Chapter 13
Office of the Chapter 13 Trustee—Akron Office
Keith L. Rucinski—Trustee

CHAPTER 13 QUARTERLY NEWSLETTER
JUNE 2021

1. COVID-19 BANKRUPTCY RELIEF EXTENSION ACT OF 2021

Many provisions of the CARES Act were recently extended.

One of the items of the CARES Act extension was to allow modification of Chapter 13 plans so that the plan duration may extend to 84 months.

This provision is effective for plans which were confirmed as of March 27, 2021. Please note that this extension will expire on March 27, 2022. Counsel and their clients have a limited amount of time to extend applicable plans to allow an 84-month plan duration.

The 84-month plan duration can be very beneficial to debtors in allowing them additional time to catch up plan payment delinquencies and be successful in their Chapter 13 plan. However, counsel should consider the following when extending the plan up to 84 months:

A. The request to extend the plan duration up to 84 months must be by motion. It is a motion to modify the plan (not an extension). The CARES Act legislation specifically says that plans may be modified; and therefore, counsel must file a motion to modify the plan.

B. To allow proper service and notice, the motion must be served on all applicable parties.

C. As with all plan modifications, amended schedules I and J must be filed with the Court.

D. As with all plan modifications, appropriate tax returns, paystubs, and other financial information must be submitted to the Chapter 13 office for review.

E. The motion must specifically state how the debtor's finances have been affected by Covid-19 and give details. Please note that the reasons to extend based on Covid-19 can include but are not limited to the following:

   i. The debtor had reduced income over the last year and a half due to Covid-19.
   ii. Someone in the debtor's household has had reduced income due to Covid-19 over the last year and a half.
   iii. Either the debtor or someone in the household has health issues related to Covid-19 (and explain how it impacted finances – inability to work, costs of medical treatment, etc.)

iv. Due to Covid-19, the debtor's finances have been limited and the debtor has not been able to pay routine living expenses such as utility bills, groceries, etc.

F. Please note that the plan is modified "up to 84 months". This allows the Chapter 13 office to adjust the plan as it may take less than the full 84 months to complete. This language should be included in both the motion and the order.

G. If the motion and order state that the plan is modified "to 84 months", the plan is locked to the full 84 months and the debtor may end up paying more to creditors than the debtor is required.

H. The motion and order must state the amount of the plan payment.

I. The motion and order must allow the Trustee to adjust the dividend based on the debtor's applicable commitment period.

The financial reasons on how someone can be affected by Covid can be very broad but they must be specifically stated in the pleadings. To simply say that the debtor has been affected by Covid-19 is not sufficient and will delay approval of the needed modification.

Some motions to modify the plan duration up to 84 months have stated that the debtor's plan payment arrearages are current as of the date of the motion. This language is not appropriate. The debtor's plan payment arrearages are not current; the arrearage is being rolled forward up to an 84-month plan duration to allow the debtor to be successful in the plan. Counsel will run into issues saying "plan payments are current", especially in cases which require conduit mortgage payments. The plan payment arrearage is being rolled forward to allow the debtor additional time to pay the delinquent payments.

Please note that the Trustee will adjust the unsecured dividend based only on the 36 month and 60-month applicable commitment period for plans extended up to 84 months. Conduit mortgage payments will extend up to 84 months. In rare cases where the debtor may have a financial windfall after extending the plan, the Trustee will move to increase the unsecured dividend through a motion to modify the plan with notice and service to the appropriate parties.

Many plans are being modified to 84 months as appropriate and will help debtors to be successful in a Chapter 13 plan.

2. FORBEARANCE NOTICES

Some mortgage holders have begun to file notices of forbearance on the Court's docket. The forbearance notices generally include a statement that says that the debtor should consult with their counsel and local court.

In many of these cases where forbearance notices have been filed, the debtor has continued to work throughout the Covid-19 pandemic, plan payments have continued to be received and conduit mortgage payments have continued to be made timely. In these cases, it appears that the debtor never asked for forbearance but the mortgage lender just issued them in some type of bulk fashion. The forbearance notices generally do not say how the debtor is to make up these missed payments. If the debtor takes advantage of the forbearance notice, it is not clear if the mortgage lender is going to file a supplemental proof of claim in several months or whether they will change the forbearance to a deferral and place the missed payments at the end of the loan.

Placing missed payments at the end of a mortgage loan may not be in the debtor's best interest especially if the mortgage loan has 15 or 20 years left on the mortgage. These missed payments being placed at the end will continue to accrue interest for the next 15-20 years. Therefore, at the end of the mortgage loan, the debtor could find themselves owing a substantial amount more on the mortgage than they anticipated.

It is the Trustee's position that if the debtor's plan payments have continued to be received that the conduit mortgage payments will be processed according to the plan, confirmation order, and the Court's Administrative Order 16-1. If the debtor continues to make payments and the Trustee were to stop paying on the conduit mortgage payments based on the forbearance notice, the funds would flow to other creditors, including unsecured creditors. This would not be in the debtor's best interest since the debtor filed Chapter 13 in order to save their home.

Therefore, the Trustee will take no action based on a forbearance notice filed by a mortgage lender but will continue to administer the plan pursuant to the plan's directive, the confirmation order, and the Court's Administrative orders. If counsel want the Trustee to stop paying the forbearance notice, they will have to file a motion to suspend plan payments citing which months the Trustee is not to pay the conduit mortgage payment and specifically state how those months are to be caught up.

The situation for each debtor is different but if plan payments have been received, it is in the debtor's interest to allow the plan to go forward and to not take any action regarding the forbearance notice.

3. FORBEARANCE PROOF OF CLAIM

Please be advised that when a mortgage company files a proof of claim based on post-petition plan payments which were held in forbearance, the Trustee will treat these forbearance mortgage claims similar to a post-petition mortgage arrearage claim. Therefore, the Trustee will process payment on these claims. In applicable cases, the Trustee will file motions to modify the plan to increase payments if the forbearance claim makes the plan not feasible. Thus, the debtor has a combination of choices which includes extending the plan up to 84 months, or objecting to the forbearance claim if the debtor believes that claim is not accurate.

4. AGREED ENTRY BETWEEN DEBTOR AND CREDITOR THAT PLAN WILL BE MODIFIED IN 30 DAYS

Please note that the Trustee is declining to approve agreed entries between the debtor and the creditor which resolve post-petition debt being added to the plan. The reason these agreed entries are not being approved by the Trustee is that the entry states that the plan will be modified in 30 days. Often times, the plan is not modified in 30 days or the modification of the plan is not filed for several months. This makes the plan severely delinquent and is not addressing the post-petition debt which is being added to the plan.

Therefore, any agreed entry between the parties which adds post-petition debt and/or conduit/fixed payments to the monthly plan payment must also state that the plan is being modified to increase the monthly Chapter 13 plan payment by a specific amount to allow for this additional debt being added to the plan. The agreed entry must also authorize the Trustee to file appropriate pay orders on a case so that funds are paid into the plan to address the issues which are the subject of the agreed entry between the parties.

5. TELEPHONIC AND ZOOM 341 MEETINGS TO CONTINUE

Pursuant to directives by the United States Trustee Program, in-person 341 meetings will continue to be suspended. The meetings will remain suspended from the date of the President of the United States proclamation on declaring a national emergency concerning the novel Coronavirus disease (COVID-19) outbreak which was issued on March 13, 2020. The requirement for remote 341 meetings will continue until such time that the President terminates the declaration.

Therefore, it is expected that the Akron 341 meetings will continue to be done remotely through telephone or video appearance for the next few months.

Please note, the Trustee does have the discretion to request an in-person meeting if the Trustee deems an in-person meeting is required. However, any in-person meetings must follow appropriate health guidelines including masks and social distancing.

Unless notified differently by the Chapter 13 office, counsel appearing on behalf of clients at 341 meetings in Akron for Chapter 13 cases can expect 341 meetings to continue to be held by telephone or video appearance until further notice.

The Trustee ask that at least two days prior to the meeting that counsel for the debtor supply the Chapter 13 office phone number(s) where counsel and their client can be contacted for the 341 meeting.

Counsel can send their contact information to*:* aroyer@ch13akron.com.

6. CREDITORS NEED TO PROVIDE NOTICE TO THE TRUSTEE TO APPEAR AT 341 MEETINGS

If a creditor wants to appear at a 341 meeting, please note as stated above that the 341 meetings will be held telephonically until further notice. To allow creditors to participate at the meeting and to put appropriate technology in place, creditors are required to provide a 2-day notice to the Chapter 13 office that they wish to participate at the meeting. Those notices can be emailed to aroyer@ch13akron.com.

7. MORTGAGE PAYMENT DEFERMENT AND LOAN MODIFICATIONS MAY NOT ALWAYS BE IN THE DEBTOR'S BEST INTEREST

Placing missed payments at the end of a mortgage loan may not be in the debtor's best interest especially if the mortgage loan has 15 or 20 years left on the mortgage. These missed payments being placed at the end will continue to accrue interest for the next 15 to 20 years. Therefore, at the end of the mortgage loan, the debtor could find themselves owing a substantial amount more on the mortgage than they anticipated.

For example, suppose the missed payments total $20,000 and the interest on the mortgage is 5%, with a remaining term of the mortgage of 20 years. At the end of the mortgage, those missed payments which have accumulated interest for 20 years and will now require the borrower to make a $54,252 final payment to the bank to complete the mortgage.

Some banks will offer a mortgage modification. A modification is similar to a deferment except the lender writes a new loan for both the missed payments and the entire outstanding balance of the loan. The borrower will find the monthly mortgage payment has decreased and the interest rate has been lowered. However, the term of the new mortgage can be up to 40 years from the date of the modification. So, if the borrower had already paid on the mortgage for 10 years, the borrower may find that the modification now requires another 40 years of payments.

If the borrower is in a Chapter 13 bankruptcy, the borrower may be able to put the missed payments into the plan and extend the plan a couple of years. In the above example, the borrower will repay the lender the $20,000 (without interest) and without the need to extend the term of the mortgage.

8. PERSONAL FINANCIAL MANAGEMENT COURSE

The Chapter 13 office will continue to sponsor an on-line Personal Financial Management Course through the Trustee Education Network. Information regarding the online program is available on the Chapter 13 website at www.chapter13info.com. There is no charge to take the course online for Chapter 13 debtors who have filed in Akron, Ohio.

Please note: in a joint case, each debtor must take the on-line course separately and use two different e-mails. The software program generates the required certificates of completion partly based on e-mails to keep track of who has taken the required course.

Please find attached to this newsletter, a flyer for the on-line course that counsel may share with their clients in Chapter 13 cases.

9. UPDATED MEANS TEST NUMBERS

Please find attached to this newsletter updated means test numbers which became effective on May 1, 2021. Counsel should work with their computer provider to make sure they have the most updated numbers for their software.

10. CASE LAW

In re Castleman, 2021 Bankr. LEXIS 1517, 2021 WL 2309994

The debtors confirmed a chapter 13 plan in the Western District of Washington at Seattle and converted the case to chapter 7 about 18 months after filing. They had scheduled their home as being worth $500,000 at filing. Using a $500,000 valuation, there was no equity in the property on filing in view of a $375,000 mortgage and the debtor's claimed homestead exemption of $125,000.

After conversion, the chapter 7 trustee filed a motion for authority to sell the home, alleging that the home was worth $700,000. The debtors contended that the valuation at conversion was of no import because appreciation after the chapter 13 filing belonged to them.

The case turned on the interpretation of Section 348(f)(1), which was amended in 1994 to clear up a split on a different but related issue. At the time, some courts held that property acquired during a chapter 13 case belonged to the chapter 7 trustee on conversion. Others held that chapter 13 debtors were entitled to keep property acquired after a chapter 13 filing but before conversion.

Congress amended Section 348(f)(1)(A) to say that debtors keep property acquired during chapter 13. As amended, the section now provides that "property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the [chapter 13] petition, that remains in the possession of or is under the control of the debtor on the date of conversion."

Although the amendment allowed debtors to retain newly acquired property, the amendment didn't explicit address appreciation in the value of an asset that was in the estate at the time of the chapter 13 filing.

Judge Marc Barreca cited the courts finding the statute ambiguous with respect to appreciation in the value of an estate asset between the chapter 13 filing and conversion to chapter 7. They allowed the debtors to retain the uptick, on the theory that depriving them of appreciation would penalize debtors who filed chapter 13 petitions.

On the other side of the fence, Judge Barreca cited cases finding no ambiguity in the statute and awarding appreciation to the chapter 7 trustee. See, e.g., In re Goins, 539 B.R. 510 (Bankr. E.D. Va. 2015). In Goins, the court gave appreciation to the trustee, but the parties had stipulated that the debtor would have credit for payments reducing the secured debt during the chapter 13 case.

The amendment to the section is not ambiguous, he stated, and "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." Judge Barreca said he does not believe that post-petition appreciation is "treated as a separate asset from pre-petition property and inures to the bankruptcy estate, not the debtor." Quoting Goins, he said that the "equity is inseparable from the real estate, which was always property of the estate under Section 541(a)." The court therefore held that "the full value of the Real Property is property of the Chapter 7 estate including any post-petition appreciation."

In re Smith, 2021 U.S. App. LEXIS 4798

The debtor bought a home with a $530,000 mortgage and defaulted a year later. Days before the scheduled foreclosure in 2007, he filed a chapter 13 petition. The sale was cancelled, and the debtor dismissed the petition a few days later.

The debtor used the same tactic in 2017 and in 2019, stopping a foreclosure sale with a chapter 13 filing and dismissing the petition a few days later. However, the lender in the present case filed a motion four months after dismissal to reopen the case under Rule 9024. The bankruptcy court granted the motion and lifted the automatic stay for two years.

The debtor appealed and filed a motion for a stay in district court. The district judge denied the stay motion but granted leave for an interlocutory appeal. The appeals court agreed to hear the appeal, to determine whether the district court's denial of a stay amounted to an abuse of discretion.

The outcome turned on Section 1307(b). If a chapter 13 case has not been previously converted from chapters 7, 11, or 12, the section provides that, "On request of the debtor at any time, . . . the court shall dismiss a case under this chapter."

The Sixth Circuit ruled that the bankruptcy court must dismiss a chapter 13 petition, even when the latest repeat filing was in bad faith. Judge Kethledge wrote in his opinion that the "provision is mandatory," by use of the word "shall." In comparison, Section 1307(c) says that the court "may" dismiss a case for "cause." He found "nothing in § 1307 that

renders § 1307(b) discretionary in cases where the debtor filed the bankruptcy petition in bad faith."

The holding was a deviation from two other circuits, The Fifth and Ninth Circuits, which have held differently. The Court relied on *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365 (2007), to hold that the bankruptcy court has discretion to deny dismissal of a chapter 13 case if the petition was filed in bad faith. *See Jacobsen v. Moser (In re Jacobsen)*, 609 F.3d 647, 660 (5th Cir. 2010); and *Rosson v. Fitzgerald (In re Rosson)*, 545 F.3d 764, 773–74 (9th Cir. 2008).

Judge Kethledge proceeded to pick apart the precedential value of *Marrama*. First, *Marrama* involved a motion under Section 706(a) for conversion of a chapter 7 case to chapter 13. That section provides that the court "may" convert, not "shall." He also characterized the language quoted above as *dicta*.

More to the point, Judge Kethledge interpreted *Law v. Siegel*, 571 U.S. 415 (2014), as "largely reject[ing] that *dictum*." He read *Law* as "flatly reject[ing] the idea that § 105(a) vests in the bankruptcy courts equitable power to disregard the Code's provisions when they lead to results that seem unfair."

Judge Kethledge said that the "command of § 1307(b) is no mere procedural nicety, which is likely why no circuit court has accepted [the lender's] argument since *Law* was decided in 2014."

Judge Kethledge reversed the district court's denial of a stay and remanded with instructions for the bankruptcy court to dismiss the most recent chapter 13 filing. However, he said that the "bankruptcy court need not take any action to restore the *status quo* prior to its . . . reinstatement of [the chapter 13] case."

Personal Financial Management Course

THIS COURSE IS REQUIRED TO EARN YOUR DISCHARGE !

Online Chapter 13 Bankruptcy Course
Finally Financial Freedom!

** The Trustees' Education Network (TEN) – an affiliate of the National Association of Chapter 13 Trustees – has created an online financial management course for the benefit and financial education of Chapter 13 debtors. This course is approved by the United States Trustee Program. **

THIS COURSE IS FREE!

THIS COURSE IS ABLE TO BE COMPLETED PRIOR TO YOUR 341 HEARING WITH THE TRUSTEE*

SIGN UP ONLINE AT WWW.13CLASS.COM

WHAT YOU WILL NEED TO SIGN UP

- Unique Trustee Identifier Number
  - **TEN13010**
- Bankruptcy Case Number
- Your full Name "exactly" as shown on bankruptcy petition
- A valid email address (each debtor will need a separate email address)
- Your bankruptcy Schedules A/B, D, and E/F for Lesson 1 and Schedules I and J for Lesson 3.

You must complete the entire course (all lessons and quizzes) to receive a Certificate of Completion from the Trustees' Education Network. Once you complete all coursework, the Trustees' Education Network will send a Certificate of Completion to you and to your Bankruptcy Court.

***Course satisfies legal requirements for debtors' Certificate of Completion and to gain a discharge of their bankruptcy case.*

**Other course providers may charge you a fee for this course.*

Updated Means Test as of May 1, 2021

MEDIAN INCOME FOR OHIO FOR CASES FILED ON OR AFTER 5/1/21

1 Person	2 People	3 People	4 People
$52,415	**$67,059**	**$79,022**	**$96,175**

****Add $9,000 for each individual in excess of 4 people on cases filed on or after 5/1/19**

NATIONAL STANDARD FOR FOOD, CLOTHING & OTHER ITEMS

Expense	One Person	Two People	Three People	Four People
Food	$400	$724	$838	$955
Housekeeping Supplies	$41	$76	$69	$79
Apparel & Services	$92	$150	$191	$259
Personal care products & services	$42	$76	$72	$89
Miscellaneous	$148	$266	$303	$358
TOTAL	$723	$1292	$1473	$1740

More than four persons	Additional Amount Per Person
For each additional person, add to four-person total allowance:	**$341**

Expense	One Person	Two People	Three People	Four People
Food & Clothing (Apparel & Services)	$92	$874	$1029	$1214
5% of Food and Clothing	$25	$44	$51	$61

More than four persons	Additional Amount Per Person
Food & Clothing (Apparel & Services)	$238
5% of Food and Clothing	$12

LOCAL HOUSING & UTILITIES STANDARDS FOR OHIO (NON-MORTGAGE EXPENSE)

Family Size	1 Person	2 People	3 People	4 People	5 or more People
SUMMIT COUNTY	$492	$578	$609	$679	$690
PORTAGE COUNTY	$498	$585	$616	$687	$698
MEDINA COUNTY	$496	$582	$613	$684	$695

LOCAL HOUSING & UTILITIES STANDARDS FOR OHIO (MORTGAGE/RENT EXPENSES)

Family Size	1 Person	2 People	3 People	4 People	5 or more People
SUMMIT COUNTY	$823	$967	$1019	$1136	$1155
PORTAGE COUNTY	$880	$1034	$1090	$1215	$1235
MEDINA COUNTY	$1014	$1192	$1256	$1400	$1423

IRS NATIONAL STANDARDS FOR OUT-OF-POCKET HEALTH CARE

Out of Pocket Costs	
Under 65	$68
65 and Older	$142

LOCAL TRANSPORTATION EXPENSE STANDARDS

Public Transportation	One Car	Two Cars
$217	$201	$402

OWNERSHIP COSTS

One Car	Two Car
$533	$1066

****Lease vehicles only get the IRS ownership cost.**

Example: If your lease payment is $350 per month, you claim $521 on the means test with no other deductions. If your lease payment is $650 per month, you only claim $521 on the means test with no other deductions.

In re Castleman, 2021 Bankr. LEXIS 1517, 2021 WL 2309994

In re Castleman

United States Bankruptcy Court for the Western District of Washington

June 4, 2021, Entered on Docket

Case No. 19-12233-MLB

Reporter
2021 Bankr. LEXIS 1517 *; 2021 WL 2309994

In re: John Felix Castleman, Sr. and Kimberly Kay Castleman, Debtors.

Core Terms

appreciation, conversion, converted, real property, property of the estate, bankrupt estate, post-petition, inures, cases, legislative history, courts, debt secured, ambiguous, changes, date of conversion, homestead

Case Summary

Overview

HOLDINGS: [1]-Pursuant to *11 U.S.C.S. 348(f)(1)*, where a debtor filed a Chapter 13 case, which was later converted to a Chapter 7 case, the Chapter 7 estate received the benefit of appreciation in the estate's property value for the period between the filing of a Chapter 13 case its its conversion to a Chapter 7 case because appreciation was not a distinct and separate asset under the Bankruptcy Code, and nothing in the statute fixed the value of estate assets at the date of petition.

Outcome
Trustee's motion granted.

LexisNexis® Headnotes

Bankruptcy Law > Procedural Matters > Adversary Proceedings > Causes of Action

HN1[] **Adversary Proceedings, Causes of Action**

Normally, both requests for determination of whether an asset is property of the estate and for declaratory relief require an adversary proceeding. *Fed. R. Bankr. P. 7001(2)* and *(9)*. Parties, however, may waive this right.

Governments > Legislation > Interpretation

HN2[] **Legislation, Interpretation**

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. In such cases, the intention of the drafters, rather than the strict language, controls. When faced with interpreting the meaning of a statute, the court begins with the language of the statute itself. If the language is clear, the court's inquiry ends, and the court will enforce the statute according to its terms. Where the statute's language is plain, the sole function of the courts is to enforce it according to its terms. 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.

Bankruptcy Law > ... > Bankruptcy > Conversion & Dismissal > Effects of Conversion

Bankruptcy Law > Individuals With Regular Income > Estate Property

HN3[] **Conversion & Dismissal, Effects of Conversion**

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, *11 U.S.C.S. § 348(f)(1)(A)* clearly adopts the Bobroff approach and rejects Lybrook. Thus, *§ 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.

Governments > Legislation > Interpretation

HN4[] **Legislation, Interpretation**

Where 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.

Bankruptcy Law > Individuals With Regular Income > Estate Property

HN5[] **Individuals With Regular Income, Estate Property**

In an individual Chapter 7 case new post-petition assets belong to the debtor not the bankruptcy estate. Post-petition appreciation is not treated as a separate asset from pre-petition property and inures to the bankruptcy estate, not the debtor.

Bankruptcy Law > Individuals With Regular Income > Estate Property

HN6[] **Individuals With Regular Income, Estate Property**

Nothing in *11 U.S.C.S. § 348(f)* indicates that a post-petition increase in value of estate property is to be treated differently than post-petition changes in value under In re Reed.

Bankruptcy Law > Individuals With Regular Income > Estate Property

HN7[] **Individuals With Regular Income, Estate Property**

The full value of real property is property of the Chapter 7 estate including any post-petition appreciation.

Counsel: [*1] For John Felix Castleman, Sr, Debtor: Steven C. Hathaway, Attorney at Law, Bellingham, WA.

For Kimberly Kay Castleman, Joint Debtor: Steven C. Hathaway, Attorney at Law, Bellingham, WA.

For Dennis Lee Burman, Trustee: Peter H Arkison, Bellingham, WA.

Judges: Marc Barreca, United States Bankruptcy Judge.

Opinion by: Marc Barreca

Opinion

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 "Debtors") real property and that the Trustee be authorized to market the residence of the Debtors. Debtors **[*2]** 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 **[*3]** 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).

ANALYSIS

I. Declaratory Relief

Before turning to the substantive legal arguments there is a procedural issue that should be addressed. ***HN1***[⬆] 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. **[*4]** 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 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 **[*5]** 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 Bankr. LEXIS 2756, 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

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

[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)*.

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 **[*6]** to encourage debtors to file under Chapter 13. 620 B.R. 652-54.

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 **[*7]** 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," 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)*

> ***HN2***[] 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 **[*8]** 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 Bankr. LEXIS 1990, 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.")).

[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)*.

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 **[*9]** 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 **[*10]** 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. ***HN3***[↑] 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 **[*11]** 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.

Unfortunately, the House Report creates some confusion. The example it provides of the risks o 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. ***HN4***[↑] Where, as here, the statute is clear and consistent with overall legislative intent, the failure to in any manner address the **[*12]** 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

HN5[↑] 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

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[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?

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 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 **[*13]** 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. ***HN6***[↑] 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 create ambiguity or put the provision at odds with overall legislative **[*14]** intent. There is no reason to read into the statute words which are not there. I therefore conclude that ***HN7***[↑] 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.

Entered on Docket June 4, 2021

Below is a Memorandum Decision of the Court.

/s/ Marc Barreca

Marc Barreca

U.S. Bankruptcy Court Judge

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[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)*.

In re Smith, 2021 U.S. App. LEXIS 4798

In re Smith

United States Court of Appeals for the Sixth Circuit

February 18, 2021, Filed

No. 21-3015

Reporter
2021 U.S. App. LEXIS 4798 *

In re: DARRYL SMITH, Petitioner.

Subsequent History: Reconsideration denied by, Writ denied by, Motion denied by, As moot *In re Smith, 2021 U.S. App. LEXIS 9580 (6th Cir., Apr. 1, 2021)*

Prior History: *Smith v. Pinkney, 2018 U.S. Dist. LEXIS 78394, 2018 WL 2128371 (N.D. Ohio, May 9, 2018)*

Core Terms

district court, mandamus, motion for leave, habeas petition, right to relief, writ petition, indisputable, in forma pauperis, mandamus petition, mandamus relief, direct appeal, habeas corpus, restrictions, vexatious

Counsel: [*1] In re: DARRYL SMITH, Petitioner, Pro se, Conneaut, OH.

Judges: Before: MOORE, GIBBONS, and MURPHY, Circuit Judges.

Opinion

ORDER

Darryl Smith, a *pro se* Ohio prisoner, petitions for a writ of mandamus asking that we compel the district court to file and process his habeas corpus petition pursuant to *28 U.S.C. § 2254*, to issue and grant his petition for a writ of habeas corpus, and to reinstate his *42 U.S.C. § 1983* action. Smith separately moves to proceed *in forma pauperis* and to compel his habeas petition to proceed, to have the petition served on the district court, and to have the district court "cease and desist" its interference.

"Mandamus is a drastic remedy that should be invoked only in extraordinary cases where there is a clear and indisputable right to the relief sought." *United States v. Young, 424 F.3d 499, 504 (6th Cir. 2005)*. "Traditionally, writs of mandamus [are] used only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *In re Pros. Direct Ins. Co., 578 F.3d 432, 437 (6th Cir. 2009)* (internal quotation marks and citation omitted). Mandamus relief is not available when petitioners have "adequate alternative means to obtain the relief they seek," *Mallard v. U.S. Dist. Ct., 490 U.S. 296, 309, 109 S. Ct. 1814, 104 L. Ed. 2d 318 (1989)*, and may not be used as a substitute for direct appeal, *In re Life Invs. Ins. Co. of Am., 589 F.3d 319, 323 (6th Cir. 2009)*.

The appropriate avenue for Smith **[*2]** to challenge the district court's dismissal of his *§ 1983* action, or the imposition of filing restrictions, was to file a direct appeal. Smith failed to appeal the district court's judgment within the time permitted. *See Fed. R. App. P. 4(a)(1)(A)*. His failure to file an appeal does not render that remedy inadequate. To the extent Smith asks us to rule on his habeas petition, "[a]n application for a writ of habeas corpus must be made to the appropriate district court." *Fed. R. App. P. 22(a)*. Thus, as to this portion of his request for mandamus relief, Smith has not shown a clear and indisputable right to relief.

It is less clear, however, whether Smith has a clear and indisputable right to relief on the filing portion of his claim. Certainly, "the court may impose prefiling restrictions on an individual with a history of repetitive or vexatious litigation." *Shephard v. Marbley, 23 F. App'x 491, 493 (6th Cir. 2001)* (order) (citing *Feathers v. Chevron, U.S.A., Inc., 141 F.3d 264, 269 (6th Cir. 1998)*; *Ortman v. Thomas, 99 F.3d 807, 811 (6th Cir. 1996)*). But Smith contends that he has attempted to file his habeas petition three times in the district court, and that it has been rejected on each occasion. Based on the documents attached to his mandamus petition, he may have submitted a motion for leave to file with the district court in November. Whether the motion for leave to file was received cannot be discerned **[*3]** from the record presently before us. Therefore, a response from the district court would be helpful in learning its process for handling vexatious litigants' mailings and motions for leave to file.

The petition for a writ of mandamus is **DENIED IN PART**. The district court is **INVITED** to respond to the remainder of the mandamus petition within thirty (30) days of entry of this order. Upon receipt of any response or the expiration of the thirty days, the matter will be resubmitted to this court. A ruling on the motions to proceed *in forma pauperis* and to compel are **RESERVED** pending receipt of any response.

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