter 7, 11, or 12, must be noticed for hearing by the moving party pursuant to LBR 9013-1(d). This notice must be given to the debtor, debtor's attorney (if any), all creditors, the chapter 13 trustee, any former trustee, and the United States trustee.

(4) Lodging and Service of Order. When an order is required, the moving party must prepare and lodge the proposed order of dismissal or conversion in accordance with LBR 9021-1 and the Court Manual. The Clerk will prepare a separate notice of dismissal or conversion.

(5) Distributions Before Notice to the Chapter 13 Trustee. Any distributions of estate funds made by the chapter 13 trustee in the ordinary course of business for the benefit of the debtor's estate prior to receipt of notice of dismissal or conversion will not be surcharged to the chapter 13 trustee.

(6) Distributions After Notice to Chapter 13 Trustee. Unless the court orders otherwise, and subject to the provisions below regarding contested distributions, the following procedures implement the requirement that the chapter 13 trustee return to the debtor (i) any postpetition earnings and (ii) any other property that is no longer property of the estate and that is vested in the debtor, after deduction for any unpaid administrative expense and certain other claims, under 11 U.S.C. §§ 348(f), 349(b), 1326(a)(2), and FRBP 1019(5) or (6).

(A) 14 Day Holding Period. The chapter 13 trustee must hold any remaining property until at least 14 days have passed after entry of the order dismissing or converting the case. Within 14 days of dismissal or conversion any person or entity asserting an administrative expense under 11 U.S.C. § 503 (including, without limitation, a claim for professional fees), or a claim under §1326(a)(2) and (3), must file an application, motion or other written request for payment thereof, set it for hearing if required, serve it pursuant to the applicable rules, and, if the document is not filed electronically, deliver it to the chapter 13 trustee so that it is received before the end of such 14-day period. If the claimant fails to do all of these things timely (the "Claim Prerequisites"), then the chapter 13 trustee may treat such request as having been filed after the 14 day deadline and of no force of effect, absent a court order to the contrary. After the deduction of any applicable chapter 13 trustee fees, the chapter 13 trustee must make distributions as follows:

(i) Distributions to Administrative Claimants. First, pro rata distributions to the holders of administrative expenses under 11 U.S.C. § 503(b) as to which (1) the Claim Prerequisites have been satisfied timely and (2) as to which the court has entered an order approving payment.

(I) Administrative expenses to which subparagraph (6)(A)(i) is applicable include without limitation: (a) any unpaid attorney's fee or expense asserted under a Rights and Responsibilities Agreement signed by the debtor's attorney and the debtor or an FRBP 2016(b) statement, (b) any supplemental fee or expense under 11 U.S.C. § 330, (c) any administrative expenses scheduled under FRBP 1019(5)(B) or (C), and (d) any other administrative expense.

(II) Unless a different deadline has been established in connection with a scheduled hearing, any application, motion or other request for payment of an administrative expense under 11 U.S.C. § 503(b) must advise parties in interest that any objection to the allowance and payment of such expense must be filed and served no later than 14 days following service of such application or request, or such objection must be deemed waived. Any objection must be served on

the applicant, the chapter 13 trustee and the debtor. If the objection is not filed electronically, it must be served so that it is received by these parties within such 14-day period. If an objection is timely filed, the applicant must schedule a hearing with the court and serve notice of such hearing on interested parties.

(ii) Distributions to Certain Creditors. Second, after any distributions to the holders of administrative expenses as provided above, pro rata distributions on the allowed claims of any persons who have filed an application for payment of amounts due and owing pursuant to 11 U.S.C. § 1326(a)(2) and (3) that satisfies the above Claim Prerequisites.

(iii) Distributions to the Debtor.

(I) Postpetition Earnings. After the foregoing distributions, the chapter 13 trustee must distribute any remaining postpetition earnings to the debtor, or to the chapter 11 trustee if the chapter 13 trustee has been served with an order or notice of appointment of a chapter 11 trustee.

(II) Other Property. If the chapter 13 trustee holds any property known to the chapter 13 trustee to come from a source other than postpetition earnings, such as proceeds from the sale of property, and that property is not automatically vested in any entity (e.g., under 11 U.S.C. § 349(b)(3)), then the chapter 13 trustee must treat such property as a contested distribution pending an order, on an application by a party in interest, authorizing a proposed distribution to the debtor or other persons pursuant to 11 U.S.C. § 348(f)(1) (for conversion) or 11 U.S.C. § 349(b) (for dismissal) and 11 U.S.C. § 1326(a)(2).

(B) Contested Distributions. Notwithstanding the foregoing, if an application, motion request or objection regarding distribution is pending, or if the chapter 13 trustee files an application for instructions from the court for direction concerning the distribution of funds, then the chapter 13 trustee must reserve sufficient funds to pay the maximum requested amounts, pending resolution by order or by consent of the affected persons.

(r) Motions Regarding Stay of 11 U.S.C. § 362.

(1) Required Format and Information. A motion regarding the stay of 11 U.S.C. § 362 must comply with LBR 4001-1.

(2) Motions Regarding Default in Payment.

(A) Preconfirmation Default. A motion for relief from the automatic stay based solely upon a preconfirmation payment default is premature until a late charge has accrued under the contract on the postpetition obligation that the creditor seeks to enforce. If no late charge is provided, the motion may be brought